VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 35

(Pages 1049-1535)

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

JULY-SEPTEMBER 1983

Edited and published by:
Robert Coe and Merrily McCabe
1017 Parkway Drive NW
Salem, Oregon 97304
(503) 362-7336

CONTENTS

CITE AS:

35 Van Natta ___ (1983)

RICK CARLSON, Claimant
Royce, Swanson & Thomas, Claimant's Attorneys
Wolf, Griffith et al., Attorneys
Noreen Saltveit, Attorney

WCB TP-83004
July 6, 1983
Interim Third Party Order
of Partial Distribution

Claimant has petitioned the Board for resolution of a dispute concerning the proper distribution of the proceeds of a third party recovery. See ORS 656.154, 656.593. Claimant has obtained a judgment against the third party in the amount of approximately $46,000. Claimant has received workers' compensation benefits, apparently from two insurers: General Accident Insurance Company (Claim No. 26 C 92760); and Kemper Insurance Company (Claim No. 87 CM 115907 N). The check issued by the third party in satisfaction of the judgment obtained by claimant in the third party action is made payable to claimant, his attorney and General Accident Insurance. This check is dated May 16, 1983 and, as of this date, has not been negotiated due to the refusal of General Accident Insurance to indorse it.

The apparent basis for General Accident Insurance withholding its indorsement is that Kemper Insurance Company is making a claim, pursuant to ORS 656.580(2) and 656.593(1)(c), against the proceeds of claimant's third party recovery. General Accident Insurance refuses to negotiate the check until Kemper Insurance Company makes clear the nature and extent of its claim.

At the present, this dispute appears to be between two insurers, both of which claim a lien against the proceeds of claimant's third party recovery. There is no dispute concerning claimant's attorney's entitlement to a reasonable attorney's fee payable from the proceeds of claimant's third party recovery. There is no dispute concerning the extent of costs incurred by claimant in the prosecution of his third party action; nor is there a dispute concerning claimant's entitlement to a minimum percentage of the third party recovery. ORS 656.593(1)(a) and (b).

We have previously stated a policy in favor of partial distribution of a third party recovery pending Board resolution of disputed issues. John J. O'Halloran, 34 Van Natta 1101, 1103 (1982); George Bedsaul, 35 Van Natta 695 (May 24, 1983); see also John Galanopoulos, 34 Van Natta 615 (1982).

In James H. Roberts, 34 Van Natta 1603 (1982), we noted the legislative policy in favor of the pursuit of third party actions by injured workers represented by their own legal counsel, observing that the legislature has provided that litigation costs, including attorney fees, are paid first from the proceeds of a third party recovery; that the claimant/plaintiff then receives a minimum statutory percentage of the third party proceeds; and that, "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. * * * In other words, the industrial insurer is third in line * * * ." 34 Van Natta at 1605.

In view of the fact that, upon receipt of the check issued by the third party, claimant had an immediate right to distribute the proceeds to the extent of his litigation costs, attorney's fee and his minimum statutory percentage, General Accident Insurance Company had no reasonable basis for refusing to agree to the terms of a partial distribution.

The apparent dispute between the two paying agencies, assuming the validity of both insurers' respective liens, is a matter which can be resolved by the Board at a later date after the parties have had an opportunity to present documentary evidence and argument relative to the issues involved in making a further distribution of the proceeds of claimant's third party recovery.

ORDER

General Accident Insurance Company is directed to indorse the check issued by the third party defendant in satisfaction of the judgment obtained by claimant, and claimant is authorized to make a partial distribution of the proceeds by payment of claimant's litigation costs and claimant's attorney's fee. Claimant shall be paid and retain the appropriate percentage of the balance of the proceeds in satisfaction of his minimum statutory share, and the remaining balance of the proceeds shall be held in trust by claimant's attorney until such time as the Board orders a further distribution.

Within twenty (20) days of the date of this order, the parties shall advise the Board as to how they wish to proceed with regard to a further distribution.

RICHARD DILKA, Claimant

Own Motion 83-0141M
July 6, 1983
Order Deferring Own Motion Relief

Claimant has requested that the Board exercise its own motion authority pursuant to ORS 656.278 and reopen his claim for an allegedly worsened condition related to his September 7, 1972 injury.

Claimant has requested a hearing pursuant to ORS 656.283 contesting the employer/insurer's denial of medical services. The request for hearing has been assigned WCB Case No. 83-05553. Claimant is entitled to a hearing on the medical services issue. ORS 656.245(2). Claimant's claim for medical services and the employer/insurer's denial thereof involve issues related to claimant's request for claim reopening and payment of temporary and/or permanent disability compensation pursuant to ORS 656.278.

IT IS THE BOARD'S POLICY TO DEFER ACTING ON A REQUEST FOR OWN MOTION RELIEF UNTIL SUCH TIME AS ISSUES INVOLVING A CLAIMANT'S ENTITLEMENT TO RELATED MEDICAL SERVICES ARE RESOLVED IN THE HEARINGS DIVISION.

Therefore, we defer action on this request for own motion relief and request that the Referee who conducts the hearing in WCB Case No. 83-05553 submit a copy of his/her order to the Board. After issuance of that order, the parties should advise the Board of their respective positions regarding own motion relief.

IT IS SO ORDERED.

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

WCB 81-06679
July 6, 1983
Order on Review

Reviewed by Board members Lewis and Barnes.

The SAIF Corporation requests and claimant cross-requests review of Referee Seifert's orders which awarded claimant compensation for permanent total disability effective as of the date of the Referee's order. SAIF contends that claimant is not permanently and totally disabled. Claimant contends that the effective date of the award should be earlier than the date of the Referee's order.

We affirm and adopt the Referee's order with respect to the award of permanent total disability but modify the effective date.

The effective date of a total disability award is a matter of proof. Morris v. Denny's Restaurant, 53 Or App 863 (1981); Wilke v. SAIF, 49 Or App 427 (1980). In this case we believe that the record establishes that claimant was totally disabled long before the date established by the Referee. Claimant's medical condition has not changed materially in the last several years. Claimant has experienced remission of some of her symptoms in response to various treatment measures but has not enjoyed any permanent improvement in her condition, nor is any improvement anticipated. The only variable in claimant's life affecting to extent of disability has been her vocational status relative to concerted rehabilitation efforts that were made in an attempt to return her to the work force. As part of that effort, claimant volunteered to work as a part-time hostess in a senior citizen center. Even doing the lightest of sedentary work on a part-time basis, claimant experienced some difficulty, and in April 1982, when there was a modest attempt to increase the scope of her duties, claimant experienced an exacerbation of her condition which resulted in her physician restricting even her volunteer activities. Given this evidence, we believe that claimant established that she was vocationally stationary with no reasonable hope of returning to gainful employment as of that time. While vocational efforts continued beyond that period, to borrow concepts from the medical field, we consider those efforts palliative rather than curative.

ORDER

The Referee's orders dated December 6, 1982 and December 10, 1982 are affirmed in part and modified in part. The Referee's award of permanent total disability is affirmed. The effective date of that determination is modified, and claimant is awarded compensation for permanent total disability as of May 25, 1982.

Claimant's attorney is awarded $750 for services rendered on Board review, payable by the SAIF Corporation.

LEONARD FRITZ, Claimant
Roger D. Wallingford, Claimant's Attorney
Rankin, McMurry et al., Defense Attorneys

Own Motion 83-0134M
July 6, 1983
Order Deferring Own Motion Relief

Claimant, by and through his attorney, has requested that the Board exercise its own motion authority pursuant to ORS 656.278 and reopen his claim for an allegedly worsened condition related to his August 4, 1976.

Claimant has requested a hearing pursuant to ORS 656.283 contesting the employer/insurer's denial of medical services. The request for hearing has been assigned WCB Case No. 83-04694. Claimant is entitled to a hearing on the medical services issue. ORS 656.245(2). Claimant's claim for medical services and the employer/insurer's denial thereof involve issues related to claimant's request for claim reopening and payment of temporary and/or permanent disability compensation pursuant to ORS 656.278.

IT IS THE BOARD'S POLICY TO DEFER ACTING ON A REQUEST FOR OWN MOTION RELIEF UNTIL SUCH TIME AS ISSUES INVOLVING A CLAIMANT'S ENTITLEMENT TO RELATED MEDICAL SERVICES ARE RESOLVED IN THE HEARINGS DIVISION.

Therefore, we defer action on this request for own motion relief and request that the Referee who conducts the hearing in WCB Case No. 83-04694 submit a copy of his/her order to the Board. After issuance of that order, the parties should advise the Board of their respective positions regarding own motion relief.

IT IS SO ORDERED.

HARRY ZERVAS, Claimant
Doblie, et al., Claimant's Attorneys
Wolf, Griffith et al., Defense Attorney

WCB 81-10471
July 6, 1983
Order on Reconsideration

The Board issued its Order on Review herein on June 10, 1983. The self-insured employer has requested reconsideration of that order, correctly noting that the order erroneously refers to claimant's award of 20% permanent partial disability as an award for "loss of wage earning capacity." Claimant's injury is to his right forearm, and although the Order on Review in its introductory remarks refers to claimant's award for 20% scheduled disability for the right forearm, the order mistakenly refers to claimant's award as compensation for loss of wage earning capacity. The criteria for rating permanent disability of a scheduled body part is permanent loss of use or function of the injured member, ORS 656.214(2), and not loss of wage earning capacity, as with injuries to unscheduled areas, ORS 656.214(5).

Accordingly, we modify our Order on Review to delete the following sentence: "Considering the record as a whole, we agree with the Referee that claimant has sustained a 20% loss of wage earning capacity attributable to this 1980 injury." We substitute therefor the following: "Considering the record as a whole, we agree with the Referee that claimant has sustained a 20% loss of use or function of his right forearm as a result of his 1980 injury."

ORDER

On reconsideration of the Board's June 10, 1983 Order on Review, the Board modifies its order as set forth more fully above. Except as modified, the Board adheres to its former order, which hereby is republished and reaffirmed.

JUENA K. McGUIRE, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-02592
July 8, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Howell's order which, in effect, affirmed that portion of the February 19, 1981 Determination Order which did not award claimant compensation for permanent disability. Claimant asserts that the medical evidence and her testimony support an award for permanent disability. The SAIF Corporation argues that OAR 436-65-600(2)(a) and Candee v. SAIF, 40 Or App 567 (1979), require that a finding of permanent impairment be based upon medical evidence, and that claimant has not satisfied this requirement.

Claimant strained her back in August 1980 while working as a psychiatric aide at Fairview Training Center. She received conservative treatment. In January 1981 Dr. Gallagher opined that claimant was medically stationary and that:

> "She has no impairment of function. She does have the disability of continued subjective pain. There is a paucity of objective findings to substantiate the complaint of pain and, therefore, I feel that this will not be a permanent disability."

In September 1981 Dr. Martens reported normal examination and diagnostic findings and concluded:

> "[Claimant] is a small lady and I agree with her decision to enter beautician school. She may have recurrence of the pain with excessive bending and lifting required as a psychiatric aide."

Claimant testified at hearing that she continued to have trouble with her back and found bending over and lifting to be painful. She also testified that she occasionally experiences numbness in her legs and feet. In sum, the medical evidence from Drs. Gallagher and Martens suggests either: (1) that claimant has no permanent impairment as a result of her industrial injury; or (2) that the doctors are unable to identify/document any permanent impairment. In contrast, claimant's testimony suggests permanent impairment in the form of disabling pain.

This case presents the difficult and recurring problem of how lay testimony is to be weighed and contrasted with medical evidence in evaluating the permanency and extent of disability. Neither

this Board nor the courts have set many (if any) hard and fast rules in this area. Because of the infinite number of factual possibilities that may arise, it is unlikely that many specific "rules" would really be workable. Nevertheless, we take this opportunity to articulate our understanding of the relevant rules and guidelines.

We recently discussed one facet of this problem in James G. Thomas, 35 Van Natta 714 (May 26, 1983):

> "The problem of reliance on lay testimony to establish permanent impairment is one of the chronic ambiguities in Oregon's workers compensation system. Compare, e.g., Holub v. SAIF, 57 Or App 571 (1982), and Martin v. Douglas Co. Lumber Co., 4 Or App 69 (1970), with Candee v. SAIF, 40 Or App 567 (1979). While we hesitate to wade into a problem of this magnitude, there is one yardstick that this Board has fairly consistently used: When there is direct medical evidence from a physician who has rendered significant treatment to an injured worker which clearly indicates the extent of the worker's impairment and which we have no reason to question, that expert opinion will generally be accepted and take precedence over any contrary opinion of a layman, unless there is compelling reason to do otherwise."

In other words, when the medical evidence and the lay testimony is squarely inconsistent on issues of the permanency or extent of disability, we generally rely on the medical evidence.

It could be said in this case that the record contains such an inconsistency, and that we should follow the doctors' opinions of no permanent impairment over claimant's testimony that suggests the contrary. While that analysis has some appeal, we do not think that the medical opinions quoted above are the "direct" form of medical evidence "which clearly indicates the extent of the worker's impairment" that we had in mind in Thomas. Rather, we think the medical evidence here falls more at a neutral/noncommittal/slightly-adverse-to-claimant's-position point on the spectrum.

In this kind of, quite common, situation, we understand the general rule to be as stated in Uris v. Compensation Department, 247 Or 420, 424 (1967):

> "Where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science and must necessarily be determined by testimony of skilled, professional persons."

Uris arose at the time when workers compensation cases were tried before circuit court juries. In Uris a jury had returned a verdict for the plaintiff-claimant, but the trial judge had entered

judgment for the defendant notwithstanding the verdict. On the appeal of the plaintiff-claimant to the Supreme Court, "the sole question [was] whether there was sufficient evidence . . . to carry the case to the jury." 247 Or at 422. In other words, the general rule stated in Uris was articulated in a procedural context that presented the question of whether the plaintiff-claimant had failed to prove his case as a matter of law; there was no occasion for the Supreme Court to consider in that procedural setting whether the plaintiff-claimant should prevail as a matter of fact. Cf Bales v. SAIF, 294 Or 224 (1982).

Under present procedures, the role that we all play in this system is more akin to the role of the jury at the time Uris was decided. All contested cases are now submitted to a Referee, the Board or the Court of Appeals for a factual decision without any counterpart to the various devices that a trial judge can use to withdraw a case from a jury. Despite this procedural change, the general rule stated in Uris -- that expert medical opinion is essential in complex medical situations -- can still be outcome determinative because it obviously follows that a party that should lose as a matter of law also should lose as a matter of fact.

The single most difficult doctrinal problem in the application of the Uris rule is to attempt to draw some kind of line between those issues of sufficient medical complexity that require expert medical opinion and those issues of sufficient medical simplicity that do not require expert medical opinion. See Edge v. Jeld Wen, 52 Or App 725 (1981); Madwell v. Salvation Army, 49 Or App 713 (1980); Jacobson v. SAIF, 36 Or App 789 (1978); Iverson v. SAIF, 28 Or App 789 (1977); Sloan v. Georgia-Pacific Corp., 24 Or App 155 (1976); McManus v. SAIF, 3 Or App 373 (1970). We doubt that such a line can be drawn with much precision, but offer the following generalizations.

(1) The existence, nature, permanence and extent of physical impairment is primarily a medical question. See OAR 436-69-601:

> "The closing examination report must be based on a complete examination done at the time the patient becomes stationary. The examination must contain all pertinent objective findings such as loss of member, ranges of motion, strength, measurable atrophy, muscle spasm, reflex changes, sensory changes, etc. The physician does not rate disability, but describes impairments."

We think it follows that the party with the burden of proof must generally produce favorable expert medical opinion on such issues. Uris v. Compensation Department, supra.

(2) The required quantum of medical opinion depends on the complexity of the medical issues -- and complexity is itself a question of fact in each case. The greater the medical complexity, the greater the need for the party with the burden of proof to produce expert medical opinion. At one end of the continuum, it can be said, consistent with our above discussion of Uris, that the

failure of the party with the burden of proof to produce favorable medical opinion means that party loses as a matter of law.

(3) The most common type of case is one in which the medical issues are, for want of a better term, of intermediate complexity. In these cases, the absence of a favorable medical opinion is not necessarily fatal to the position of the party with the burden of proof, but that absence is an important factor to be weighed in the factfinding process, and certainly entitles the factfinder to conclude that lay evidence on a primarily medical question is not persuasive in the absence of supporting medical evidence.

Contrary to SAIF's apparent position in this case, we think that Candee v. SAIF, supra, falls into this third category. The claimant in Candee requested a hearing on the issue of permanent disability; the claimant thus had the burden of proof. The claimant, however, was unable to produce any favorable expert medical opinion. The Court of Appeals noted the claimant's credible testimony that, if persuasive, would establish permanent physical impairment as a result of the compensable injury, but nevertheless concluded that the claimant had not sustained the burden of proof. As we interpret Candee, the court did consider and weigh the claimant's testimony as part of its factfinding process, but found that lay testimony unpersuasive in the absence of supporting medical evidence.

SAIF also argues that OAR 436-65-600(2)(a) requires that a finding of permanent injury-caused physical impairment must always be supported by medical documentation. That rule was adopted by the Workers' Compensation Department to govern the evaluation of disability by the Evaluation Division in the first instance, a process that does not often include much direct input from the injured worker. An injured worker's right to a hearing within this agency does create the opportunity for that direct input. We conclude that OAR 436-65-600(2)(a) is not per se binding on the Referee or the Board. However, what we have already said in James G. Thomas, supra, and our analysis of the Uris doctrine in this order, may produce about the same bottom line. Permanent injury-caused physical impairment must usually be supported by medical documentation; however -- and this is the difference between the role of the Evaluation Division and the role of this agency -- it is theoretically possible that in this agency lay testimony can be found to be persuasive in the absence of supporting medical documentation.

Turning to the merits of this case, we agree with the Referee's conclusion; we are not persuaded that claimant has proven permanent physical impairment. Claimant sustained an apparently minor back strain. Medical treatment has been conservative and, apparently, quite limited. Drs. Gallagher and Martens agree that x-rays, range of motion tests, etc. are all normal. To the extent that Dr. Martens might be imposing a lifting limitation -- a matter that is far from clear -- in context that appears to be more of a comment on claimant's small size than an opinion that there is permanent injury-caused impairment. We have considered claimant's testimony about her perceptions of her physical impairments. It is our conclusion, as we understand it was the court's conclusion in Candee, that we cannot say we are persuaded by claimant's testimony when considered with all the evidence in the record.

ORDER

The Referee's order dated April 28, 1982 is affirmed.

PATRICIA A. ANDERSON, Claimant
Robert J. Morgan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-11502
July 12, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review and claimant cross-requests review of Referee Gemell's order upholding SAIF's partial denial but awarding claimant permanent total disability compensation. The issues on review are: 1) The compensability of claimant's conditions other than eye problems; 2) extent of disability attributable to her compensable condition(s); 3) premature closure; 4)whether this is properly a scheduled or unscheduled injury; and 5) whether the Referee awarded excessive attorney's fees.

FACTS

Claimant is a 51-year-old former bulb planter who sustained a compensable occupational disease as a result of her exposure to a chemical known as Difolitan. Following her exposure to that chemical, she developed extreme photophobia and blepharospasm. Subsequently, she developed syncope, lung problems, heart problems, back problems and phlebitis.

PARTIAL DENIAL

SAIF has denied all of claimant's problems except the eye conditions. The Referee affirmed the partial denial because she found Dr. Drip's opinion that these conditions were unrelated to the occupational exposure as convincing as Dr. Leveque's opinion to the contrary. Because claimant has the burden of proving compensability, the Referee found that the claimant had failed to prove that the conditions are compensable. We agree; however, we note that Dr. Drip's testimony is more convincing to us than Dr. Leveque's, not only because of his qualifications, but because his explanation for his opinion is much clearer and more complete than Dr. Leveque's conclusory statements to the contrary.

EXTENT OF DISABILITY

Claimant received an award for permanent total disability by a Determination Order which specifically excluded consideration of those conditions which had been partially denied by SAIF. The Referee affirmed that Determination Order and concluded that claimant is permanently and totally disabled by her severe eye conditions. The Referee relied on Harris v. SAIF, 292 Or 683 (1982), and stated:

> "In this case, however, claimant has already received a permanent total disability award and SAIF has the burden of proving a change in circumstances such that she is no longer permanently and totally disabled."

The Referee's analysis reflects the general confusion which has arisen concerning challenges to Determination Orders awarding permanent total disability. The Determination Order issued in this case is a Determination Order issued pursuant to the claim closure provisions of ORS 656.268. This Determination Order is not one issued pursuant to the provisions of ORS 656.206(5) and 656.325(3), which create a procedure the employer/insurer may invoke to determine whether or not a claimant who previously has been awarded compensation for permanent total disability continues to remain of that status. Determination Orders issued under ORS 656.206(5), which are redeterminations of prior, final orders awarding permanent total disability, involve different procedural and substantive considerations than Determination Orders closing a claim and awarding permanent total disability in the first instance.

We recently concluded that Harris and other cases which deal with redeterminations pursuant to ORS 656.206(5) do not apply to cases in which the employer/insurer challenges a Determination Order closing a claim with an award for permanent total disability.

> "[C]ases like Bentley, Harris and Pick have all arisen under ORS 656.206(5) which permits periodic reexaminations for prior awards of total disability that had previously become final. The issue in this case, by contrast, is whether claimant should be granted total disability in the first instance. The Determination Order granting total disability did not become final because the insurer timely requested a hearing; thus, that award is not a prior award in the same sense as the prior awards in cases like Bentley, Harris and Pick." Keith Phillips, 35 Van Natta 388, 389 (1983).

In Phillips we held that the insurer was not required to prove a material change in claimant's condition since the date of the challenged Determination Order. Perhaps compounding the confusion concerning the issue of insurers' challenges to Determination Orders awarding permanent total disability, we failed to clearly state in that case whether it was the claimant's burden to prove he was permanently and totally disabled, or whether it was the insurer's burden to prove that claimant was not permanently and totally disabled as of the time of hearing.

We now hold that when an insurer requests a hearing contesting a Determination Order which has closed a claim with an award for permanent total disability pursuant to the claim closure provisions of ORS 656.268, it is the insurer's burden to prove that claimant is not permanently and totally disabled as of the time of hearing; however, the insurer is not saddled with the extraordinary burden of proof which it must satisfy in cases involving redeterminations of a claimant's continuing permanent total disability status after reevaluation, as in cases arising under ORS 656.206(5) and 656.325(3). Although the court's dictum in Harris v. SAIF, supra, was to the effect that, "a disability claimant seeking, in the first instance, permanent total disability status has the burden

of proving that he is so disabled," 292 Or at 689, the court's statement most likely failed to consider situations in which the issue of permanent total disability comes before the Referee or the Board on an insurer's request for hearing. It is axiomatic that a claimant has the burden of proving entitlement to compensation claimed; however, where proceedings are initiated by an employer or insurer, it is equally as clear that the employer or insurer bears the burden of establishing entitlement to the relief requested. John F. Byers, 1 Van Natta 25 (1967); cf Michiel M. Harth, 34 Van Natta 703, 704 (1982); Lewis Twist, 34 Van Natta 52, 34 Van Natta 290, 293 (1982), affirmed 62 Or App 762 (1983); Gary E. Freshner, 35 Van Natta 528 (April 14, 1983).

Applying this principle to the facts of this case, we find that SAIF has failed to satisfy its burden of proving that, as of the date of hearing, claimant was not permanently and totally disabled. The medical evidence is overwhelming that claimant is permanently and totally disabled by her eye conditions. Both Dr. Neal, her treating ophthamologist, and Dr. Drips indicate that claimant is severely impaired by her visual conditions. Dr. Drips notes that she is unable to read, work under bright lights or even watch television. Dr. Neal states that she is totally handicapped in the visual sense of the word. SAIF introduced no contrary medical opinions. Furthermore, the testimony of a vocational expert, while somewhat equivocal, indicates that claimant cannot perform any regular employment without either significant modification of the work environment or retraining. Accordingly, we affirm the Referee's award of permanent total disability.

PREMATURE CLOSURE

SAIF contends that the claim was prematurely closed because the Evaluation Division awarded permanent total disability without benefit of any workup of claimant's vocational considerations by Field Services Division. We know of no requirement that the Field Services Division perform a workup before the Evaluation Division can make a determination of extent of disability. SAIF's argument is without merit.

SCHEDULED/UNSCHEDULED INJURY

SAIF argues that claimant is not entitled to permanent total disability because her loss is to her eyes and the maximum allowed by ORS 656.214 for loss of vision is 300 degrees. SAIF overlooks the fact that ORS 656.206 permits an award of permanent total disability for loss of use of any scheduled or unscheduled portion of the body which renders a claimant incapable of performing a gainful and suitable occupation. Furthermore, claimant's eye problems represent more than mere loss of visual acuity. Therefore, under Russell v. SAIF, 281 Or 353 (1978), claimant's visual problems are unscheduled. Accordingly, we affirm the Referee on that issue.

ATTORNEY'S FEES

SAIF alleges that the $2,000 which the Referee awarded claimant's attorney was excessive. SAIF in its argument on this issue characterizes the major issue as the partial denial of claimant's conditions other than her eye condition. It characterizes the

issue of permanent total disability as peripheral. Permanent total disability is the central issue in our mind. The compensability of other conditions is peripheral. ORS 656.382(2) and OAR 438-47-050(1) provide for a reasonable insurer-paid attorney's fee if the insurer unsuccessfully challenges a Determination Order. We find that an award of $2,000 is not excessive in this case.

ORDER

The Referee's order dated November 10, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee on Board review, to be paid by the SAIF Corporation.

RASOOL BAMBECHI, Claimant (Deceased) WCB 80-09148
Pozzi, et al., Claimant's Attorneys July 12, 1983
SAIF Corp Legal, Defense Attorney Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of Referee Galton's order which set aside its denial of this claim for death benefits. The issue is whether the deceased worker's death by drowning at a company picnic arose out of and in the course of employment.

The decedent was a 19-year-old fry cook at Burgerville U.S.A., Store No. 14, in Portland during the summer of 1980. On August 26, 1980 Store No. 14 had a picnic at Marine Park in Vancouver, Washington, along the Columbia River. After eating, several employes, including the decedent, went swimming in the Columbia. He was pulled under by a strong current and drowned. There is no hint of wrongdoing or negligence on the part of anyone in connection with the drowning.

Both parties cite and rely on Richmond v. SAIF, 58 Or App 354 (1982). In that case the Court of Appeals quoted the following criteria from Professor Larson with apparent approval as relevant to determining the compensability of injuries/fatalities in connection with recreational/social activities.

> "Recreational or social activities are within the course of employment when:
>
> "They occur on the premises during a lunch or recreation period as a regular incident of employment; or
>
> "The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> "The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 58 Or App at 357, quoting, 1A Larson, Workmen's Compensation Law, 5-71, §22.00 (1979).

Larson also asks a series of questions which he suggests bear on the question of whether a picnic is sufficiently work-related to give rise to a compensable claim for injuries or death. These questions include: (1) Whether the employer sponsored the event; (2) to what extent the attendance was really voluntary; (3) how much encouragement there was to attend; (4) whether the employer financed the event to a substantial extent; (5) whether employes regarded the picnic as an employment benefit to which they were entitled; and (6) whether the employer benefitted from the event in some tangible way. 1A Larson, Workmen's Compensation Law, 5-85, § 22.23.

In Richmond v. SAIF, supra, the court found that an injury which was incurred by a police officer during a benefit game between police and fire fighters was not compensable. In that case, the employer/city's involvement with the game consisted of allowing the use of its videotape equipment during the game, allowing city vehicles to be present during the game and donating a trophy. Other relevant facts were that uniforms were purchased by the individuals involved, practices were held and games were played on off-duty time, the game was organized by the participants and the city neither approved nor disapproved of the game either orally or in writing. The court specifically stated that there was no evidence that supervisors even knew that employes were planning the event while on duty.

The facts of this case differ signficantly. In this case, the manager of Store No. 14 testified that each Burgerville store tries to have an annual picnic. He said company picnics have been discussed at management meetings. An employe testified that there had been an annual picnic at Store No. 14 for at least three consecutive years. The manager testified that it was customary within the chain for a store to give all employes the day off for its annual picnic and for employes from another store in the chain to provide coverage for that day.

The manager testified that he was the principal organizer of this particular picnic. He chose the site of the picnic and first brought up the annual picnic at the weekly mandatory staff meeting. He said the picnic was planned by himself and the store employes at the staff meeting. The manager encouraged employes to attend, although he did not require attendance. He said he believed some employes did not attend that year although he was not certain.

The employes and the single guest which each employe was allowed to bring all met at Store No. 14 on the morning of the picnic. They then carpooled to the park. The employes supplied the food for a potluck meal. Burgerville supplied soft drinks which were served in Burgerville cups. The manager testified that alcohol or drugs were not allowed at the picnic and that, had he discovered any, he would have ended the picnic.

In 1979, five Burgerville stores in the Portland area conducted a "mystery shopper contest." An employe of Burgerville visited each store pretending to be a customer. The stores were rated on cleanliness, quality of food and service. Store No. 14

won the contest. The prize for the contest was that the employes of the winning store did not have to cover for any other store's annual picnic. It is unclear from the testimony whether the prize of not having to cover for another store was awarded during the summer of 1979 or the summer of 1980.

Applying the tests described in Richmond and in Larson's treatise to the above facts, we find that claimant's death is sufficiently work-connected to give rise to a compensable claim. We are particularly persuaded by the following factors. Burgerville felt these picnics were sufficiently important in its business to finance them, at least to a limited extent, and to discuss and plan them at mandatory staff meetings. It exercised control over the picnic in question in that the store manager was the genesis of the idea of having a picnic, was the architect of the picnic, chose the site of the picnic, limited the number of guests an employe could bring and would have terminated the picnic had alcohol or drug use occurred at the picnic. Although the employer did not pay the decedent or other employes for the time they took off to go to the picnic, it assured that they could have the day off by its custom of having employes from other stores cover during the picnic. Finally, and we think quite importantly, it is apparent from the fact that an incentive contest to improve store cleanliness, quality and service was associated with the annual picnics, that these picnics had become an institutional event with some tangible benefits for the employer other than simply improving employe morale. Although the law in this area is hardly characterized by litmus-paper precision, the sum of all of these factors leads us to the conclusion that the decedent's death was sufficiently work-connected that this claim for death benefits should be accepted.

ORDER

The Referee's undated order as amended by his order dated September 30, 1982 is affirmed. Claimant's attorney is awarded $750 for services rendered on Board review, payable by the SAIF Corporation.

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

WCB 80-05477
July 12, 1983
Order on Remand

On review of the Board's order dated April 7, 1982, the Court of Appeals reversed that portion of the Board's order which failed to award claimant's attorney a reasonable attorney's fee for successfully defending the Referee's award of compensation on Board review, see ORS 656.382(2), and remanded to the Board for an award of a reasonable attorney's fee.

Now, therefore, the above noted Board order is modified to award claimant's attorney $650 as a reasonable attorney's fee for services rendered on Board review.

IT IS SO ORDERED.

JO WANDA ORMAN, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-03671
July 12, 1983
Order on REconsideration

Claimant requests reconsideration of the Board's Order on Review dated May 11, 1983. By order dated June 10, 1983 we abated our Order on Review to allow additional time for reconsideration.

Having reconsidered based on claimant's motion and the SAIF Corporation's response thereto, we adhere to our prior Order on Review with the following correction and additional comments.

The last line on page 3 of the Order on Review states that the report of Psychological Consultants was dated September 28, 1982. The correct date is September 28, 1981. This was a typographical error and had no effect on the substance of our analysis or conclusion.

Claimant continues to argue that Dr. Layman's reports and opinions support her aggravation claim. We understand the factfinding process to include the question of whether any doctor's expressed opinions are persuasive. For the reasons stated in our Order on Review, we are not persuaded by Dr. Layman's opinions. See also Oakley v. SAIF, 63 Or App 433 (1983).

ORDER

The Board's Order on Review dated May 11, 1983, as corrected and supplemented herein, is readopted and republished effective this date.

IRIS F. SCHULER, Claimant
Liana Colombo, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-08449
July 12, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of Referee Shebley's order on remand which set aside SAIF's partial denial of claimant's psychological treatments.

Claimant is a former school teacher who specialized in teaching students with learning disabilities. The 1978-79 school year was especially stressful for claimant because new federal regulations increased her work load and multiplied her paper work. Claimant left work on May 11, 1979 because of colitis. She has not returned to work. SAIF accepted the colitis condition as a compensable occupational disease. Claimant began receiving psychiatric counseling for which SAIF initially paid.

In July 1980 Dr. Muderspach, claimant's treating internist, wrote SAIF a letter indicating that claimant was medically stationary. SAIF requested claim closure and a Determination Order was issued on August 26, 1980 awarding claimant temporary total disability benefits but no permanent disability. On January 15, 1981 SAIF issued a partial denial of future treatment for either colitis or psychiatric problems on the grounds that the stress from claimant's job had only temporarily worsened claimant's preexisting

colitis and psychiatric conditions and that the temporary worsening had ceased.

Claimant requested a hearing on the partial denial and on the Determination Order. Referee Shebley issued an order which held that: (1) Both claimant's colitis condition and her psychiatric condition were caused by job exposure; (2) the psychiatric condition was not stationary when the August 26, 1980 Determination Order was issued; and, therefore, (3) claimant's claim had been prematurely closed.

SAIF requested Board review of the Referee's order on only the issue of treatments for claimant's psychiatric condition. Thus SAIF concedes that claimant's colitis continues to be compensable. We issued a prior order in this case on May 28, 1982. 34 Van Natta 716 (1982). We remanded to the Referee for further evidence regarding whether claimant's psychiatric treatments were treatments for claimant's compensable colitis condition or whether the psychiatric condition was to be considered a separate occupational disease, thus requiring claimant to prove that job stress was the major cause of the psychiatric condition.

On remand, the Referee found that claimant's colitis is in accepted status and the medical evidence establishes that the reduction of stress through psychiatric treatments helps to reduce the symptoms of colitis. The Referee thus concluded on remand that the psychiatric treatments are compensable as treatments for colitis. The Referee alternatively held that, even if the major cause standard applies, claimant has proven that her job exposure is the major cause of her psychiatric condition. SAIF has again requested review.

The medical evidence is overwhelming and uncontroverted that claimant's colitis flares up when she is under stress. Dr. Muderspach states:

> "The patient is continuing to have problems with her colitis.... Specifically, when she gets under stress this increases her symptoms quite remarkably. She has had to be hospitalized on several occasions.
>
> "... I am not sure she is going to improve a whole lot until her emotional stresses are taken care of.
>
> "She has continued to see Dr. Achord, her psychiatrist."

Dr. Girard, who reviewed claimant's file at SAIF's request, opined:

> "The irritable bowel syndrome is a somewhat vague entity.... Patients who have this syndrome are often troubled by emotional problems and it is felt that stress may aggravate their symptoms. It is most likely that the claimant has an underlying susceptability to these symptoms and that the stress of her job caused an exacerbation in

these symptoms. I believe that it is likely that her symptoms will persist unless there is a substantial change in her psychological status."

Claimant's treating psychiatrist, Dr. Achord, stated:

"The successful treatment of colitis involves active psychological intervention to reduce the emotional stress that precipitates recurring bouts of colitis."

Dr. Stolzberg, SAIF's consulting psychiatrist, testified that colitis is a stress-related disease.

Based on the record as expanded on remand, we conclude claimant's psychiatric treatments are treatments for claimant's accepted colitis condition. The colitis flares up when claimant is under stress. Her psychiatric treatments are intended to help relieve her stress. Consequently, her psychiatric treatments are for her compensable colitis condition and are compensable under ORS 656.245. Because of this finding we need not and do not reach the question of whether claimant's job exposure is the major cause of her current psychiatric condition.

ORDER

The Referee's order on remand dated January 10, 1983, as amended by his order dated January 12, 1983, is affirmed. Claimant's attorney is awarded $600 for services rendered on Board review, payable by the SAIF Corporation.

DONALD D. MILLER, Claimant
DeForest, et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 81-11348
July 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Brown's order which set aside its denial of claimant's occupational disease claim for bilateral plantar fascitis. The issue is compensability.

After working for twenty years as a painter, on March 5, 1981 claimant went to work for this employer as a bailer/stacker in a charcoal plant. Claimant's job consisted of working alternately between two positions on a conveyer belt. Claimant placed a sack on a machine which filled the sack with bags of charcoal. He then lowered the sack, pivoted either right or left and placed the sack on a conveyer belt. There were two lines in operation at the plant. On one line the work required him to pivot on his right heel and the ball of his left foot. On the other line he pivoted in the opposite direction. Claimant was required to pivot in this manner about once every three seconds for about half of each shift.

Claimant first began experiencing severe pain in his feet, worse on the left, about June 1, 1981. He continued working until June 17 when he was unable to continue working because of the pain.

He first saw a podiatrist, Dr. Hoyal, who diagnosed his problem as plantar fascitis. Dr. Hoyal felt that the cause of the problem was working and standing on hard flat surfaces. However, he indicated that it was possible claimant had a preexisting condition which had been aggravated by his on the job exposure.

Claimant was then seen by Dr. Gell who initially thought that he might be suffering from rheumatoid arthritis. However, Dr. Gell later abandoned that diagnosis and concluded that claimant suffers from plantar fascitis. He stated that the etiology of the problem was unknown, but he suspected that it was caused by claimant's job exposure and obesity. Dr. Gell said there might be some underlying propensity to develop this type of inflammation.

Dr. Widen, a podiatrist who specializes in sports medicine, stated that he saw no indication of any underlying disease and attributed all of claimant's symptoms to his job exposure, particularly claimant's repetitive rotation on the balls of his feet.

Only Dr. Peterson said definitely that he thought claimant had an underlying condition which was only temporarily exacerbated by his job exposure.

We find the opinion of Dr. Widen most persuasive. Dr. Widen stated:

> "It was only after he began the persistent rotating motion of his occupation that the acute fascial and Achilles tendon inflammation began.
>
> "I encounter perhaps a hundred (100) cases of plantar fasciitis yearly, and it has been my experience that some direct-persistent trauma such as Mr. Miller sustained while at work can cause a highly unresolvable plantar fascial inflammation."

Dr. Peterson, on the other hand, based his opinion on his belief that claimant "could be engaged in very similar activity under many different circumstances in terms of being on his feet." Dr. Widen linked claimant's condition, not to activity which required him to be on his feet, but to the persistent rotation required by claimant's job. While there is testimony that claimant was active at home prior to the onset of his problem, the evidence indicates that he did nothing off the job which resembled the constant rotation on the balls of his feet which he did at work.

Dr. Widen said there was no underlying disease. Both Dr. Gell and Dr. Hoyal felt that an underlying condition was a possibility, but neither was willing to state that it was a probability. Dr. Peterson said there was no direct evidence of an underlying arthritic condition; he did, however, believe that claimant had an underlying plantar fascitis condition which was exacerbated by on the job exposure. We find that the claimant did not suffer from an underlying disease prior to the onset of his plantar fascitis. Thus, Weller v. Union Carbide, 280 Or 270 (1979), is not applicable.

We conclude that claimant's job exposure was a major cause of his plantar fascitis because the evidence is clear that the repetitive rotation on the balls of his feet was the cause of his condition. He performed no such movements off the job. In this case the medical evidence specifically links claimant's condition to a repetitive type of motion which he performed at work, an activity in which he did not engage at home. We think this satisfies the major cause standard of SAIF v. Gygi, 55 Or App 570 (1982).

The insurer also objects to the Referee's reference to the permanency of claimant's condition, protesting that this comment is not relevant to the issues raised at hearing. In context, we do not think the Referee's comment was totally irrelevant to the issues at hearing. But for the sake of future clarity, we affirm the Referee's order with the understanding that it has not yet been litigated or decided whether claimant is entitled to an award for permanent disability as a result of this claim.

ORDER

The Referee's order dated June 25, 1982 is affirmed. Claimant's attorney is awarded $600 as a reasonable attorney's fee for services on Board review, to be paid by the insurer.

JAMES W. ROBINSON, Claimant
Robert Repp, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-09934
July 14, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Knapp's order which found that claimant was entitled to additional compensation for temporary total disability until August 14, 1981 but otherwise affirmed the September 18, 1981 Detrmination Order which awarded no compensation for permanent disability. The Referee also rejected claimant's contention that he was entitled to vocational rehabilitation and assessed a penalty/attorney fee against the insurer for failing to timely furnish a medical report pursuant to OAR 436-83-460.

Claimant has filed no brief on Board review. In the absence of any indication of what issues claimant wants reviewed or what relief claimant wants us to grant, we perceive no error in those portions of the Referee's order that were adverse to claimant's position.

The insurer argues that claimant was not entitled to compensation for temporary total disability beyond May 12, 1981, as found by the September 18, 1981 Determination Order. It is true that in a check-the-boxes form dated July 21, 1981 Dr. Bell indicated that claimant was released to regular work effective May 12, 1981. However, in context with Dr. Bell's earlier and later reports, we confess to considerable uncertainty about the actual meaning of the July report. Moreover, ORS 656.268(2) refers to a release to work by a claimant's "attending physician;" it would appear that by the time Dr. Bell submitted the July report, claimant had transferred his care to Dr. Langston. We agree with the Referee's conclusion that, on this record, it is appropriate to continue claimant's time loss until he was released to work by Dr. Langston.

ORDER

The Referee's order dated November 15, 1982 is affirmed.

ZOI SARANTIS, Claimant
Bloom, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-08881
July 14, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer requests review of Referee Shebley's order which awarded claimant compensation for permanent total disability. The issue is the extent of claimant's disability.

Claimant was employed by the Sheraton Hotel in Portland as a room attendant when, on April 3, 1980, she sustained a lower back injury while putting away a hide-a-bed. The claim was accepted as a non-disabling injury. Claimant was initially treated conservatively but exhibited little improvement. On December 9, 1980 the Orthopaedic Consultants reported that claimant should continue to receive conservative treatment but that a decompression laminectomy might be necessary, and:

> "We advise this operation only because the patient is a well meaning pathetic little thing who is free of actual functional problems and is in great pain which so far has not responded to non operative measures. The operation, if done on a limited basis as described, would not leave any significant residuals in and of itself that would be harmful and it might prove to be beneficial to the point where the patient could be able to return to work."

Claimant continued to be treated conservatively with no improvement. On May 7, 1981 Dr. Parsons performed a myelogram. The myelogram revealed an extra-dural defect at the L4-5 interspace on the right; a small right side defect was also suspected at L5-S1. Dr. Parsons believed that a lumbar laminectomy and discectomy at L4-5 was indicated as well as exploration of the L5-S1 defect.

On May 11, 1981 Dr. Parsons reported that he discussed surgery with claimant and that she indicated that she wished to consult with her husband. On May 18, 1981 Dr. Parsons indicated that claimant had elected to "continue to live with her pain without possible improvement by lumbar laminectomy." He suggested that, in view of claimant's decision, her claim be considered for closure. Claimant was thereafter referred to Orthopaedic Consultants for a closing examination. On July 31, 1981 the Consultants reported that claimant's condition was not medically stationary but that since she had refused operative treatment, the claim should be closed as there was little more to offer in the way of conservative treatment. The total loss of function without the surgery was considered to be in the high moderate or lower moderately severe category. With regard to claimant's refusal to consider surgery, the Consultants stated:

> "The reason for this decision is that she is

> apparently afraid of surgery and the possible untoward result. She specifically stated she did not want to spend the rest of her life in a wheelchair nor did she want to spend the rest of her life in the kneeling position praying. In addition, according to the interpreter, there is a great deal of family influence of a negative sort regarding surgery which is also influencing the patient's current decision."

On August 28, 1981 a Determination Order issued closing the claim and awarding claimant 40% unscheduled permanent partial disability.

On September 28, 1981 Dr. Parsons reported that:

> "It is my opinion that the patient's decision not to have surgery was not a reasonable one. She had been at that time disabled by pain for over a year since her injury and still unable to return to work. With the advised surgery, she had approximately a 75% chance of a good result and being able to return to her usual employment."

On September 17, 1982 Dr. Schostal reported that he had reviewed the Orthopaedic Consultants' July 31, 1981 report and Dr. Parsons' September 28, 1981 report, and that he was:

> ". . .in complete agreement with the conclusions outlined in his [Dr. Parsons'] letter. As I have pointed out in my initial note of March 31, 1981, I would consider this patient a candidate for myelography and lumbar disc surgery if all conservative measures have been exhausted. From my discussion with you it certainly appears as if all of the conservative measures outlined in my note have been exhausted and I feel that the only reasonable treatment alternative for Mrs. Sarantis is the one outlined by Dr. Parsons."

On September 20, 1981 Dr. Geist reported that he was aware of no other reasonable means of effecting relief of claimant's pain other than through a laminectomy and removal of the herniated portion of the involved discs. He further stated that, although he did not do disc surgery himself:

> "There are many patients, probably greater than 50% of those who have a laminectomy that do return to gainful employment after surgery, though I can not quote an exact percentage."

Dr. Parsons further reported on September 21, 1982 that he felt that the proposed surgery would offer claimant at least a 75% chance of significant symptomatic relief and of being able to

return to her previous job. Additionally, there is a report from Dr. Eckhardt dated September 23, 1982 in which he states that he concurred that surgical procedure might be beneficial to improve claimant's overall functional capability but that he could not comment as to relative percentages as he did not perform back surgery. Neither Dr. Parsons nor Dr. Eckhardt felt that the risks as portrayed by the claimant in the Orthopaedic Consultants' report of July 31, 1981 were realistic.

Claimant was 52 years of age at the time of the hearing and is unable to speak, read or write English. She has lived in the United States for only a few years, having emigrated from Greece, and received only a third grade education in Greece. She initially worked in the fields in her native village, and later was employed for a thread manufacturer in Athens. Claimant also worked in a wire factory and a factory which produced appliance motors. After coming to the United States she apparently worked in a garment plant for a time before becoming employed by Sheraton.

Shortly after claimant's industrial injury, she was referred to International Rehabilitation Associates for vocational assistance. Due to communication barriers and the lack of transferable skills, claimant's vocational counselor attempted a homebound employment program. This was unsuccessful. The counselor felt that claimant was "essentially unemployable" due to the injury and her inability to communicate in English.

When the hearing on the Determination Order convened on October 4, 1982, the employer contended that claimant had not made reasonable efforts to reduce or mitigate the extent of her disability. The Referee concluded that claimant's refusal to undergo surgery was reasonable under Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978); and that although claimant had made no efforts to seek employment pursuant to ORS 656.206(3), she was relieved of this duty under Butcher v. SAIF, 45 Or App 313 (1980). The Referee then concluded that considering claimant's impairment as related by the Orthopaedic Consultants, with her social/vocational handicaps, she was permanently and totally disabled.

Claimant testified at the hearing that prior to her industrial injury, she had never been to a doctor and that her father died at age 95 without having known what a doctor was. No one in claimant's family has ever undergone surgery. She testified that she had seen other people in wheelchairs and was afraid she might end up like them and was also afraid that she could die.

> "Q. In other words, you'd pretty much made up your mind in the very beginning here that you weren't going to have surgery?
>
> "A. Yes. I was pretty sure from the beginning that I wouldn't. I had said that.
>
> "Q. So if Dr. Parsons had said gee, 99 percent chance that you'll be better if you have surgery, you still didn't want surgery?
>
> "A. No one said anything about 99 percent.

"Q. Did he say anything about -- did he say anything about 75 percent.

"A. Yes.

"Q. Well, if he had said 99 percent, would that have changed your mind?

"A. No. I'm afraid."

Claimant's husband also testified at the hearing. He stated that when he called his son in Greece to talk to him about the proposed surgery, his son threatened to kill him if claimant ended up in a wheelchair as a result of the surgery. He indicated that his wife did not make the final decision to refuse surgery, but that the whole family had decided against it. He stated that if Dr. Parsons had given him a guarantee of 100 percent success it would have been discussed to a greater extent.

The employer argues that an unreasonable refusal to submit to medical treatment which might promote recovery and expedite reintegration into the labor market is a negative factor in determination of extent of disability. The employer is correct. Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978); Waldroup v. J.C. Penney Co., 30 Or App 443 (1977); Brecht v. SAIF, 12 Or App 615 (1973). In Clemons, the court adopted Larson's test for determining whether a permanent disability award should be adjusted because of a worker's refusal to submit to recommended treatment:

> "The test * * * is whether the refusal is reasonable. 1 Larson, Workmen's Compensation Law, §13.22 at 3-398 (1978). Reasonableness is a question of fact. See Grant v. State Industrial Acc. Com., 102 Or 26, 46, 201 P 438 (1921). The relevant inquiry is whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment. Such a determination must be based upon all relevant factors, including the worker's present physical and psychological condition, the degree of pain accompanying and following the treatment, the risks posed by the treatment and the likelihood that it would significantly reduce the worker's disability. Grant v. State Industrial Acc. Com., 102 Or at 45; see 1 Larson, Workmen's Compensation Law, supra.
>
> "Reasonableness must take into account the worker's perspective; it may not be based upon medical opinion alone. * * *" 34 Or App at 138-39.

The reasonableness test is thus a question of fact and a weighing process where all relevant factors must be considered in making a determination.

Both parties have cited numerous decisions from various jurisdictions supporting their contentions concerning claimant's refusal to submit to the proposed surgery. From a factual standpoint, the most similar case cited is Beneta Kissas, 33 Van Natta 596 (1981), aff'd without opinion, 58 Or App 222 (1982). Like the claimant in this case, the worker in Kissas was employed as a room attendant for the Sheraton Hotel. The worker had emigrated from Greece to the United States only a few years prior to her injury, was illiterate in English and her work experience was limited to manual labor. The worker suffered a head injury for which "minor" surgery was proposed. Claimant refused. The Referee acknowledged that without the surgery, claimant was permanently and totally disabled. However, the Referee refused to award permanent total disability because he found that refusal of surgery was unreasonable when the risk and pain factors were balanced against the likelihood of success and claimant's "irrational fear" of physicians and hospitals. This decision was affirmed by the Board and the Court of Appeals, supra. The major (and apparently the only) differences between Kissas and the current case is that the surgery proposed in the current case could not be classified as minor, and that the likelihood of complete success is somewhat less.

While Kissas sheds some light, we do not understand that type of risk-benefit analysis to really be central to this case. Professor Larson states that a claimant's refusal to undergo surgery cannot be deemed reasonable when the only reason for such refusal is the claimant's subjective fear, unless that fear itself has some substantial basis in reality. 1 Larson, Workmen's Compensation Law, § 13.22, 3-423, 3-424 (1982). Our examination of this record convinces us that the only reason for claimant's refusal to submit to corrective surgery is fear. There is nothing in the record to suggest that claimant had made a rational evaluation of the risks versus the potential benefits from the proposed surgery, even though she has been fully appraised of the facts by her physicians. Claimant does not choose to forego the surgery based on the factors of pain, risk, likelihood of success, etc., but bases her refusal solely on her generalized fear of the medical profession and her family's disapproval of the procedure. Unquestionably this is based in large part on claimant's social and cultural background. She and her family had little or no exposure to the medical profession prior to emigrating to the United States. We think it is apparent from the record that claimant would refuse to undergo any surgery under any circumstances, even if there were a 100 percent likelihood of success, based upon her fear of the medical profession, a fear which has no substantial basis in claimant's experience, or for that matter, in her entire family's experience. While claimant is certainly free to refuse surgery, we are free to find, and do find, claimant's refusal to be unreasonable under all of these circumstances.

That being the case, the next question is, what is the extent of claimant's disability? In view of claimant's age, education, illiteracy, limited work experience and physical impairment, from which the negative factor of her refusal to submit to surgery is deducted, we conclude that claimant is entitled to an award of 70% unscheduled permanent partial disability.

ORDER

The Referee's order dated October 22, 1982 is modified.

Claimant is awarded 224° for 70% unscheduled permanent partial disability, that being an increase of 30% over and above the Determination Order of August 28, 1981. Claimant's attorney's is allowed 25% of the increased permanent partial disability made payable under the terms of this order, not to exceed $2,000, as a reasonable attorney's fee, in lieu of the fee allowed by the Referee's order.

RONALD MEDLOCK, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Atherly, Butler, et al., Defense Attorneys
Lindsay, et al., Defense Attorneys

WCB 81-00055, 81-09724 & 82-00421
July 15, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Scott Wetzel Services, Inc. requests review of Referee Baker's order overturning its denial of responsibility for claimant's back surgery of July 1, 1982. Responsibility for the back surgery is the only issue on review.

Claimant is a 42-year-old truck driver who has suffered from low back problems since approximately 1966. He had back surgeries in 1966 and 1968. In January 1976 he sustained a compensable low back injury while working for Puget Sound Truck Lines, insured by Scott Wetzel. The injury occurred when he used his entire weight to pull a chain to uncover a bin of wood chips. An L4-5 laminectomy was performed on March 23, 1976. The claim was closed on April 4, 1978 by a Determination Order which awarded 50% unscheduled disability. On December 14, 1978 a stipulation increased that award to 70% unscheduled disability.

Claimant sustained another injury in June 1978 while working for Presley Trucking, insured by the SAIF Corporation. That injury occurred while claimant was changing a flat tire on his truck. He did not immediately file a claim for that injury. SAIF denied the claim on the ground of late filing, but the Referee overturned that denial, finding that claimant had informed his employer of the injury. The Referee ordered SAIF to pay two weeks time loss on that claim. SAIF does not contest that portion of the Referee's order. Likewise, no party contends that SAIF, as Presley's insurer, is responsible for the later surgery.

Claimant was employed for most of the time between his 1976 compensable injury and 1979 as a long haul truck driver. He experienced pain during that period but took medication for the pain and was able to work without losing time from work.

In late 1979 or early 1980 claimant began working for Reeds Fuel Company as a short haul truck driver. SAIF also insures Reeds. On August 26, 1981 claimant again injured his back. That injury occurred while he was atop his truck pulling a heavy tarp up over a load of bark chips. SAIF accepted that injury as a disabling injury. The claim was closed on October 15, 1981 by a Determination Order which awarded time loss but no permanent disability.

On July 1, 1982 Dr. Hockey, claimant's treating physician, performed a fourth laminectomy which involved decompression from L2 to the sacrum. Following the surgery, insurers for all three employers where claimant had sustained compensable injuries denied responsibility for the 1982 surgery.

Scott Wetzel characterizes the issue on Board review as whether claimant sustained an aggravation or a new injury on August 26, 1981. It argues that claimant sustained a new injury and, therefore, the new injury insurer is liable for the 1982 surgery. As SAIF points out in its brief for Reeds, there is no doubt that claimant sustained a new injury on August 26, 1981. SAIF accepted it as such and processed the claim to closure. The real issue under the rule of Boise Cascade v. Starbuck, 61 Or App 631 (1983) and Smith v. Ed's Pancake House, 27 Or App 361 (1976), is whether the injury at Reeds independently contributed to claimant's need for surgery.

Dr. Gallo, in a preoperative report to Dr. Hockey, said that according to claimant's history, the onset of severe symptoms occurred at the time of the August 26, 1981 injury. Dr. Hockey, in his deposition, agreed that the onset of the symptoms which caused the need for the surgery began with the August 26, 1981 injury. However, he opined that the reason claimant required surgery in 1982 was because of scar tissue caused by the earlier operations, including the operation following claimant's compensable injury at Puget. He felt that the injury of August 1981 caused increased symptoms but did not worsen the preexisting problem: "But I don't think that one episode changed the need for his surgery...." Dr. Hockey felt that the 1976 injury was a material contributing cause of claimant's need for surgery in 1982.

We find that claimant's 1976 injury was a material contributing cause of claimant's need for surgery in 1982. We find that claimant's 1978 and 1981 injuries did not independently contribute to claimant's need for surgery in 1982. Accordingly we find Scott Wetzel responsible for the 1982 surgery.

No attorney's fee will be awarded to claimant's attorney as he did not participate in Board review.

ORDER

The Referee's order dated November 18, 1982 is affirmed.

VICTOR VANDERSCHUERE, Claimant

Own Motion 82-0025M
July 15, 1983
Own Motion Determination on Reconsideration

The Board issued its Own Motion Order herein on August 6, 1982, reopening claimant's May 25, 1971 injury claim for a worsened condition related to his original injury. The Board issued an Own Motion Determination on May 6, 1983, closing this claim with an award for temporary total disability from December 8, 1981 through April 8, 1983, with no additional award for permanent partial disability.

Claimant, by and through his attorney, thereafter requested reconsideration of the Board's Own Motion Order to include payment of temporary total disability benefits during the period claimant will be enrolled in an authorized training program, which apparently was authorized on May 2, 1983.

Claimant sustained his industrial injury in 1971. He, therefore, does not qualify for receipt of temporary total disability benefits during an authorized training program pursuant to ORS 656.268, as do workers injured on and after January 1, 1974. See also ORS 656.728 and 1973 Oregon Laws Chapter 634 §§ 2, 3. Any claim for temporary total disability during claimant's enrollment in an authorized training program, therefore, is the proper subject of a request for relief pursuant to ORS 656.278.

Claimant's aggravation rights expired March 20, 1978, more than five years ago. This most recent claim reopening, by the Board's Own Motion Order, reopened the claim as of December 8, 1981, and the claim was closed by the above-referenced Own Motion Determination awarding temporary total disability compensation until April 8, 1983, based upon Dr. Nash's statement that, as of that date, claimant had achieved maximal medical benefit.

There is currently no indication that claimant's medical condition is other than medically stationary.

Under the circumstances presented herein, we do not find it appropriate to extend claimant's temporary total disability benefits during the period he is enrolled and actively engaged in an authorized training program. Accordingly, we decline to amend our prior Own Motion Determination as requested by claimant.

ORDER

On reconsideration of the Board's Own Motion Determination dated May 6, 1983, the Board adheres to its order.

DONALD AMENT, Claimant
Flaxel, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-09477
July 18, 1983
Order on Reconsideration

The Board issued its Order on Review herein on June 30, 1983. Claimant has requested reconsideration of that portion of the order which failed to impose a penalty and associated attorney's fee for the SAIF Corporation's failure to timely accept or deny his claim. Claimant maintains that under the guidelines set forth by the Board in Zelda M. Bahler, 33 Van Natta 478 (1981), reversed on other grounds 60 Or App 90 (1982), SAIF is liable for payment of a penalty and attorney's fee for violating claimant's right-to-know interest. See Bahler, 33 Van Natta at 479-480.

Claimant states in his request for reconsideration that the Board and the Referee, "seem to be of the opinion that you cannot award penalties and attorney's fees even where the denial is

unquestionably unreasonably delayed, when there was no compensation 'then due' on which to base the penalty," suggesting that even in the absence of some amount of compensation "then due," a penalty can be imposed for violation of the claimant's right-to-know interest. In this case, claimant was paid interim compensation for the period during which he was hospitalized in December of 1979. Thereafter, he returned to work and continued to work up until the date of SAIF's denial in September of 1980. SAIF's denial was several months late. We observed in our Order on Review that since claimant was working, SAIF was under no obligation to pay interim compensation. See Anthony A. Bono, 35 Van Natta 1 (1983).

Claimant apparently does not dispute the fact that he was not entitled to payment of interim compensation. In fact, at the outset of the hearing, claimant withdrew issues relating to payment of interim compensation. Claimant, nevertheless, contends that a penalty may be imposed as a sanction for SAIF's unreasonably delayed denial.

We agree that SAIF's failure to comply with the 60-day period of ORS 656.262(6) was an egregious violation of claimant's right-to-know interest, and would warrant imposition of the maximum penalty allowable under the standard discussed in Bahler, supra. However, as we previously have observed, our authority for imposition of a penalty is limited to assessing a penalty based upon a percentage of the compensation "then due" at the time acts of unreasonable claims processing, such as unreasonably delayed denials, occur. ORS 656.262(9). Alfred M. Norbeck, 35 Van Natta 802 (June 16, 1983); Gary L. Clark, 35 Van Natta 117 (1983). Compare Clark with Richard Kirkwood, 35 Van Natta 140 (1983), and Norman J. Gibson, 34 Van Natta 1583, 1584 (1982).

In view of the fact that claimant was working during the period that SAIF unreasonably delayed acceptance/denial of his claim, and he, therefore, was not entitled to receive interim compensation, there were no amounts "then due" to provide the basis for imposition of a penalty. Accordingly, we lack authority to penalize SAIF for its flagrant violation of claimant's right-to-know interest under the facts and circumstances of this case. This is an obvious gap in the statutory provisions for penalties and, perhaps, a proper matter for legislative attention; "however, any change along these lines is a matter for the legislature, not for us." Gary L. Clark, supra, 35 Van Natta at 119.

ORDER

On reconsideration of the Board's Order on Review dated June 30, 1983, the Board adheres to its former order which hereby is republished and reaffirmed.

RICHARD D. BUKER, Claimant
Bottini & Bottini, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 81-06700
July 19, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests and claimant cross-requests review of that portion of Referee McCullough's order which awarded claimant 30% unscheduled permanent low back disability, that being an increase of 30% over and above the Determination Orders of March 3, 1981 and June 7, 1982. The employer contends that the Referee's award of 30% disability is excessive. Claimant contends that the award is insufficient.

Claimant strained his back while lifting some "lilly pads." The claim was accepted on a nondisabling basis. Claimant continued working and received conservative medical treatment. In the fall of 1979 claimant suffered an exacerbation while running lumber on a green chain. Claimant received chiropractic therapy and returned to work in November 1979. Claimant continued working until May 1980, at which time another exacerbation caused him to visit Dr. Campagna, a neurosurgeon. Dr. Campagna performed a myelogram on June 5, 1980. The myelogram revealed evidence of a protruded L-4 disc. Dr. Campagna did not feel that surgery was indicated due to the minimal neurologic findings. Claimant was treated conservatively and released to return to regular work on September 3, 1980.

Claimant continued working until September 9, 1980, when he was unable to continue due to back symptoms. He returned to Dr. Campagna and received additional conservative treatment. Dr. Campagna eventually released claimant to return to regular work on February 2, 1981 and noted that claimant exhibited "minimal physical impairment." A Determination Order issued on March 3, 1981; it awarded claimant no compensation for permanent disability.

Claimant returned to work and continued working until November 1981 when he again missed a few days of work due to another flareup of his back pain. He returned to work for a few days and was then laid-off. On November 24, 1981 claimant was seen by Dr. Klump with complaints of back pain. Claimant returned to Dr. Campagna who performed another myelogram on January 7, 1982. The myelogram revealed evidence of a "markedly" protruded L-4 disc. However, due to the fact that claimant exhibited a full range of back motion with negative neurological findings, Dr. Campagna again felt that conservative treatment would be appropriate. Claimant was again released to return to work on March 1, 1982. Claimant worked for a few days at Weyerhaeuser and was subsequently laid-off in a general lay-off.

On May 18, 1982 Dr. Campagna reported:

> "The patient's back condition is stationary and there is no disability as a result of accident in 1978."

A Determination Order issued on June 7, 1982; it awarded claimant no compensation for permanent disability. On June 9, 1982 Dr. Campagna, in a letter to claimant's attorney, again indicated that

claimant's condition was stationary and that he had no disability as a result of the 1978 injury. Claimant was examined by Dr. Thompson on August 16, 1982 for the first and only time. Dr. Thompson's physical findings were about the same as Dr. Campagna's and Dr. Thompson agreed that surgery was not indicated. Dr. Thompson, nevertheless, felt that claimant had moderate impairment and that he should avoid repetitive bending and lifting over 25-30 pounds.

Claimant did not return to work for Weyerhaeuser but was employed for a rock crushing company in August 1982 for approximately three weeks. His duties included shoveling dirt.

Claimant was only 28 years of age at the time of the hearing. He had completed the eleventh grade and part of the twelfth. The report of Industrial Counseling Services, dated January 28, 1981, indicates that claimant did "farm work" in 1972-3 after leaving school and also worked as a dishwasher. In 1974 he was employed for a time as a well driller and in 1976 as a green chain puller. Claimant apparently also has had some experience as a printing press operator and truck driver. In 1977 claimant began working for Weyerhaeuser. His duties involved clean-up and utility work, truck driving, equipment operating and chipper operator.

The Referee stated:

> "Considering all of the evidence, I am more persuaded by Dr. Thompson's opinion concerning residual impairment. * * * Dr. Campagna's conclusion is difficult to understand given the history of claimant's problem and given a previous recommendation Dr. Campagna had made [for vocational rehabilitation]."

Although the Referee concluded that the work restrictions Dr. Thompson placed on claimant were "essentially prophylactic," he concluded that claimant's education and work experience were generally negative factors and that his physical limitations would "probably" preclude him from many of his previous jobs. The Referee thus concluded that claimant had suffered a 30% loss of earning capacity. We disagree.

Unlike the Referee, we find that Dr. Campagna's opinion is entitled to considerable weight as he has been claimant's treating physician through the majority of the history of this claim. See Blair v. SAIF, 21 Or App 229 (1975). Dr. Thompson, on the other hand, only examined claimant on one occasion, and his examination findings differ very little, if at all, from those of Dr. Campagna; and those findings are extremely minimal, even though claimant does have a herniated disc. The findings have been so minimal that neither Dr. Campagna nor Dr. Thompson thought that surgery was indicated. Despite the fact that claimant has a herniated disc, it would appear that at this point in time it is creating very little, if any, physical impairment. It is true, as the Referee noted, that Dr. Campagna felt vocational rehabilitation was indicated; however, this recommendation was made in September 1980 and was not repeated following successful conservative treatment. Contrary to the Referee's conclusion, we find Dr. Campagna's opinion that

claimant's physical impairment disability is at most minimal to be convincing.

In addition to our disagreement with the Referee concerning claimant's physical condition, we find that many of his conclusions regarding the types of employment in which claimant could or could not engage are speculative and unsupported in the record. In fact, as we noted above, claimant's work performance following his conservative treatment seems to belie any such conclusions. Claimant worked full-time in August 1982 for a rock crushing company shoveling sand, dirt and rocks. He indicated that this work was similar in nature to digging ditches, but that he did not consider it to be "killer" work of the type that "drags you down." Claimant's foreman at the rock company testified that he never observed claimant having any difficulty with his back during his employment there.

In summary, it is impossible for us to conclude that a 28 year old worker with a nearly complete high school education, average intelligence, a fairly diverse vocational history and extremely minimal physical findings, which his long-time treating physician find to be suggestive of no physical impairment, has suffered a 30% loss of wage earning capacity. The employer indicates in its brief that it "concedes that claimant has sustained some impairment," and suggests that an award in the range of 10% disability would be appropriate in this case. Were we to strictly apply the guidelines contained in OAR 436-65-600, et seq., we would be inclined to agree with the Evaluation Division's determination. However, under substantially similar factual circumstances, awards of 10% disability have been allowed, and we certainly agree with the employer that no award in excess of that amount can possibly be justified on this record. We modify the Referee's order accordingly.

ORDER

The Referee's order dated November 22, 1982 is modified. Claimant is awarded 32° for 10% unscheduled permanent partial low back disability. This award is in lieu of and not in addition to all previous awards. Claimant's attorney's fee should be adjusted accordingly.

MARILYN J. CHRISTENSEN, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Lindsay, Hart et al., Defense Attorneys
Cheney & Kelley, Defense Attorneys

WCB 81-03090 & 81-09364
July 19, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The aggravation insurer, Industrial Indemnity, requests review of Referee Braverman's order assigning responsibility to it and awarding claimant permanent total disability. The issues on review are responsibility and extent of disability.

Claimant is an obese 40-year-old woman who was injured while working as a mail clerk for Standard Insurance Company. She initially sustained a low back injury while lifting heavy files on

April 1, 1980. At that time Standard was insured by Industrial Indemnity. Claimant was released to modified work on April 22, 1980 and released to regular work on June 2, 1980. On July 17, 1980 while lifting a heavy mail bag claimant again experienced back pain. At that time Standard was insured by Argonaut. Claimant later returned to work, but in February 1981 she again had a recurrence of her back symptoms. She was taken off work by her treating physician and has not returned to work.

The Referee assigned responsibility for the July 1980 incident and resulting disability to Industrial Indemnity because he found that claimant had suffered an aggravation of her April 1980 injury. He based that finding on the short duration between the original injury and the second incident. The Referee also considered the fact that claimant had only been doing regular work about six weeks when the second incident occurred. He also noted that her symptoms after the second incident were in the same area as after the original compensable injury.

We affirm that portion of the Referee's order assigning responsibility to Industrial Indemnity. It is apparent that claimant never fully recovered from the original injury. We conclude that the incident in July 1980 was merely a recurrence of the original injury.

Determination of insurer responsibility is often the only issue ripe for resolution: The denial of the insurer found to be responsible is set aside and the claim is remanded to the responsible insurer for acceptance and processing. In this case, however, the Referee reached the further issue of extent of disability. We are not sure we understand procedurally why this issue was properly before the Referee. The last Determination Order in the record is dated May 25, 1982. It reclosed claimant's April 1980 claim with an award for additional time loss and 10% unscheduled disability. Claimant's July 1980 claim has, of course, never been closed because it was never accepted; both Industrial Indemnity and Argonaut denied responsibility. However, as we understand claimant's counsel's statements at the outset of the hearing, it was his position that claimant's condition as a result of both the April and July claims was stationary by the time of the May 25, 1982 Determination Order, and thus it was appropriate for the Referee to reach the question of extent of disability. We are not certain that this assessment is correct, but because no party has raised any procedural question, we proceed to the merits.

The Referee found that claimant is precluded from "regularly performing work at a gainful and suitable occupation given her permanent impairment to her back and morbid obesity." We think the Referee erred in considering claimant's obesity in finding her permanently and totally disabled.

In Patricia Nelson, 34 Van Natta 1078, 1080 (1982), we concluded that:

> "A worker is not entitled to compensation for disability attributable to obesity to the extent that (a) the evidence establishes that weight loss would reduce

> or eliminate the degree of disability, and (b) it is within the voluntary control of the worker to follow such medical advice and lose weight, and (c) the worker has not made a reasonable effort to follow such medical advice. We further conclude that, where a case involves the rating of disability and the issue is raised, the burden of proof is on the claimant to show that he or she did not unreasonably fail to follow medical advice to lose weight."

The evidence in this case indicates that much of claimant's disability is attributable to her obesity. Orthopaedic Consultants opined that the loss of function in claimant's back is mild and that due to her compensable injury is minimal. They felt that the obesity was "a great aggravating factor, and contributes to her total amount of impairment." Her treating physician, Dr. Eigner, stated that he agreed with Orthopaedic Consultants "that the greatest aggravating factor is her obesity...."

Dr. Eigner testified that claimant had been on numerous diets under his supervision, but that she never stayed on a diet longer than two months. Dr. Eigner testified that people as heavy as claimant are generally not highly motivated to lose weight and that claimant's motivation was fairly typical of morbidly obese people.

We find that claimant has failed to meet her burden of proving that she made reasonable efforts to follow medical advice to lose weight. Accordingly, her obesity will not be considered in rating her permanent disability.

We have considered claimant's permanent impairment due to this injury, which we find to be minimal, together with the relevant social and vocational factors. We conclude that claimant is entitled to an award of 20% unscheduled disability to her low back.

ORDER

The Referee's order dated October 19, 1982 is reversed in part. That portion of the Referee's order awarding claimant compensation for permanent total disability is reversed. Claimant is awarded 64° for 20% unscheduled disability for injury to her low back in lieu of the award granted by the Referee. Claimant's attorney is allowed 25% of the increased compensation granted by this order (10% unscheduled permanent disability) as and for a reasonable attorney's fee in lieu of the fee allowed by the Referee, payable out of and not in addition to claimant's compensation. The remainder of the Referee's order is affirmed.

ERMA L. PARMER, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
David Horne, Defense Attorney

WCB 82-05555
July 19, 1983
Order of Abatement

The Board has received a motion to abate its order of June 27, 1983 and remand the case to the Referee for consideration of additional medical reports.

In order to allow sufficient time to consider the motion, the above-noted Board order is abated, and employer/insurer is requested to file a response to the motion for remand within ten days.

IT IS SO ORDERED.

JOANNE E. RUSSELL, Claimant
Emmons, et al., Claimant's Attorneys
Minturn, et al., Defense Attorneys

WCB 82-06915
July 19, 1983
Order on Reconsideration

The Board issued its Order on Review herein on June 23, 1983. Claimant has moved the Board for reconsideration of that order, requesting that the Board remand this case to the Referee for an evaluation of claimant's permanent partial disability.

In our Order on Review we found that the Referee improperly had decided an issue not presented or litigated at hearing. The Referee found that claimant's claim had been closed prematurely, although claimant did not contend at hearing that she was not medically stationary. We, therefore, reinstated the Determination Order, and proceeded to evaluate claimant's permanent disability. In her request for reconsideration, claimant contends that, once we found that the Referee improperly concluded claimant's condition was not medically stationary, we should have remanded the case to the Referee for a rating of permanent disability.

The fallacy in claimant's request for reconsideration and remand is that claimant already has had a full opportunity to present evidence on the issue of the extent of her permanent partial disability. In fact, extent of permanent disability was the issue litigated at hearing, and the Referee's mistake in deciding an issue not before him should not, and will not, grant claimant an opportunity to relitigate her extent case.

Accordingly, we decline to remand this case for further proceedings. Under the facts and circumstances presented herein, we disagree with claimant's assertion that, by rating her permanent partial disability and issuing an Order on Review based upon the record previously developed before the Referee, we have "deprived this claimant of a hearing concerning her permanent partial disability and a rating before the Referee as required by statute."

ORDER

On reconsideration of the Board's Order on Review dated June 23, 1983, the Board adheres to its former order, which hereby is republished and reaffirmed.

RONALD E. BASS, Claimant
PATRICIA S. BASS, Claimant
Leonard Pearlman, Dept. of Justice

WCB CV-83009
WCB CV-83008
July 20, 1983
Notice of Hearing (in Tandem)

This matter is before the Board on claimants' requests for hearing concerning the Department of Justice's Findings of Fact, Conclusions and Orders on Reconsideration dated July 28, 1982 which denied compensation to claimants under the Victims of Crime Compensation Act (ORS Chapter 147). Claimants have requested an evidentiary hearing.

The hearing has been set as follows:

DATE: August 16, 1983

TIME: 9:30 a.m.

PLACE: Workers' Compensation Board
480 Church Street, S.E.
Salem, Oregon

Hearing Room E (use Bellevue Street Entrance)

Pursuant to OAR 438-82-035, we appoint Ms. Kay Kinsley, Staff Attorney for 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 direct that the requests for hearing be processed and the hearing conducted in accordance 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 orders herein. Only those persons whose statements were considered by the Department of Justice will 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 record of the oral proceedings shall also be made and forwarded to the Board within 30 days (for transcription, if necessary).

IT IS SO ORDERED.

DONALD L. LENTZ, Claimant
Rolf Olson, Claimant's Attorney
Mitchell, Lang & Smith, Defense Attorneys

Own Motion 83-0192M
July 20, 1983
Interim Own Motion Order

Claimant, by and through his attorney, requests that the Board exercise its own motion authority and reopen his December 31, 1976 industrial injury claim for payment of temporary total disability compensation. Claimant's aggravation rights have expired.

The Board initially referred claimant's request for own motion relief to the self-insured employer's claims processing agent for a decision regarding voluntary claim reopening pursuant to the provisions of ORS 656.278(4). Counsel for the self-insured employer has indicated that additional time is required for investigative purposes prior to making a decision with regard to voluntary claim reopening.

Claimant's petition for own motion relief requested payment of medical bills for recent treatment, including surgery. Claimant's injury occurred in 1976; accordingly, claimant has a continuing lifetime right to receive medical treatment for conditions related to his original industrial injury. ORS 656.245(1). Cf William A. Newell, 35 Van Natta 629 (May 6, 1983).

In addition to requesting additional time within which to investigate the possibility of voluntary own motion reopening, the self-insured employer, through counsel, has indicated that an acceptance or denial of medical services has not been issued under the provisions of ORS 656.245, for the reason that claimant's present treating physician, "has failed to issue a report establishing the causal relationship between the 1976 industrial injury and the current surgery. * * * As soon as a report from Dr. Becker is issued regarding causation, an acceptance or denial of medical benefits under ORS 656.245 will be issued."

In January 1983, claimant consulted Dr. Johnson, an orthopedic physician in Boise, Idaho. Dr. Johnson reported to the self-insured employer on January 11, 1983, detailing claimant's history and current physical complaints. Diagnostic tests were performed, including a CT scan. A central probable disc extrusion at L5-S1 and bulging at L4-5 was diagnosed by Dr. Johnson, and by letter of January 24, 1983, the employer was informed of this diagnosis. The employer apparently informed Dr. Johnson that it would not pay for his treatment. Claimant returned to Oregon, and on March 18, 1983, was examined by Dr. Becker, an orthopedic physician, who wrote a report to the employer on that same date. Claimant was hospitalized on April 11, 1983 for a lumbar myelogram, and on April 13, 1983, a laminectomy was performed.

> "When the time for submitting a claim under ORS 656.273 has expired, any claim for medical services referred to in this section shall be submitted to the insurer or self-insured employer. If the claim for medical services is denied, the worker may

submit to the Board a request for hearing pursuant to ORS 656.283." ORS 656.245(2).

Accordingly, it is quite clear that a claim for medical services must be formally denied notwithstanding the expiration of a claimant's aggravation rights. See Max D. Cutler, 34 Van Natta 1480 (1982). The statutory response time for a claim for medical services is sixty (60) days: With reference to rendered medical services, the claim should be paid or formally denied within sixty (60) days. Billy J. Eubanks, 35 Van Natta 131, 135 (1983). The failure to do so may subject the insurer or self-insured employer to penalties. In spite of the provisions of ORS 656.245(3), a bill submitted by an out-of-state physician is nevertheless a claim for compensation which must be paid or formally denied within sixty (60) days, with notification of claimant's hearing rights. See generally Anita Gilliam, 35 Van Natta 377 (1983); Rivers v. SAIF, 45 Or App 1105 (1980).

Claimant now has sought treatment with an Oregon physician, who has recommended the same treatment as the Idaho orthopedic physician. The self-insured employer has been on notice of the fact that claimant has been treating with Dr. Becker, the Oregon physician, at least since March of 1983; and further is advised of the fact that a surgical procedure was performed on April 13, 1983. The self-insured employer has advised the Board that it "doubts that there is a causal relationship between the industrial injury and the recent herniated disc," but admittedly has not yet issued a denial in conformance with Cutler, supra, and Eubanks, supra.

There obviously is an issue present regarding the compensability of claimant's recently incurred medical bills for treatment of a herniated disc. Such issues are subject to the insurer or self-insured employer's obligation to issue a formal denial and claimant's corresponding right to request a hearing pursuant to ORS 656.283. ORS 656.245(2).

Accordingly, we construe the material that has been submitted to us ostensibly under our own motion authority pursuant to ORS 656.278 as a request for hearing under ORS 656.283. The docket clerk hereby 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, as well as penalties/attorney 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 then will consider whether to grant claimant compensation for temporary total disability in the exercise of its own motion authority.

IT IS SO ORDERED.

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

Own Motion 82-0025M
July 20, 1983
Corrected Own Motion Determination on Reconsideration

The Board issued its Own Motion Order herein on August 6, 1982, reopening claimant's May 25, 1971 injury claim for a worsened condition related to his original injury. The Board issued an Own Motion Determination on May 6, 1983, closing this claim with an award for temporary total disability from December 8, 1981 through April 8, 1983, with no additional award for permanent partial disability.

Claimant, by and through his attorney, thereafter requested reconsideration of the Board's Own Motion Order to include payment of temporary total disability benefits during the period claimant will be enrolled in an authorized training program, which apparently was authorized on May 2, 1983.

Claimant sustained his industrial injury in 1971. He, therefore, does not qualify for receipt of temporary total disability benefits during an authorized training program pursuant to ORS 656.268, as do workers injured on and after January 1, 1974. See also ORS 656.728 and 1973 Oregon Laws Chapter 634 §§ 2, 3. Any claim for temporary total disability during claimant's enrollment in an authorized training program, therefore, is the proper subject of a request for relief pursuant to ORS 656.278.

Claimant's aggravation rights expired March 20, 1978, more than five years ago. This most recent claim reopening, by the Board's Own Motion Order, reopened the claim as of December 8, 1981, and the claim was closed by the above-referenced Own Motion Determination awarding temporary total disability compensation until April 8, 1983, based up Dr. Nash's statement that, as of that date, claimant had achieved maximal medical benefit.

There is currently no indication that claimant's medical condition is other than medically stationary.

Under the circumstances presented herein, we do not find it appropriate to extend claimant's temporary total disability benefits during the period he is enrolled and actively engaged in an authorized training program. Accordingly, we decline to amend our prior Own Motion Determination as requested by claimant.

ORDER

On reconsideration of the Board's Own Motion Determination dated May 6, 1983, the Board adheres to its order.

PHILLIP A. BERTRAND
Doblie, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11065
July 21, 1983
Order on Reconsideration

The Board issued its Order on Review herein on June 30, 1983. Phillip A. Bertrand, 35 Van Natta 869 (1983). We have reconsidered that order, sua sponte, with regard to the issue of the appropriate penalty for the SAIF Corporation's unilateral termination of claimant's temporary total disability benefits. Our order states the following:

> "SAIF has asserted in its brief on review that it did not unreasonably terminate claimant's benefits because it closed the claim pursuant to the insurer-closure procedure in ORS 656.268(3). SAIF's assertion that it closed this claim is unsupported by the record. If such a closure was attempted by SAIF, it is obvious that the notice requirements of ORS 656.268(3) were not complied with and, thus, a penalty is warranted. However, due to the statutory haze that permeates the claims-processing issue in this case, we believe that an award of less than the maximum penalty would be more appropriate." 35 Van Natta at 872-73.

The Referee's order imposed a penalty equivalent to 25% of the accrued temporary disability benefits due as of the date of his order; i.e., from the date of SAIF's December 3, 1981 denial. As reflected by the above-quoted portion of our Order on Review, we intended to adjust the Referee's imposition of a penalty by imposing a penalty in some amount less than the maximum allowable. However, we inadvertently failed to modify the penalty in the "order" portion of our Order on Review.

As a penalty for unilateral termination of temporary total disability, SAIF shall pay an additional amount equal to 15% of the temporary total disability compensation awarded by the Referee for the period December 3, 1981, to the date that the claim was closed by Determination Order, April 1, 1982. See Phillip A. Bertrand, 35 Van Natta 874 (June 30, 1983).

ORDER

On reconsideration of the Board's Order on Review dated June 30, 1983, we modify our prior order. The penalty imposed by the Referee's order is modified to provide that the SAIF Corporation shall pay to claimant 15% of the temporary total disability compensation awarded for the period December 3, 1981 to April 1, 1982. Except as modified herein, the Board's prior order is adhered to and hereby is reaffirmed and republished.

CONNIE A. GARCIA, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-04656
July 21, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of that portion of Referee Quillinan's order which awarded claimant 10% unscheduled permanent partial disability, that being an increase of 10% over and above the May 7, 1982 Determination Order. The issue for review is the extent of claimant's disability.

Claimant was employed as a psychiatric aide at Fairview Hospital on November 20, 1981 when she sustained a compensable injury to her left shoulder and neck. Claimant was treated that same day by Dr. Grobman, and was examined at Salem Hospital the following day. The diagnosis was left trapezius strain. Claimant missed only two days of work immediately following the injury, and another five days near the end of the month. On December 3, 1981 Dr. Winthrop indicated that claimant's shoulder was better, although not totally healed. He suggested light duty work with no lifting over thirty pounds for one week. On December 9, 1981 claimant experienced an exacerbation of pain, but upon examination, Dr. Winthrop could detect little tenderness and no limitations of neck or shoulder motion.

Claimant continued working on a full-time basis. On December 12, 1981 claimant was involved in a non-work-related motor vehicle accident when her car was struck from behind by another vehicle. The collision resulted in an increase in claimant's shoulder symptoms and a cervical sprain for which she was fitted with a neck brace for the first time. Apparently claimant did not return to work following the motor vehicle accident until April 1982.

Claimant continued to treat with Dr. Winthrop who reported on January 14, 1982:

> "As you know, Connie Garcia has been suffering from a strain in the cervical and trapezius area while at work on November 20, 1981. I felt all along that it was a minor problem but have not been able to convince her of that. I have attempted at times to get her back to work and each time she says she is not able to work because of severe pain. * * * I tried to get her back to work but today she tells me she just can't work becase of discomfort in her shoulder and neck. * * *"

Dr. Winthrop suggested claimant visit another physician and referred her to Dr. Tiley. A possible clue to Dr. Winthrop's dilemma can be found in a letter from Viking Insurance dated April 5, 1982 and addressed to claimant's attorneys. The letter stated:

> "It has been brought to my attention that your client, Connie Garcia, had been involved in a workman's comp. claim on

> November 20th, 1981 . . . Also, it does appear that we have duplicate payments on Connie's wage loss.
>
> "In good faith I have paid Connie's wage loss from December 12, 1981 through February 8, 1982. This is a total of eight weeks of wage loss. According to the SAIF Corporation, they have been paying $133.03 per week during the same time.
>
> * * *
>
> "Enclosed you will find a copy of my PIP ledger which shows you that I have paid $1,131.64 too much. Please be advised that we will be asking reimbursement from her regarding this amount."

On February 10, 1982 SAIF issued a partial denial by which it denied that it was responsible for any injuries or treatment resulting from the December 12, 1981 motor vehicle accident. The November 20, 1981 injury remained in accepted status.

On February 19, 1982 Dr. Tiley reported that claimant's industrial neck and shoulder injury had been improving nicely before reinjury on December 12, 1981. Dr. Tiley stated, "The etiology of her problem is dual, related to two separate injuries, and there is absolutely no way that I can tell you at this point how much of one or the other is the most significant contributing factor." He indicated that such a determination would have required him to have seen claimant before either incident had taken place.

On March 3, 1982 claimant returned to Dr. Grobman, whom she had not seen since her initial visit on November 20, 1981. Dr. Grobman indicated that claimant would require chiropractic care for approximately the next two and one-half months. On April 19, 1982 claimant was examined by Drs. Murphy and Fax, both orthopedists, and Dr. Mead, a neurologist. A complete examination was performed and claimant was found to have normal ranges of cervical and shoulder motion. There was no atrophy, spinal tilt or muscle spasm present and only some minimal tenderness over C2-3 was noted. No neurological deficits were found. The physicians found claimant to be medically stationary with no permanent impairment relative to either her work injury or the motor vehicle accident. It was felt that she could return to her regular job with no restrictions. The physicians further indicated that it would not be possible to separate the complaints due to claimant's industrial accident versus the motor vehicle accident, and that both incidents contributed to her symptom complex, "but since these symptoms have largely resolved at this time, it is a moot point."

On May 7, 1982 a Determination Order issued. It awarded claimant no benefits for permanent partial disability.

On June 29, 1982 Dr. Grobman reported that he believed claimant's left shoulder had been weakened to the point where lifting over forty to fifty pounds on a repetitive basis would be harmful. On July 27, 1982 he reported that he had been treating claimant for

her industrial injury of November 20, 1981, but that: "Her auto accident injury does affect her shoulder but since the areas are so closely related it is impossible to separate the two injuries." He felt that claimant's inability to lift over forty to fifty pounds on a repetitive basis indicated a minimal permanent impairment. Dr. Grobman testified to the same effect at the hearing.

There is one other medical report in the record which is of interest. It is a "check-the-boxes" report prepared by Dr. Tiley for Viking Insurance on March 16, 1982. Dr. Tiley indicates that the diagnosis of claimant's condition is a neck injury of the mid-dorsal spine, that she has never had a similar condition in the past, that the condition was solely the result of the auto accident of December 1981, that it was not the result of an industrial injury and that no permanent defects were anticipated.

Based on Dr. Grobman's opinion, the Referee concluded that claimant was entitled to 10% unscheduled disability for injury to the shoulder. We disagree and reverse.

The only indication in this record that claimant suffers any impairment whatsoever, comes from Dr. Grobman. Yet, Dr. Grobman, as well as every other physician who has examined claimant, states that it is not possible to separate the effects of claimant's industrial versus her nonindustrial injury. Even if we were to accept Dr. Grobman's conclusion concerning permanent impairment, which we do not, this is a fatal flaw in claimant's case. If claimant has some permanent impairment, and if her physicians are unable to defferentiate between the effects of her industrial and nonindustrial injury, has claimant sustained her burden of proving a loss of earning capacity resulting from her industrial injury? We think not. Moreover, if claimant has sustained any permanent impairment, the facts tend to implicate the motor vehicle accident as the cause, rather than the industrial injury. Claimant missed a total of seven days from work as a result of her industrial injury and, other than that, continued working in a full-time capacity. She was improving nicely from the effects of that injury when the motor vehicle accident intervened. Claimant was thereafter in a neck brace and missed fourteen days from work in December 1981, and did not return to work again until April 1982.

In addition to the above, we find that a preponderance of the evidence indicates that claimant suffers no permanent impairment as a result of either her industrial or nonindustrial injury. Drs. Fax, Mead and Murphy, who examined claimant in April 1982, found no indication that claimant suffered any permanent impairment at all and felt that she could return to work with no restrictions. Dr. Winthrop, claimant's initial treating physician, was of the opinion as early as January 1982 that claimant was capable of returning to work. He considered her industrial injury to be "a minor problem," and does not indicate that she sustained any permanent impairment as a result of that injury. Dr. Tiley's report of March 16, 1982 lends additional support to this conclusion. Although Dr. Grobman may believe claimant sustained some minimal impairment, the weight of the evidence is contrary to that opinion, and he himself admits that he cannot differentiate the effects of the industrial injury versus the nonindustrial injury.

On June 30, 1983 SAIF submitted to the Board a petition for admission of additional evidence. The evidence consists of a copy of a complaint for personal injuries in a civil action in relation to claimant's December 1981 motor vehicle accident. SAIF contends that the allegations in the complaint constitute judicial admissions that claimant is not entitled to the relief sought in her workers' compensation hearing. In view of our disposition of this claim, we find it unnecessary to rule on SAIF's petition.

Since no party takes issue with the Referee's "alternative" finding that had claimant requested a hearing in a timely manner in relation to the February 2, 1982 partial denial, the Referee would have found claimant's cervical problems subsequent to the December 1981 accident compensable, we express no opinion as to the propriety of that determination.

ORDER

The Referee's order dated January 26, 1983 is reversed in part. That portion of the order which awarded claimant 10% unscheduled permanent partial left shoulder disability is reversed, and the May 7, 1982 Determination Order is reinstated. The remainder of the Referee's order is affirmed.

DEBORAH R. YETTER (PANKEY)
SAIF Corp Legal, Defense Attorney

WCB 81-01466
July 21, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Podner's order which affirmed that portion of the April 14, 1981 Determination Order finding claimant medically stationary as of February 26, 1981, awarded claimant 10% unscheduled permanent partial disability, that being an increase of 10% over and above the Determination Order, ordered the SAIF Corporation to pay for claimant's osteopathic and physical therapy treatments rendered by Dr. Judd prior to July 15, 1980 and ordered SAIF to pay for all treatment provided claimant by Dr. Birdsell prior to April 8, 1982.

Claimant contends that the Referee erred in affirming the Determination Order's medically stationary date and (apparently) in awarding her only 10% unscheduled disability. She also contends that the Referee should have ordered SAIF to pay for all medical treatment rendered by Drs. Judd and Birdsell and to pay for numerous other assorted and sundry bills for medical and travel expenses. SAIF argues that the Referee erred in ordering it to pay for any treatment rendered by Dr. Birdsell and that the Referee's order should be affirmed in all other respects.

We adopt the Referee's findings of fact as our own except as otherwise noted herein.

With regard to the questions concerning premature claim closure and extent of disability, we affirm and adopt the relevant portions of the Referee's order. We agree that Dr. Bashara's report of February 26, 1981 convincingly establishes that claimant

was medically stationary as of that date. Claimant may truly believe that she was not stationary as of that date, but a preponderance of the convincing medical evidence is not only persuasive that she was medically stationary as of February 26, 1981, but strongly indicative that from an objective standpoint, claimant's orthopedic and/or neurological impairment is minimal to none.

With regard to claimant's contentions that SAIF should be responsible for payment of all medical and related expenses incurred coincident with her treatment by Drs. Judd and Birdsell, we disagree. Both Drs. Judd and Birdsell are out-of-state doctors. SAIF initially paid for claimant's treatments by Dr. Judd with no objection. However, on May 29, 1980 SAIF advised claimant that it no longer would be responsible for treatments rendered by Dr. Judd, as he had not provided narrative medical reports despite repeated requests to do so. Claimant was informed that treatment was authorized only with Dr. Bashara, an orthopedic surgeon in Des Moines, Iowa.

The Referee concluded that since Dr. Bashara indicated in his chart notes of May 15, 1980 that he would reexamine claimant in two months and that in the interim she could "continue with her osteopathic manipulations," SAIF was responsible for continued treatment with Dr. Judd until July 15, 1980. The Referee found that Dr. Bashara had "delegated the duty of osteopathic manipulations and physical therapy" to Dr. Judd.

Although SAIF does not take issue with this determination, had it done so, we likely would have concluded it is not responsible for payment of benefits for any treatment rendered by Dr. Judd beyond May 29, 1980, despite the fact that Dr. Bashara indicated that claimant could continue with osteopathic manipulations. In Rivers v. SAIF, 45 Or App 1105 (1980), the court stated: "By specifically giving the worker a choice of doctors within the state of Oregon, the legislature withheld that choice outside the state." 45 Or App at 1108. In Anita Gilliam, 35 Van Natta 377 (1983), we stated our understanding of Rivers to be that the worker has an absolute right to choose an attending physician within the State of Oregon, and that similarly, an employer/insurer has an absolute right to refuse to pay for treatment provided by a physician outside the State of Oregon. 35 Van Natta at 378. Despite the fact that Dr. Bashara may have felt that additional osteopathic manipulation was indicated, SAIF was quite explicit in its rejection of any further responsibility for treatments rendered by Dr. Judd. Had claimant desired to continue with osteopathic manipulations, she should have requested SAIF to designate an acceptable osteopathic physician. Under Rivers, the Referee had no authority to order SAIF to pay for any additional treatments rendered by Dr. Judd once it had indicated that Dr. Judd was not acceptable. However, since SAIF does not take issue with the Referee's determination relative to payment for Dr. Judd's treatments prior to July 15, 1980, we do not disturb that portion of his order.

With regard to claimant's contention that SAIF should be responsible for payment for all of her treatments with Dr. Birdsell, we disagree, based on the same reasoning as above.

SAIF contends that the Referee erred in ordering it to pay for all of Dr. Birdsell's treatments rendered prior to April 8, 1982.

We agree and, accordingly, reverse that portion of the Referee's order. The first notice SAIF received that claimant was treating with Dr. Birdsell came in the form of a bill for $464.00, received by SAIF on March 29, 1982. SAIF immediately notified Dr. Birdsell that it had not authorized him to treat claimant, that Dr. Bashara was the only authorized physician and that Dr. Birdsell should bill claimant. As with Dr. Judd, had claimant desired to treat with Dr. Birdsell, she should have requested SAIF's authorization to do so prior to beginning her treatments, rather than presenting SAIF with a fait accompli and demanding payment on the basis that SAIF had not indicated treatment with Dr. Birdsell was improper prior to the billing. Having failed to obtain such authorization, SAIF was not responsible for payment for any treatments rendered by Dr. Birdsell, and we conclude that the Referee erred in ordering SAIF to do so. Although claimant has a right to receive continued medical care for conditions related to her compensable injury, so long as she resides outside the State of Oregon, SAIF has the absolute right to refuse to pay for treatment rendered by unauthorized physicians. Rivers, supra, Gilliam, supra.

In addition to the above, claimant also contends that SAIF should be ordered to reimburse her for a variety of expenses related to her medical treatments, such as travel expenses, prescription drugs, etc. Any expenses related to claimant's treatment with Dr. Birdsell are not reimbursable as we have concluded that SAIF is not responsible for claimant's treatments with that doctor. Any expenses related to claimant's treatment with Dr. Judd beyond July 15, 1980 are similarly not reimbursable. The additional expenses for which claimant requests reimbursement are not clearly indentified, and we remain uncertain as to what they are. The only specific delineation made by claimant at the hearing related to expenses in connection with her treatment by Dr. Birdsell. It was up to claimant to specifically delineate at the hearing whatever additional relief she was seeking beyond expenses related to treatment with Dr. Birdsell. She has failed to do so.

ORDER

The Referee's order dated December 8, 1982 is affirmed in part and reversed in part. Those portions of the Referee's order which ordered the SAIF Corporation to reimburse claimant for treatments rendered by Dr. Birdsell prior to April 8, 1982 are reversed. The remainder of the Referee's order is affirmed.

MYRTLE L. THOMAS, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-04330
July 22, 1983
Order on Reconsideration

Claimant requests reconsideration of our Order on Review of July 6, 1983 which affirmed the Referee's order refusing to require the SAIF Corporation to pay for diagnostic testing and to award a penalty and attorney's fee for unreasonable resistance to payment of compensation. On reconsideration we vacate our previous order.

FACTS

Claimant is a 25 year old woman who compensably injured her

neck and shoulders when she slipped and fell on wet pavement in May 1977. She was diagnosed as having a cervico-dorsal strain. The claim was closed by a Determination Order on October 3, 1978 which awarded temporary disability benefits but did not award any permanent disability benefits. By a stipulation dated August 9, 1979 claimant was granted a 10% disability award.

Claimant's complaints have remained essentially the same since shortly after her compensable injury. These include neck pain, muscle spasms in the neck, limited range of motion in the neck, bilateral shoulder pain, left arm pain and occasional radiating pain into the arms. However, in the spring of 1981 she also began complaining of degenerative numbness, coldness and whiteness in one of the fingers of her right hand. Claimant received palliative treatment until March 1980. She received no treatments between March 1980 and March 1981 when she returned to Dr. Resner, her chiropractor.

In March 1981 Dr. Resner suspected that claimant was suffering from "vascospastic disease, Raynoud's type." He indicated that diagnostic tests were needed to determine if the Raynoud's disease were caused by the compensable injury.

Claimant was then seen by Dr. Woolpert, an orthopedic surgeon, who opined that an evaluation should be done to determine whether claimant indeed suffers from a vascospastic disease and, if so, whether the disease was caused by the compensable injury.

SAIF has refused to authorize payment for diagnostic testing. Claimant requested a hearing to protest SAIF's refusal to pay for the requested diagnostic testing. Claimant also requested a penalty and attorney's fee for unreasonable resistance to payment of compensation. The Referee refused to order SAIF to pay for the diagnostic procedures because he found that claimant had failed to prove that the requested diagnostic procedures were causally related to her compensable injury. We affirmed and adopted the Referee's order.

COMPENSATION FOR DIAGNOSTIC PROCEDURES

On reconsideration, claimant argues that Jimmy Layton, 35 Van Natta 253 (1983), controls. In Layton the claimant sustained a compensable neck injury in a fall. Sometime thereafter he began experiencing hearing loss. His treating physician requested permission to perform surgery to determine whether his hearing loss was related to his compensable injury. We stated there that the issue was not whether diagnostic procedures are compensable, but under what circumstances such procedures are compensable. Both the Board and the Court of Appeals have recognized that ORS 656.245 extends to payment for diagnostic procedures even when the procedures ultimately reveal that claimant's condition is not compensable. Brooks v. D & R Timber, 55 Or App 688 (1982), Edith Stevens, 34 Van Natta 642 (1982). In Layton we suggested that where the treating physician opined that diagnostic treatments were necessary to decide whether a condition is compensable we would be inclined to defer to the treating physician and find the diagnostic tests compensable. However, we did not so hold because SAIF had effectively conceded that the diagnostic surgery requested in that case was compensable.

In this case SAIF does not concede the compensability of the requested diagnostic procedures. Therefore, we are squarely faced with the issue we did not decide in Layton. We hold that where claimant has proven by a preponderance of the evidence that a diagnostic procedure is reasonably necessary to determine whether claimant's condition is causally related to a compensable injury, the insurer is responsible for paying the cost of such diagnostic procedures. In this case claimant has carried her burden.

Claimant presented evidence from both a treating chiropractor and a treating MD that she needs to have diagnostic treatment to determine whether she has vasculospastic disease caused by her compensable injury. SAIF has presented no contrary evidence. Absent persuasive evidence to the contrary, we will defer to the judgment of claimant's treating physicians. We find that SAIF is obligated under ORS 656.245 to provide the requested diagnostic testing.

PENALTY AND ATTORNEY'S FEE

The Referee found that SAIF had acted unreasonably in failing to accept or deny payment for Dr. Resner's treatment of claimant and in failing to accept of deny claimant's request for diagnostic testing. However, he did not impose a penalty because he found no compensation due. In view of our holding that claimant is entitled to compensation, we impose a penalty of 25% of the outstanding medical bills for claimant's visits to Dr. Resner. See Billy J. Eubanks, 35 Van Natta 131 (1983), and Richard Kirkwood, 35 Van Natta 140 (1983). We also order SAIF to pay an attorney's fee of $500 pursuant to ORS 656.382.

ORDER

The Order on Review of July 6, 1983 is rescinded. The Referee's order dated December 30, 1982 is reversed. The SAIF Corporation is ordered to authorize claimant to obtain the requested diagnostic procedures and to compensate claimant for those procedures. SAIF also is ordered to pay Dr. Resner's bill for March 6, 1981 and April 14, 1981. SAIF is ordered to pay claimant a penalty of 25% of the amount due to Dr. Resner. SAIF is ordered to pay claimant's attorney $500 as an attorney's fee for unreasonable resistance to payment of compensation. SAIF is ordered to pay claimant's attorney an additional fee of $500 for services on Board review.

RODNEY J. BEIERLE, Claimant
Kenneth Peterson, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 82-02363
July 26, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer/insurer requests review of Referee Cronan's order which awarded claimant 15% unscheduled permanent partial low back disability, that being an increase of 15% over and above the February 17, 1982 Determination Order. The issue for review is the extent of claimant's disability.

We adopt the Referee's findings of fact as our own, except as otherwise noted herein.

As a preliminary matter, we first address claimant's motion to remand this matter to the Referee for the taking of additional evidence pursuant to ORS 656.295(5). The nature of the evidence concerns claimant's employment status. Claimant indicates that he has been terminated from his job, that this was the same job at which he was working at the time of his industrial injury and that since he was employed at the time of the hearing, it was not possible to produce this evidence at that time. Claimant argues that since post-injury earnings are relevant to a determination of loss of earning capacity, the matter should be remanded to the Referee for a consideration of such evidence.

We conclude that claimant's motion to remand must be denied. In Gary A. Freier, 34 Van Natta 543 (1982), we noted that a worker's disability is rated at the time of the hearing. See also Gettman v. SAIF, 289 Or 609 (1980), Leedy v. Knox, 34 Or App 911 (1980). Remand to the Referee for consideration of post-hearing factors on a determination of claimant's loss of earning capacity would violate this basic principle (although certain exceptions may be appropriate, such as cases involving permanent total disability and ORS 656.206[3]). In addition, as noted by the employer, if claimant's request were granted on this basis, this would suggest that the employer then would be able to request remand for additional evidence should claimant once again become employed prior to review by the Board. This could lead to a never ending process of remand and redetermination. We, therefore, conclude that claimant's motion must be denied. See also Robert W. Dalton, 35 Van Natta 352 (1983).

With regard to the question of the extent of claimant's disability, we find that the amount awarded by the February 17, 1982 Determination Order was adequate. Although claimant sustained a herniated L4-5 disc as a result of his industrial injury, all of his medical treatment has been of a conservative nature. Claimant has responded well to this conservative therapy and neither Dr. Camp nor Dr. Smith feel that surgery is necessary. Dr. Smith has restricted claimant only from heavy work, with no crawling or repetitive working in a flexed position. Although claimant was injured on January 27, 1981, he was able to continue working until March 25, 1981. He returned to work in May 1981 and generally continued working thereafter, although in a somewhat lighter capacity. Claimant testified that he takes no pain medication and that the last time he had been to a physician was in June 1982 when Dr. Smith performed his closing examination. Claimant's testimony further indicated that although he had some physical restrictions, they were relatively minor and he has been able to function adequately within those minor restrictions.

From a social/vocational standpoint, the evidence indicates that claimant was only 24 years of age at the time of the hearing and had a high school education. He would appear to be of at least normal intelligence and does not appear to have any psychological

or emotional difficulties. Claimant was employed as a telephone installer and repairman prior to his injury and was earning $8.93 per hour. Subsequent to his injury his job was that of pay-telephone repairman and coin collector, for which he was being paid $11.76 per hour. Prior to his current job, he was employed as a combination technician for The Bell System.

Utilizing the guidelines of OAR 435-65-600 et seq., we make the following findings. Claimant's physical impairment is assigned a value of +10 (nonsurgical herniated disc with minimal physical findings). Since claimant was 24 years of age at the time of the hearing, a value of -7.5 is assigned to this factor. Claimant's high school education yields a value of zero. As noted above, there is nothing in the record to indicate that claimant has any emotional or psychological difficulties, and he would appear to be of at least average intelligence. Values of zero are, therefore, assigned to these factors. The Dictionary of Occupational Titles indicates that the specific vocational preparation time for claimant's occupation is over two years (SVP 7). A +10 is, therefore, assigned to the work experience factor. Claimant's employment was classified as heavy prior to his injury. He is currently restricted to the lower portion of the medium range. We, therefore, allow a value of +6 for this factor. The labor market findings indicate that with a GED of four, an SVP of seven and with a restriction to medium work, that 78% of the labor market performs work at claimant's level or at a lower level. This corresponds to a value of -25. The combined positive values equal +24. The combined negative values equal -30.5. Multplying the positive total by the negative percentage value yields 7.32. A +24 minus 7.32 yields 16.68 which, rounded to the nearest 5%, yields 15%. This is exactly what was awarded by the Determination Order. Considering the result obtained by utilizing the guidelines, in light of other cases involving similarly situated claimants, we find that 15% unscheduled permanent disability accurately represents the loss of earning capacity claimant has sustained as a result of his industrial injury.

Both claimant and the Referee expressed some puzzlement at how a -25 factor could have been arrived at by the Evaluation Division. We have explained how this was done above. Based on Futrell v. United Airlines, 59 Or App 571 (1982), the Referee concluded that there was no justification in the current case for assigning a value of -25 to claimant's labor market factor. We find that the facts of Futrell are clearly distinguishable from the current case. The claimant in Futrell was no longer able to engage in his previous occupation as an airline mechanic, and was unable to find even light duty work. He was employed in a marginal capacity at a small bookstore at the time of the hearing. The claimant in the current case has been restricted from only heavy to medium work and has testified to and demonstrated his ability to engage in that type of work. Claimant clearly has transferable skills in the communications industry and was regularly employed in that area at the time of the hearing. We also find the facts of Ford v. SAIF, 7 Or App 549 (1972), inapplicable. The claimant in Ford sustained a serious injury which restricted him from performing work in a large segment of the labor market. We do not find the claimant in the current case to be so restricted.

ORDER

The Referee's order dated November 26, 1982 is reversed and the February 17, 1982 Determination Order is reinstated.

MICHAEL J. BLACK, Claimant
Pozzi, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-00384
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of that portion of Referee Mulder's order which found that claimant was entitled to an award of compensation equal to 50% loss of use of the left forearm. Claimant contends he is entitled to an award of permanent partial disability for injury to his left arm rather than an award of permanent partial disability for injury to his left forearm. We agree with claimant and, therefore, modify the Referee's order.

On October 6, 1980 claimant suffered a crushing injury to his upper body and head when he was caught between a metal post and a larger piece of metal equipment at work. One of the consequences of this injury was impairment of claimant's whole left upper extremity, including the left shoulder. Claimant has been granted an award for his left shoulder and left forearm impairment, but the Referee found that claimant has failed to prove that he has disabling loss of function at or above the elbow so as to justify a "loss of the arm" award.

Review of the medical reports shows a continuum of left arm complaints that include weakness, numbness and pain in claimant's left elbow and upper arm, including some atrophy of the upper left arm musculature. Additionally, the Referee made a finding that claimant credibly testified to soreness and weakness of the left elbow, numbness and weakness of the upper arm together with size reduction of the whole arm.

Based on the documentary evidence in the record and claimant's testimony, we find that he is entitled to an award of compensation equal to 50% loss of use of his left arm in lieu of the award made by the Referee for 50% loss of use of his left forearm.

ORDER

The Referee's orders dated September 2, 1982 and October 14, 1982 are modified. Claimant is awarded compensation equal to 96° for 50% loss of use of the left arm. This award is made in lieu of the prior left forearm award of 75° for 50% loss of use. Claimant's attorney is allowed 25% of the increased compensation granted by this order as a reasonable attorney's fee, not to exceed $1,000, to be paid out of claimant's compensation and not in addition thereto.

TERRY L. COOPER, Claimant
Evohl F. Malagon, Claimant's Attorneys
Brian Pocock, Defense Attorney
Keith Skelton, Defense Attorney

WCB 81-11610 & 82-06139
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Seifert's order which: (1) Approved Liberty Mutual Insurance Company's denial of aggravation dated January 8, 1982; (2) approved Aetna Technical Services, Inc.'s denial of new injury dated June 17, 1982; (3) awarded claimant interim compensation from December 16, 1981 to January 8, 1982; and (4) awarded claimant an amount equal to 25% of the interim compensation, payable by Liberty Mutual Insurance Company, for failure to accept, deny or pay interim compensation to claimant within 14 days of the December 16, 1981 aggravation claim.

On review claimant contends: (1) That he has proven a temporary aggravation of his shoulder and psychological conditions which occurred between July 27, 1981 and January 19, 1982; (2) that, for purposes of determining during which period of time a worsening must occur, the last arrangement of compensation should be the date on which claimant's attorney signed a stipulated order and not the date on which the Referee approved the stipulation; and (3) that Dr. Norris-Pearce's report of October 23, 1981 constitutes an aggravation claim and that interim compensation and penalties should run from July 27, 1981 -- the date which Dr. Norris-Pearce's October 23, 1981 report indicated was the last day claimant was able to work due to increased shoulder pain.

We find that Dr. Norris-Pearce's report of October 23, 1981 did constitute an aggravation claim. However, we also find that viewing the evidence as a whole, claimant has not proven that he incurred a worsening of his shoulder condition or psychological condition. Since we do not find the aggravation claim to be compensable, the insurer only has the duty to pay interim compensation from the date it was given notice of medically verifiable inability to work due to a compensable condition. Donald Wischnofske, 34 Van Natta 664 (1982). Therefore, for purposes of awarding interim compensation, we need not reach the issue of whether the last arrangement of compensation should be in April of 1981, when claimant's attorney signed the stipulation, or from October 2, 1981 when the stipulation was approved by the Referee. In any case, claimant is only entitled to interim compensation from the later date of October 23, 1981 -- the date the insurer had notice of claimant's inability to work.

ORDER

The Referee's order dated January 7, 1983 is modified. Claimant is awarded additional interim compensation from October 23, 1981 to December 16, 1981. Further, claimant is awarded 25% of this additional compensation as a penalty, payable by Liberty Mutual Insurance Company, for its failure to process the October 23, 1981 aggravation claim. The remainder of the Referee's order is affirmed. Claimant's attorney is allowed 25% of the increased interim compensation awarded in this order as a reasonable attorney's fee and further is awarded $100 as a fee pursuant to ORS 656.382(1), payable by Liberty Mutual Insurance Company.

WARREN E. DENT, Claimant
Dennis Henninger, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
Minturn, et al., Defense Attorneys

WCB 81-00733 & 81-00734
July 26, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Seifert's order which found it responsible for a new injury sustained by claimant on December 12, 1980. The sole issue is insurer/employer responsibility. SAIF contends that the evidence preponderates in favor of a finding that claimant suffered an aggravation of his April 2, 1979 injury rather than a new injury.

We affirm and adopt the order of the Referee, with the following additional comments. As is often the case in resolving the question of whether an incident represents an aggravation or new injury, the medical evidence in this case is equivocal and of little assistance in making the determination. For example, claimant's treating orthopedic physician was only able to state: "It is somewhat hard for me to say that the patient did not have a second specific injury in December of 1980, though it is also hard to say that this was not a re-injury as he essentially has the same symptom complex."

We think the most elucidating evidence in this case is the non-medical evidence which indicates that after claimant's initial injury in 1979 he returned to his job as a timber faller in April 1979, where he continued to work until December 1979, at which time he quit that employment to begin a business of his own. He worked on a contract basis clearing rights of way until going to work for SAIF's insured in September of 1980, again as a timber faller. Although claimant continued to experience back pain and suffered some limitation in his activities subsequent to his initial injury, he was able to perform strenuous labor and sought no medical treatment for a period of almost 20 months, from May 1979 until the date of his second injury on December 12, 1980. As a result of this incident, which occurred when claimant jumped from a log carrying approximately 50 pounds of equipment on his back, he experienced the immediate onset of severe and excruciating pain in his neck, right shoulder, upper and lower back, causing him to drop to his knees. This incident was followed by a period of temporary disability. Whereas claimant was capable of performing timber falling prior to this second incident, since that time he has been able to perform very little activity of this nature due to extreme pain.

In view of the facts indicating about 19 or 20 months of relative stability prior to the December 1980 incident during which claimant was capable of performing fairly rigorous activity, and the traumatic episode in December 1980 which resulted in the immediate onset of severe symptoms and a subsequent period of disability, we find that the incident on December 12, 1980 contributed at least slightly to claimant's disability. We, therefore, affirm the Referee's finding of new injury. Cf Ray M. Mushaney, WCB Case Nos. 82-00915, 82-04140, 82-05481, 35 Van Natta 1114 (decided this date).

ORDER

The Referee's order dated December 9, 1981 is affirmed. Claimant's attorney is awarded $250 as a reasonable attorney's fee on Board review, to be paid by the SAIF Corporation.

HAROLD L. DePUE, Claimant
Forcum, West, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 80-11185
July 26, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The insurer requests review of Referee Quillinan's order which: (1) Set aside the insurer's denial of claimant's thoracic outlet syndrome; (2) set aside the insurer's denial of claimant's carpel tunnel syndrome; (3) awarded 25% scheduled arm disability in addition to the 10% awarded by Determination Order; (4) imposed a penalty and attorney's fee for unreasonable denial of the thoracic outlet syndrome claim; and (5) imposed a penalty equivalent to 10% of the permanent partial disability award.

The insurer contends that neither the thoracic outlet syndrome nor the carpal tunnel syndrome is compensable, that the award of permanent disability was excessive, that no penalty or attorney's fee is warranted because of its denial of the thoracic outlet condition and that it was inappropriate to rate the extent of claimant's permanent disability inview of the fact that certain conditions arising from the same injury were not yet medically stationary. We agree with all of the insurer's contentions except for the award of permanent disability which we find accurately reflects the extent of claimant's residual disability causally related to compensable conditions. However, we find that the award of disability should be separated into awards for scheduled disability and unscheduled disability.

In February 1978, in the course of his employment as a timber faller, claimant, age 35 at the time, was struck on the right shoulder, head and neck by the top of a tree approximately 10 inches in diameter and 20 feet long. He was knocked unconscious and thrown into the snow underneath the tree. Claimant's treating physician initially diagnosed a rotator cuff tear and prescribed the use of a sling and medication. In their closing examination report, Orthopaedic Consultants diagnosed only a contused right shoulder girdle and occasional suboccipital headache related to muscle soreness from the injury. X-rays confirmed that there was no fracture, but no arthrogram was done to determine whether claimant had sustained a rotator cuff tear. The claim was closed by Determination Order dated June 1, 1978 with an award of seven weeks' time loss and no permanent disability.

Claimant did not return to logging but instead began working as a plumber's apprentice. He continued to experience some shoulder and arm pain but managed to function with medication and occasional injections. Claimant experienced a distinct increase in pain and disability dating from a trip he took to Idaho in November 1979. He sought medical attention in April 1980 from Dr. MacCloskey. An arthrogram done at that time revealed the existence

of a small rotator cuff tear. Claimant filed an aggravation claim. The insurer accepted the rotator cuff tear as a compensable consequence of the 1978 injury. In May 1980 an acromionectomy and repair of the rotator cuff tear was carried out.

Dr. MacCloskey's post-surgery chart notes indicate that claimant's shoulder and arm continued to be painful, and in July 1980 it was noted that claimant may have been worse, with less range of motion than before the surgery. Apparently on referral from Dr. MacCloskey, claimant was examined by a neurologist, Dr. Eckman. In his report dated August 22, 1980, for the first time, there was mention that claimant was reporting intermittent low chest pain. EMG and nerve conduction studies were normal. Eventually Dr. MacCloskey opined that it appeared that the surgery had failed to return claimant to his preinjury functional capacity and that there would be permanent impairment. By Determination Order dated December 3, 1980 claimant was awarded 10% scheduled permanent disability.

Dr. MacCloskey's chart note of January 9, 1981, for the first time mentions numbness in claimant's right arm associated with activity. When physical therapy and medication failed to resolve the symptoms, a chart noted dated March 5, 1981 contains the first mention that claimant may have a thoracic outlet syndrome. In April 1981 Dr. Goldsmith, after examining claimant and reviewing his medical records, agreed that claimant had a thoracic outlet syndrome and recommended a right first rib resection. Dr. Goldsmith noted that the onset of the thoracic outlet symptoms some three or four months prior thereto was not associated with any trauma or work history that would indicate a reason for the recent onset of symptoms, but the doctor was "not at all certain" that the thoracic outlet syndrome was related to the 1978 industrial injury.

Claimant was then examined by Dr. Eckman again in May 1981. Nerve conduction tests and an EMG showed evidence of significant carpal tunnel syndrome but no evidence of a thoracic outlet syndrome. Dr. Eckman opined that claimant did not have a "truly typical thoracic outlet syndrome," that his impression was that claimant had "autonomic hand syndrome" which was responsible for some of claimant's sensory deficits and he advised against the proposed rib resection. In June 1981 the insurer denied responsibility for the carpal tunnel syndrome.

In July 1981 claimant was examined by Dr. Carlsen who noted claimant's various symptoms and opined that claimant had "chronic soft tissue injury of significant nature." In September 1981 Dr. MacCloskey recommended carpal tunnel release surgery. He noted that, although it is not a frequent occurrence, carpal tunnel in the wrist can cause referred pain in the shoulder. Dr. MacCloskey, without further explanation, opined that this condition was related to the 1978 injury.

Dr. Rosenbaum then reviewed claimant's medical records at the insurer's request. His report questions the validity of the tests that purported to reveal the existence of carpal tunnel syndrome and whether claimant's symptoms were really indicative of carpal tunnel syndrome. If claimant did have carpal tunnel syndrome, Dr. Rosenbaum opined it was more likely related to a fracture of the right arm claimant sustained in 1962, which resulted in open

reduction surgery and some hand paresthesia and hyperesthesia, rather than to the 1978 industrial shoulder, neck and head injury.

In November 1981 Dr. MacCloskey performed carpal tunnel release surgery. Claimant obtained some relief of symptoms he had been experiencing in his hand, but the bulk of his arm and shoulder symptoms continued unabated. Claimant was examined by Dr. Goldsmith again in December 1981. Dr. Goldsmith reiterated his belief that claimant had thoracic outlet syndrome and that the rib resection surgery was indicated. In March 1982 the insurer denied responsibility for the rib resection and the thoracic outlet condition. In April 1982 Dr. Rosenbaum again reviewed the medical records and, with respect to the thoracic outlet syndrome and proposed rib resection, again questioned the validity of the studies and symptoms indicating existence of the condition. Noting that claimant had been working as a plumber for the last several years, Dr. Rosenbaum reasoned as follows:

> "[I]s the thoracic outlet syndrome related to his 1978 injury, to his current occupation or to neither[?] Paresthetic symptoms did not develop until 1981 and this is extremely well documented in the record. When shoulder or upper thoracic trauma does cause thoracic outlet syndrome, the symptoms should come on shortly following injury rather than three years later. Mr. DePue's shoulder pain by itself is not a typical thoracic outlet symptoms, and the delay of development of paresthesias until 1981 indicates to me that it is more likely that if a thoracic outlet syndrome exists, it is related to his current profession rather than the 1978 injury."

The last medical report in the record is from Dr. MacCloskey who wrote:

> "Mr. DePue has had recurrent problems with his arm, wrist, and shoulder. He has had multiple surgeries in an attempt to determine what the cause of it is and in an attempt to alleviate the problem. He has continued to work, and he works at less and less effective jobs because of his shoulder pain. He saw Dr. Eckman in about May of 1981, and, at that time, he was noted to have a carpal tunnel syndrome. We did not know if it was really caused by the shoulder problem that he had been previously treated for, but the symptoms have always been the same ever since he was initially hurt.... We tried him on some conservative treatment.... Nothing seemed to help....[T]he carpal tunnel release [was done] on November 27, 1981. This was all done in good faith in hopes that it would return this man to his prefunctional capacity."

I

Addressing the compensability issues first, there is a distinct lack of medical unanimity whether claimant actually has either carpal tunnel or thoracic outlet syndrome. Although claimant's treating physician relates them both to the 1978 injury, the apparent basis for that conclusion is that claimant has had continued shoulder, arm and wrist/hand symptoms since the original accident. With respect to the carpal tunnel syndrome, a close examination of the record indicates that Dr. Rosenbaum correctly noted that some of the symptoms suggesting carpal tunnel syndrome preexisted the 1978 injury, that claimant sustained a severe fracture of his right arm prior to this accident, and there is no evidence that claimant's lower arm or wrist were injured in the 1978 accident. Moreover, the symptoms suggesting thoracic outlet syndrome did not have their onset until some three years after the accident. No physician provides a cogent explanation as to how the 1978 injury could have led to the development of carpal tunnel syndrome or thoracic outlet syndrome years later. This record simply does not provide a basis for assigning responsibility for either condition to the employer/insurer involved here.

II

The Referee assessed a penalty for the insurer's allegedly unreasonable denial of the thoracic outlet syndrome. In light of the conflicts in the evidence as to whether claimant really had thoracic outlet syndrome and particularly considering the lack of evidence of a causal relationship to the industrial injury, we disagree with the Referee. In passing we would note that the Referee's attempt to assess a penalty based upon a percentage of the permanent disability awarded at hearing is inappropriate. ORS 656.262(9) prescribes that a penalty be based on amounts "then due." Even if the insurer's conduct denying the claim had been unreasonable, at the time of the denial the permanent disability awarded by the Referee was not due. See Alfred M. Norbeck, 35 Van Natta 802, 803 (June 16, 1983).

III

We also think the Referee incorrectly made an award of permanent disability and at the same time remanded the claim for acceptance of two contested conditions arising from the same claim. This is inconsistent with our decision in Gary Freier, 34 Van Natta 543 (1982), wherein we stated that it was improper to rate the extent of disability and at the same time remand the claim to the insurer for acceptance of another condition arising from the same claim, where the other condition was not yet stationary. The Referee attempted to distinguish Freier on two grounds. First, the Referee noted that Freier involved a remand on an original claim, whereas here the two conditions in issue were identified after claim closure and in the context of an aggravation claim. Second, the Referee noted that her rating of disability was based on claimant's diagnosed conditon at the time the claim was originally closed and the documented impairment at that time, not on the additional conditions that she remanded for acceptance.

The difficulty with the Referee's reasoning is that disability is rated at the time of the hearing based on all conditions arising from the industrial injury. If any of the conditions arising from the industrial injury are not medically stationary, it is inappropriate to rate extent of disability. This is true for two reasons. First, typically, conditions cannot be so compartmentalized as to afford a reasonable basis for separately rating extent of disability. Second, even where conditions can be sufficiently compartmentalized, disability rating is not based on individual conditions per se. Disability is based in part on extent of impairment (in a scheduled and/or unscheduled portion of the body) arising from one or more compensable conditions. If one or more compensable but not stationary conditions cause impairment to the same body part as a compensable and stationary condition, rating extent of disability, a relatively uncertain business at best, can become even more uncertain.

The facts of this case highlight the potential rating problem: A rotator cuff tear, thoracic outlet syndrome and carpal tunnel syndrome alone or in combination can cause similar impairment in the same unscheduled part of the body (the shoulder) or scheduled portion of the body (the arm). It is difficult enough to rate the extent of disability when there are multiple conditions causing similar impairment where only one of them is compensable. It would be extremely difficult to accurately rate the extent of disability where, as the Referee found here, there were multiple compensable conditions presently causing similar impairment but only one of which was medically stationary. In such a circumstance, the rating process would have to include whatever present impairment there was arising from the medically stationary condition and exclude present impairment from those compensable but not medically stationary conditions that might improve or deteriorate with the passage of time or treatment, all with respect to the same body part. Under the Referee's reasoning, this same difficult process of trying to separate similar impairments would have to be repeated in the future when it was time to rate disability caused by thoracic outlet and carpal tunnel syndrome. The law does not contemplate such a process. Gary Freier, supra. Cf Kociemba v. SAIF, 63 Or App 557 (1983).

IV

The insurer also has challenged the Referee's assessment of the extent of claimant's permanent disability. We note, first, that we have decided that the carpal tunnel and thoracic outlet syndromes are not compensable and, therefore, we have attempted to exclude impairment arising from those conditions from our consideration of the extent of claimant's injury-related permanent disability. Second, we note that the claim was closed with an award of scheduled disability. Our review of the record indicates that claimant has impairment arising from the accepted conditions as follows: Loss of 10% elevation ability in the right arm, disabling pain that limits range of motion with respect to adduction, internal and external rotation, impairment in the ability to use the arm to throw objects, mild to moderate pain with lifting heavy objects, and loss of grip strength, weakness, and some arm muscle atrophy. (In identifying these impairments, we have relied primarily on medical reports that were generated before the appearance of symptoms suggesting the development of the carpal tunnel and thoracic outlet conditions.)

All the various types of impairment, except the arm pain associated with lifting heavy objects and loss of grip strength, weakness and atrophy, reflect impairment to an unscheduled portion of claimant's body, namely, the shoulder. The disabling arm pain and loss of grip strength, etc. reflect impairment in a scheduled portion of the body, namely, claimant's right arm. Thus, although no one has raised the issue, we cannot rate claimant's disability de novo without making separate awards for the scheduled and unscheduled portions of claimant's body.

Applying the disability evaluation guidelines for injuries to unscheduled portions of the body (OAR 436-65-600 et seq.), our calculations reveal that claimant is entitled to an award of 20% unscheduled permanent disability, taking into consideration the residual impairment from accepted conditions and social/vocational factors. Applying the disability evaluation guidelines for injuries to the arm (OAR 436-65-530), we conclude that claimant is entitled to an award of 15% to 20% disability for the residual impairment in claimant's right arm attributable to the accepted conditions. Considering that in this case there is some overlap in impairment from the two body parts, we believe that the total of 35% disability awarded by Determination Order and the Referee is correct, but that 20% of it should be an unscheduled award and 15% of it a scheduled award.

ORDER

The Referee's orders dated August 5, 1982 and August 27, 1982 are affirmed in part, reversed in part and modified in part as follows:

(1) Those portions setting aside the insurer's denials of June 24, 1981 and March 18, 1982, assessing a penalty and awarding a $300 attorney's fee in conjunction with the penalty are reversed.

(2) Those portions awarding permanent disability and a $1,100 attorney's fee are modified as follows:

(a) Claimant is awarded 64° for 20% unscheduled permanent disability for his accepted right shoulder condition and 22.5° for 15% scheduled permanent disability for his accepted right arm conditions. These awards are in lieu of all prior awards of permanent disability arising from the industrial injury of February 10, 1978.

(b) Claimant's attorney is allowed 25% of the increased compensation granted by this order over that granted by Determination Order, up to a maximum of $2,000, to be paid out of claimant's compensation and not in addition thereto. This award is in lieu of the $1,100 attorney's fee awarded at hearing. No appearance or brief having been filed on claimant's behalf on review, no fee is awarded for services on review.

(3) That portion of the Referee's order allowing an overpayment of temporary total disability to be offset against the award of permanent disability is affirmed.

MARY FRALEY, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 82-0266M
July 26, 1983
Own Motion Determination

Subsequent to the last claim closure herein, which was by a Board's Own Motion Determination dated November 2, 1982, claimant became enrolled in an authorized training program. Claimant's injury occurred July 11, 1971. Her aggravation rights expired June 14, 1978.

Claimant began her authorized training program on March 28, 1983. In view of the fact that claimant was injured prior to January 1, 1974, she was not entitled to receive temporary total disability benefits during the period she was enrolled and actively participating in her authorized training program. Victor Vanderschuere, Own Motion No. 82-0025M, 35 Van Natta 1074 (July 14, 1983). Her claim, therefore, was not reopened for payment of temporary total disability benefits pursuant to the provisions of ORS 656.268(5). Claimant's claim has remained in closed status during her authorized training program.

Claimant previously has received awards for permanent partial disability totaling 40% unscheduled permanent disability for injury to her low back. We find that prior awards for unscheduled permanent disability have adequately compensated claimant. Her authorized training program was interrupted June 10, 1983, prior to completion. We find no evidence that, as a result of her participation in an authorized training program, claimant's earning capacity has increased or that a reduction in prior disability awards is warranted.

ORDER

Claimant is awarded no compensation for temporary total disability, and her unscheduled permanent partial disability remains unchanged.

EDWARD HANSON, Claimant
Wolf, Griffith et al., Attorneys

WCB 82-09911
July 26, 1983
Order of Dismissal

The employer/insurer moves to dismiss claimant's request for Board review on the grounds that claimant failed to serve a copy of his request for review on the employer/insurer within 30 days of the date of the Referee's order herein. See ORS 656.289(3), 656.295(2).

The Referee's order was entered on April 28, 1983. Claimant timely requested review within 30 days of the date of the Referee's order. Claimant's request was mailed on May 25, 1983 and received by the Board on May 26, 1983. See OAR 436-83-700(2). The Board acknowledged receipt of claimant's request for review on May 31, 1983, more than 30 days after the date of the Referee's order. Claimant is proceeding pro se on Board review.

The employer/insurer has moved to dismiss claimant's request for review, alleging by affidavit that prior to receipt of the Board's acknowledgment, the employer/insurer had received no

notice of claimant's request and had not been served with a copy of the request for review.

Until very recently, this Board would have denied the employer/insurer's motion to dismiss claimant's request for review on the basis of the Board's decision in Michael J. King, 33 Van Natta 433, 33 Van Natta 636 (1981), and Barbara Rupp, 30 Van Natta 556 (1981).

In King the Board discussed the Court of Appeals decision in Albiar v. Silvercrest Industries, 30 Or App 281 (1977), in which the court held that: "The time within which notice of the request for Board review is required to be given, i.e., served on the opposite parties, is an 'irreducible hardcore of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case.'" 30 Or App at 284. We also discussed our computer-generated acknowledgment of requests for Board review, noting that in no case had it taken more than seven days for an acknowledgment letter to be mailed after receipt of a request for review.

> "Thus, if the party requesting review does not serve copies of the request on the opposite parties, the Board's acknowledgment letter supplies actual notice of the request for review.
>
> "The only possible interest the other parties have, other than trying to win on hypertechnicalities, is to know whether the Referee's order is final pursuant to ORS 656.289(3). . . However, the Board rules have already compromised this knowledge interest somewhat. OAR 436-83-700(2) provides, in effect, that a request for Board review is timely if postmarked by the 30th day after the Referee's order. Thus, even if served with a request for Board review, the parties' knowledge of finality can now be delayed until 30 days plus the due course of the mail.
>
> "Given the Board's almost instantaneous response to a request for Board review with an acknowledgment being sent to all parties, the parties' interest in knowledge of finality can be further compromised for a few more days if knowledge of the request for review comes from the Board rather than from the requestor. We simply cannot agree with the Albiar court that this possible additional delay of up to a few days amounts to 'an irreducible hardcore of necessary function' that comes even close to outweighing 'the thwarting of the protective functions of the act.' 3 Larson, [§78.10 (1973)]." 33 Van Natta at 636-637.

On review of the Board's decision in King, the court has stated its disagreement with the Board's conclusion that failure to serve a copy of a request for review on other parties within the statutory 30-day period does not operate to defeat the requesting party's right to Board review of the Referee's order. In Argonaut Insurance Co. v. King, 63 Or App 847 (1983), the court held that "compliance with ORS 656.295 requires that statutory notice of the request for review be mailed or actual notice be received within the statutory period [i.e., 30 days from the date of the Referee's order]." 63 Or App at ___.

It is conceivable, therefore, that a party requesting Board review, particularly an unrepresented claimant, would timely request review but fail to serve opposing parties with the request for review, and that the Board's acknowledgment letter would provide actual notice to the other parties within the statutory 30-day period. Such is not the case in this instance, however. As mentioned above, the Board's acknowledgment of claimant's request for review did not issue until May 31, 1983, one day after expiration of the statutory period. The employer/insurer most likely received the Board's acknowledgment letter the next day. Accordingly, the employer/insurer now moves to dismiss claimant's request for review for the reason that notice of the request was not received until the 32nd day after the date of the Referee's order. This is the type of technicality that the Board sought to avoid by the rationale expressed in Michael King, supra, and Barbara Rupp, supra; however, the Court of Appeals has spoken on the matter, and we are bound by their decision until further word from the Supreme Court or the legislature. See Argonaut Insurance Co. v. King, supra, ns. 2 and 3, 63 Or App at ___. Accordingly, we are required to dismiss claimant's request for review in view of claimant's failure to serve a copy of his request on the employer/insurer, which failed to receive actual notice of claimant's request within the statutory period.

ORDER

Claimant's request for Board review is dismissed.

RALPH R. LEE, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Lindsay, Hart, et al., Defense Attorneys
Schwabe, Williamson, et al., Defense Attorneys

Own Motion 81-0142M
July 26, 1983
Order Deferring Own Motion Relief

Claimant has requested that the Board exercise its own motion authority and reopen his April 4, 1974 industrial injury claim for payment of additional temporary total disability for a worsened condition related to his original injury. Claimant's aggravation rights have expired. The employer, North Side Lumber Company, and its insurer, Argonaut Insurance Companies, voluntarily paid claimant temporary total disability benefits from February 22, 1983 through March 22, 1983.

Claimant has filed an injury claim with his new employer, Green Thumb, Inc., insured by GAB Business Services, Inc., (Claim No. 49343-29799), on the basis of a claimed new injury occurring with this employer on February 22, 1983. This new

employer/insurer has denied responsibility for claimant's current condition, by denial dated March 25, 1983. Claimant has requested a hearing contesting this denial, which has been assigned WCB Case No. 83-03015.

Claimant, by and through his attorney, has made application with the Compliance Division of the Workers' Compensation Department for entry of an order pursuant to ORS 656.307 and OAR 436-54-330, et seq. designating either Argonaut, the "aggravation" insurer, or GAB, the new injury insurer, as a designating agent for payment of claimant's compensation until resolution of the issue of insurer responsibility. Argonaut insures a claim in which claimant's aggravation rights have expired; accordingly, Compliance has no authority to enter an order pursuant to ORS 656.307 designating either employer/insurer as the responsible entity for processing claimant's claim, at least insofar as the claim is one for temporary and permanent disability benefits. ORS 656.307(2). To the extent that a portion of the claim arises under the provisions of ORS 656.245, theoretically, the Compliance Division has authority to designate an employer/insurer for payment of claimant's medical expenses; however, there is no compelling reason, in most cases, to require immediate payment of medical expenses, unlike payment for temporary disability benefits, and it is understandable that, for practical reasons, the Compliance Division would refrain from exercising any such authority that may exist. See e.g. OAR 436-54-332(11), which contemplates designation of a paying agent based upon the lowest temporary disability rate. See also ORS 656.313.

Claimant has filed a motion in WCB Case No. 83-03015 (Green Thumb, Inc./GAB) requesting that North Side Lumber Company and its insurer, Argonaut, be joined as parties to that proceeding "as they are necessary parties for the complete resolution of this controversy."

Claimant's injury while employed by North Side Lumber Company (Argonaut) occurred on April 4, 1974. Claimant has continuing rights to medical treatment pursuant to the provisions of ORS 656.245. If claimant has submitted a claim for medical services to North Side Lumber Company/Argonaut, any such claim for medical services must be denied or paid within 60 days. ORS 656.245(2); Billie J. Eubanks, 35 Van Natta 131, 135 (1983). With respect to injuries occurring on and after January 1, 1966, the employer/insurer is obligated to pay or formally deny a claim for rendered medical services within 60 days, notwithstanding expiration of the claimant's aggravation rights. Max D. Cutler, 34 Van Natta 1480 (1982). Claimant has a right to a hearing in the event of a denial. ORS 656.245(2).

In this case, if the own motion employer/insurer (North Side Lumber Company/Argonaut) doubts the causal connection between claimant's 1974 injury and current claim for medical services, it is obligated to formally deny this claim with notification of claimant's hearing rights. The failure to do so may subject the employer/insurer to penalties and/or attorney fees. See Max D. Cutler, supra.

In view of the fact that North Side Lumber Company/Argonaut is obligated to formally deny the claim for medical services, and the fact that claimant has hearing rights with respect to any such denied claim, claimant's motion to join North Side Lumber Company/Argonaut as a party to the proceeding in WCB Case No. 83-03015 would appear superfluous. A request for hearing on the medical services issue and consolidation of claimant's two requests for hearing will accomplish the purpose intended by claimant's motion.

With respect to claimant's request for own motion relief for payment of additional temporary total and/or permanent disability benefits, the Board will defer further consideration of claimant's request for own motion relief until such time as there is a resolution of the litigation pending in the Hearings Division in WCB Case No. 83-03015, involving claimant's new injury claim filed with Green Thumb, Inc./GAB, and the resolution of the apparently denied claim for medical services involving claimant's 1974 injury claim with North Side Lumber Company/Argonaut. Upon resolution of this litigation, claimant and North Side Lumber Company/Argonaut should advise the Board as to how they wish to proceed in this own motion proceeding.

IT IS SO ORDERED.

WILLIAM H. McCALL, Claimant
Blair, MacDonald, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-05558
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Howell's order which did not award additional temporary total disability compensation and did not assess a penalty and attorney's fee against the employer for its allegedly unreasonable termination of claimant's benefits. Claimant asserts that he is entitled to temporary total disability compensation from April 16, 1981 through April 26, 1981 and a penalty and attorney's fee for the employer's unreasonable unilateral termination of compensation payments. The employer has cross-requested review of that portion of the Referee's order which found the employer's conduct to have been unreasonable. Although the Referee made such a finding, he declined to impose a penalty reasoning that there were no amounts of compensation "then due" to provide the basis for calculation of a penalty.

Claimant suffered a compensable injury to his right shoulder and upper back on March 31, 1981. He continued to work performing no heavy labor through the end of the week. On Monday, April 6, 1981, Dr. Whitney examined claimant and prescribed medication, physical therapy and inactivity. Between April 6, 1981 and April 27, 1981 claimant did not work and his condition improved. On April 16, 1981 claimant was filmed working in his yard. The film showed claimant doing strenuous bending and pulling type movements similar to the type of activity he does at work. However, the film does not show claimant doing any heavy lifting.

SAIF issued a partial denial on May 22, 1981 which states:

> "After reviewing the evidence surrounding the circumstances of the disability period April 16 through April 26, 1981, we are partially denying your claim.
>
> "This means we are denying the responsibility of any wage loss incurred during that period. This does not mean that we are not responsible for any medical care incurred. We have and will continue to pay any medical bills relating to your injury of March 31, 1981."

Claimant contends that the employer did not follow the procedures for closing the claim pursuant to ORS 656.268 and that the employer's unilateral termination of temporary total disability payments was unreasonable. We agree.

In Phillip A. Bertrand, 35 Van Natta 869, WCB Case No. 81-11065, (June 30, 1983), modified on reconsideration, 35 Van Natta 1087 (July 21, 1983), we held that unilateral termination of benefits upon issuance of a partial denial is unlawful and unreasonable in this type of situation.

The employer cannot unilaterally terminate compensation unless a release to return to work has been received from the treating doctor or claimant has returned to work. Claimant's doctor in the present case had not given such a release. The claim was not submitted for closure nor closed by the employer under ORS 656.268(3) prior to the termination.

Therefore, the employer must pay the compensation it would have paid had it acted correctly. In Addition, imposition of a penalty is appropriate. The employer shall pay claimant an amount equal to 25% of the compensation due claimant for the period from April 16, 1981 through April 26, 1981 as a penalty.

ORDER

The Referee's order dated March 4, 1982 is reversed. The employer's denial dated May 22, 1981 is reversed. The employer shall pay claimant all compensation owing for the period April 16, 1981 through April 26, 1981 and an additional amount equal to 25% of such compensation as a penalty. Claimant's attorney is awarded $400 as a reasonable attorney's fee for prevailing on the compensability and penalty issues, to be paid by the employer.

A.B. McMANUS, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08787
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Daron's order which approved the insurer's September 15, 1981 denial of aggravation for claimant's February 5, 1975 cervical strain and associated aggravation of preexisting anxiety neurosis with psychophysiological and depressive symptoms. The last arrangement of compensation was July 16, 1979 -- the date of a previous Referee's order which awarded claimant permanent and total disability compensation. That award was modified by Board order dated January 14, 1980 in which the Board held:

> "The medical evidence in the record indicates that the psychiatric condition is not permanent. There is no proof of an ongoing disability due to claimant's injury. The Board finds that the opinions of the psychiatrists, Drs. Parvaresh, Maltby and Winters are more persuasive in this matter than those of [the psychologist] Dr. Ackerman. However, based on the orthopedic and neurological findings of Drs. Throop and Bassinger, the Board finds that claimant is unable to return to his former job. This disability, along with claimant's age, education, prior work experience, and other factors, leads the Board to conclude that claimant is entitled to an award equal to 96° for 30% unscheduled disability for his loss of wage earning capacity due to his injury in January 1975." 28 Van Natta 521, 526 (1980).

Based on the above holding, the Referee in the instant hearing concluded that, since the Board had decided that the compensable psychological condition had resolved leaving no permanent residuals, it would not now be possible for claimant to show a worsening of that condition. We disagree.

Claimant correctly asserts that he had compensable psychological disability as a result of his February 5, 1975 cervical strain. A January 5, 1976 Referee's order directed the insurer to accept both the cervical strain and the causally related increased "predisposed neurosis." The diagnosis of claimant's psychological condition at that time by Dr. Mark Ackerman, psychologist, was that of marked anxiety neurosis with prominent psychophysiological and depressive symptoms.

Based on the evidence presented at the hearing which resulted in the July 16, 1979 Referee's order, the Board determined that the related portions of claimant's psychological condition had resolved and, therefore, did not award any permanent disability compensation. However, the Board did not decide that the accepted psychological condition was no longer compensable -- a decision which

would have foreclosed the possibility of a future claim for medical services or aggravation of that accepted condition.

The nature of an industrial injury or disease may be such that it results in exacerbations and remissions. The fact that the evidence before the Board at the time of the January 1980 review was that the related portion of the psychological condition had remitted as of that time did not mean that the accepted psychological condition could not have exacerbated and become disabling in the future. The compensable cervical strain is a permanently disabling condition and it is not inconceivable that its presence and/or worsening again could have aggravated claimant's underlying neurosis.

Therefore, the focus of the Referee's analysis regarding claimant's psychological condition should have been whether claimant had proven at the September 1982 hearing that his compensable cervical injury had caused an increase in his psychological condition as of that hearing such that an aggravation claim should be allowed.

After clarifying what we believe to be the proper focus of the case, we turn to deciding whether claimant has proven a physical or psychological worsening of his condition since the last arrangement of compensation. We agree with the Referee that the physical portion of claimant's cervical disability has not worsened, although claimant may well gain some benefit from treatment at a chronic pain rehabilitation center as suggested by Dr. Van Veen, M.D. Further, considering Dr. Ackerman's recent report in context with the other evidence in the record, we are not persuaded that claimant has suffered a worsening of his anxiety neurosis.

ORDER

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

RAY M. MUSHANEY, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
J.W. McCracken, Jr., Defense Attorney

WCB 82-00915, 82-04140 & 82-05481
July 26, 1983
Order on Review

Reviewed by Board members Barnes and Ferris.

The employer, Tomlinson's Metal Fabricators, Inc., and its insurer, Northern Insurance Company, request review of Referee Mannix's order, which found that claimant sustained new injuries on June 2, 1981 and November 27, 1981, as opposed to an aggravation of his June 2, 1975 injury while employed by Norris Paint & Varnish, insured by the SAIF Corporation. Tominson's/Northern contend that the 1981 incidents represent an aggravation of claimant's prior injury rather than new injuries.

We agree with the Referee's assessment of the evidence in this case, which indicates claimant sustained new injuries on the dates in question. We adopt as our own the Referee's findings of fact, the pertinent portions of which are set forth below.

Claimant initially sustained a low back injury on April 7, 1970 when he suffered a contusion of his lumbar spine. He received conservative treatment for this injury. In August 1970 he bent over to lift a case of fat and suffered sudden excruciating low back pain with some left leg radiation. A diagnosis of possible degenerated disc with postural backache was made. Claimant received conservative treatment. He suffered another injury in November 1970, as a result of which he was hospitalized for eight days. Treatment included exercises and a lumbosacral corset. He was deemed essentially asymptomatic by December 28, 1970.

Claimant suffered another acute episode of low back pain on February 16, 1971. X-rays at that time revealed spondylolysis at the L5 level. Later that same year claimant underwent a lumbar laminectomy and fusion. He thereafter received a permanent disability award from the State of Nevada. Subsequent to the 1971 fusion, claimant recovered and regained almost completely unlimited physical capability. His only limitations were that he had to be careful in performing certain bending and lifting activities.

In May 1974 claimant began work for Norris Paint & Varnish. He sustained an injury in August 1974 when he slipped in the back of a truck, injuring his back. He suffered low back and left leg pain, as well as restricted neck motion. A December 1974 myelogram was essentially normal. Dr. Buza released claimant to return to his previous work activity as of April 19, 1975. At that time claimant was experiencing paravertebral muscle spasm, mild numbness in the legs and an absent left ankle jerk.

On June 2, 1975, while working for Norris, claimant bent over to move a bag of pigment and was unable to straighten up. He experienced low back and left leg discomfort. Dr. Buza diagnosed low back strain and provided conservative treatment, including physical therapy. He deemed claimant recovered as of June 30, 1975. In early September 1975 claimant suffered a recurrence of his low back pain while reaching over and pulling an object at work. Claimant attempted to return to work with his physician's consent; however, he suffered an increase in symptoms and Dr. Buza thereafter recommended that claimant pursue different employment not requiring heavy lifting.

An EMG performed in November 1975 was normal. Dr. Buza characterized claimant's condition, in December 1975, as having been stable during the previous year but characterized by remissions and exacerbations. He restricted claimant from activities requiring heavy lifting, excessive bending, hyperextending and flexing the lumbar spine.

Claimant entered a vocational rehabilitation program in January 1976, during which he experienced periodic episodes of low back pain. In June 1976 he suffered a severe onset of low back pain and numbness in both legs as he began to get up from a sitting position. He received conservative treatment. In July 1977 he suffered severe pain after bending over to tie his shoes, and he was hospitalized for four days of bed rest and pain medications. By mid-August 1977 claimant had essentially regained his prehospi-

talization status, and his family physician at that time, Dr. Hall, approved claimant's continuation with the rehabilitation program. Claimant concluded the program, as a result of which he achieved his GED and received an Associates Degree with training as a machinist. Upon completion of the program, a Determination Order was issued in June 1978 awarding claimant time loss and no permanent partial disability. Claimant went to work as a machinist for West Salem Machinery for four or five months, and he then went to work for Tomlinson's Metal Fabricators, Inc.

In August 1978 claimant suffered a recurrence of low back pain when he reached over to pull some vegetables from the ground at home. He was treated conservatively with pelvic traction at home and he essentially recovered by mid-September 1978. Claimant again suffered a recurrence of back pain when lifting at home in December 1978. By the end of that month he had recovered with no apparent residual pain.

On or about February 23, 1979, while working at Tomlinson's, claimant experienced severe back pain while moving an object from a lathe to a bench. The item was described as weighing less than 30 pounds. The pain was so severe that it practically caused claimant to fall to the ground. Claimant sought treatment with Dr. Hall, who diagnosed chronic musculoligamentous strain. Claimant was hospitalized for conservative treatment and discharged in March 1979 in an improved, but not fully recovered, condition. He continued to be symptomatic thereafter.

In May 1979 while bending at home, claimant experienced an acute exacerbation of his back pain. X-rays and a myelogram in June 1979 were essentially unremarkable. As of August 13, 1979 Dr. Buza opined that claimant was medically stationary. He felt that further treatment would be palliative and expressed the opinion that claimant had permanent impairment in the mild to moderate range.

Claimant's June 2, 1975 injury claim with Norris Paint & Varnish was reclosed by an October 2, 1979 Determination Order which awarded claimant additional time loss and 20% unscheduled permanent partial disability for injury to his low back.

In early October 1979 claimant suffered another episode, which he described as dull, throbbing and aching pain with occasional sharp, stabbing pain. He described aching pain and numbness in the legs exacerbated by twisting, pulling, bending, lifting and being on his feet for long periods of time. He was hospitalized for a few days and received conservative treatment.

A February 1980 myelogram was essentially unremarkable, and in April 1980 Dr. Buza opined that claimant's condition remained stationary.

The permanent disability award granted by the October 1979 Determination Order was increased in May 1980 by a Referee's order which awarded claimant 70% unscheduled permanent partial disability.

Claimant apparently was experiencing symptoms in the latter part of August 1980, as evidenced by an August 26, 1980 visit with

Dr. Hall indicating that claimant had been experiencing back pain of a different nature for the preceding few months, related particularly to pain and a tingling sensation in the legs. Dr. Hall recommended an evaluation by Dr. Buza, a neurosurgeon, but there is no evidence that claimant saw Dr. Buza during this time. On August 29, 1980 claimant returned to work with Tomlinson's, where he worked with minimal time off during 1980 and 1981. From August 1980 until June 1981, a period of approximately ten months, claimant worked at Tomlinson's without any new back problems. Although his back continued to be painful, consisting of low back pain and pain in both legs, claimant did not receive any regular medical treatment during this time. He was restricted in his lifting on the job, and his foreman would assign people to help him with any lifting that was required.

On June 2, 1981 claimant tripped over a welding lead while working at Tomlinson's. He did not fall; however, he experienced the immediate onset of pain in his low back and he was momentarily unable to walk. He found it necessary to sit down on the edge of a welder. He then returned to work and was able to finish that work day, albeit with significant back pain. He visited Dr. Hall the following day who diagnosed chronic low back pain and initiated symptomatic conservative treatment. Claimant improved over the next few days and was released to return to work on June 8, 1981. He did return to work on that day, but his back became worse as the day progressed, so he again ceased working. By approximately June 30, 1981, claimant's back condition had returned to its status prior to the June 2, 1981 incident, and claimant returned to his regular level of work activity.

Claimant worked full time until November 27, 1981 when, while helping another worker place a metal hood over a root-cutting machine, the other worker's grip slipped and claimant was required to hold the entire weight of the hood by himself. The hood was described as being approximately three feet deep, three feet wide and 20 inches tall, weighing approximately 50 pounds. Claimant was unable to hold this hood by himself, and he dropped it. Fifty pounds was more than claimant was allowed to lift on the job. As a result of this incident, claimant experienced the immediate onset of back pain. He was unable to walk or stand normally; however, he finished his shift. Claimant relaxed over the weekend, went to work on the morning of November 30, 1981 but found that he had to stop working because of excessive pain. He visited Dr. Hall that same day, at which time he was walking in a "hunched over" position and exhibiting tenderness over the area of his previous back injury. He was unable to forward bend at all. Dr. Hall diagnosed low back pain and muscle spasm and provided conservative treatment. By December 11, 1981, claimant's condition had improved with minimal discomfort in his legs, and he returned to work full time on December 12, 1981.

Claimant testified that after his recovery from the June 2, 1981 and November 27, 1981 incidents, his condition returned to its pre-injury status. He has continued to work regularly at Tomlinson's since December 12, 1981 except for loss of work occasioned by an April 1982 job injury in which he slipped on some oil and landed on his buttocks.

When claimant visited the clinic in which Dr. Hall practices on June 17, 1981, he was examined by a physician other than Dr. Hall, whose only identification in the record appears in chart notes initialed "LHW." This physician's chart note regarding claimant's June 17, 1981 office visit states: "I am certain this is a continuation of his previous back problem and not a new back injury."

Dr. Hall's chart note of June 3, 1981 states: "I think that he has his old chronic low back pain." In response to an inquiry from SAIF, Dr. Hall responded on July 6, 1981: "I am unable to identify specifically whether or not his present complaints are related to the incident of June 2, 1975." In response to an inquiry from SAIF regarding claimant's November 27, 1981 incident, Dr. Hall indicated that he was unable to tell exactly whether this incident represented a new injury or an aggravation of an old injury. In a report dated June 24, 1982, in which Dr. Hall responded to specific inquiry from SAIF regarding the contribution of claimant's June 2 and November 27, 1981 incidents to his treatment and disability, Dr. Hall stated:

> "Both of these incidences, I think, triggered an increase in his symptoms and resulted in the need for treatment. That is, his back pain was exacerbated by those acute injuries. His work record, recently, would indicate that except for those injuries of this nature, he has worked full time."

Tomlinson's Metal Fabricators, the employer found responsible for payment of claimant's compensation on the basis of new injuries occurring in June and November of 1981, contends that the medical evidence indicates that these incidents do not represent new injuries but merely represent a recurrence of symptoms related to claimant's pre-existing 1975 back injury without a worsening of any underlying condition, citing Wills v. Boise Cascade Corporation, 58 Or App 636 (1982).

The factual context in Wills is different from the facts of this case. The claimant in Wills had sustained a wrist fracture in 1976 while working in Washington. In 1980, while working in Oregon, the claimant slipped and sprained the same wrist. This was accepted as a compensable injury by the Oregon employer. Increasing difficulties in the wrist resulted in a subsequent surgical procedure, and the issue was which of the two employers would be responsible for this subsequent surgery and associated disability. The factual and procedural context of Wills, and the issues presented, are similar to those in Roger Ballinger, 34 Van Natta 732 (1982), and Paul S. Gill, 34 Van Natta 1471 (1982), and other cases in which we have been confronted with situations in which it is necessary to determine employer or insurer responsibility for a worsened condition and/or medical services where claimant previously has sustained two or more prior compensable injuries and exercises his or her right to file an aggravation claim or claim for medical services against each of the previous employers/insurers. Whereas the distinction between the symptoms of a condition and the underlying condition itself may be

relevant or determinative in deciding which one of the various employers/insurers is responsible for the subsequent claim for compensation, we have found the symptoms/condition distinction of little assistance in determining responsibility where the issue is aggravation versus new injury. In fact, we often have found non-medical factors to be more probative than statements or conclusions offered by physicians, who are sometimes unable or unwilling to venture an opinion as to whether a particular incident or exposure represents a "new injury" or an "aggravation" of a prior injury. See, e.g. Warren E. Dent, WCB Case Nos. 81-00733, 81-00734, 35 Van Natta 1100 (decided this date).

We think the Referee's analysis of the responsibility issue presented in this case is precise and correct, and we, therefore, set it forth verbatim:

> "In analyzing the facts of this case, I remain aware of the concept that the employer takes the worker as he finds him. I am also aware of the concept that one may suffer from a problem that was going to happen anyway and in such circumstances the problem is deemed an aggravation rather than a new injury, even though a particular episode may have precipitated the problem.
>
> * * * *
>
> "Here, the facts demonstrate a lengthy history of exacerbations of claimant's condition, most of which exacerbations occurred with minimal physical stress (standing up, bending over, etc.). Claimant's work history since August 1980 has reflected regular work albeit with restrictions on his physical capability based on his previous injuries. He has lost substantial amounts of time from work only in relation to three particular traumatic episodes. The first was the tripping episode of June 2, 1981. The second was the lifting and dropping episode of November 27, 1981. The third was the April 1982 slip and fall. Although the June and November 1981 episodes might not have injured the average worker, they did represent particular traumas which resulted in an immediate onset of substantial additional physical symptoms and the need for immediate conservative medical intervention with time loss during the period of recovery.
>
> "I am satisfied that claimant suffered new injuries in June and November 1981. These injuries were to the same portion of the body which claimant had previously injured, but this simply reflects the fact that claimant has a predisposition to further injury in this weakened area of the body. * * * *."

Claimant's condition appears to us to be a chronic low back strain manifested by acute episodes of muscle spasm brought on by relatively minimal physical exertion. Each of the incidents in issue here represent identifiable traumatic episodes preceded by a significant period of relative stability during which claimant was able to perform his usual work activity, with restriction, and followed by the immediate onset of severe pain and a consequent period of disability. Under the last injurious exposure rule of Smith v. Ed's Pancake House, 27 Or App 361 (1976), we find that these incidents represent new injuries and not an aggravation of claimant's earlier 1975 injury. Accordingly, we affirm the Referee's order finding Tomlinson's Metal Fabricators, Inc. and its insurer responsible for payment of claimant's compensation.

ORDER

The Referee's order dated September 28, 1982 is affirmed. Claimant's attorney is awarded $250 as a reasonable attorney's fee on Board review, to be paid by Tomlinson's Metal Fabricators, Inc. and its insurer.

EVERETT C. NEVIN, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05074
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order which failed to order the SAIF Corporation to pay claimant compensation which SAIF previously had paid to the Lane County Circuit Court pursuant to a Writ of Garnishment. Claimant contends the Writ of Garnishment was illegal and that SAIF should be ordered to pay claimant the compensation it wrongfully paid to the court under the writ.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 27, 1983 is affirmed.

JAMES G. ROBINSON, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Wolf, Griffith et al., Defense Attorneys

WCB 81-04482
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer requests review of those portions of Referee Shebley's order which set aside its partial denial of claimant's low back injury and awarded a penalty and attorney's fee. The employer contends that its denial was appropriate and that its termination of claimant's benefits was reasonable. Claimant cross-requests review, contending that the employer should be penalized for failing to comply with discovery demands prior to the hearing.

We affirm and adopt the Referee's findings and conclusions on the compensability and discovery issues but modify the penalty awarded for the employer's unreasonable conduct.

We recently held that the unilateral termination of benefits upon issuance of a partial denial is unlawful and unreasonable in situations such as the case at hand. Phillip A. Bertrand, 35 Van Natta 869, WCB Case No. 81-11065 (June 30, 1983), modified on reconsideration, 35 Van Natta 1087 (July 21, 1983). However, because of the confusion at the time over how this type of claim was supposed to be processed, we believe that less than the maximum penalty would be more appropriate. Employer shall pay claimant an amount equal to 15% of compensation owing to claimant for the period between April 10, 1981 and June 30, 1981.

ORDER

The Referee's order dated October 1, 1981 is modifed. The penalty awarded by the Referee is reduced to 15% of the compensation due claimant for the period April 1, 1981 to June 30, 1981. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $400 as a reasonable attorney's fee for services rendered on Board review, to be paid by the employer.

ALVIN H. ROSE, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Miller, et al., Defense Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-03050 & 82-03010
July 26, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Braverman's order which set aside EBI Companies' March 16, 1982 denial and found that claimant sustained a new injury on January 7, 1982 while employed by All Star Distributors; approved North Pacific Insurance Company's March 11, 1982 denial which denied that claimant's January 7, 1982 incident represented an aggravation of his March 10, 1981 injury; and found claimant entitled to no benefits for permanent partial disability in relation to his March 1981 injury. All Star Distributors/EBI (All Star) has cross-requested review of that portion of the Referee's order which set aside its denial and found that claimant sustained a new injury on January 7, 1982 as opposed to an aggravation of his 1981 injury. The issues for review are responsibility and extent of permanent partial disability.

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

With regard to the question of whether claimant sustained a new injury or an aggravation of his 1981 injury on January 7, 1982 we agree with the Referee and affirm those portions of his order. It is true that Dr. Schuler often refers to claimant's January 7, 1982 incident as an aggravation. However, "aggravation" is a term which has a specific legal import. The fact that Dr. Schuler used the term aggravation does not necessarily mean that claimant's

January 7, 1982 incident constituted an aggravation. When Dr. Schuler's reports are read as a whole, it seems clear that he is saying that claimant simply sustained another back strain on January 7, 1982, similar to many other back strains which he suffered in the past. Dr. Schuler indicated in his October 25, 1982 report that:

> "The patient had recovered from the strain of his low back in the 1981 injury and had been dismissed to return to work. He was injured again in early 1982 from this work problem."

Despite claimant's and All Star's contentions to the contrary, we agree with the Referee that a preponderance of the convincing evidence indicates that claimant was basically asymptomatic with regard to his back prior to the January 1982 incident. Dr. Schuler indicates that this was the case and claimant himself so stated when he was interviewed on March 3, 1982. It is also apparent that claimant suffered symptoms which were markedly more severe than his back symptoms following the 1981 injury. We, therefore, agree with the Referee that claimant sustained a new injury on January 7, 1982.

With regard to the question of permanent partial disability relative to the 1981 injury, however, we partially disagree with the Referee. Claimant contends that he is entitled to an award of unscheduled disability for injury to his right shoulder and apparently his back. We agree with the Referee that there is simply no indication in Dr. Schuler's reports that he felt that claimant had suffered any permanent impairment in either the shoulder or back.

The question of permanent disability with regard to claimant's right elbow, however, is another matter. In his December 8, 1981 report Dr. Schuler indicates that:

> ". . . there is click in the area of the radial head which was fractured in his right elbow. He gets aching and some swelling if he has to hold his elbow in a flexed position for any length of time. Aside from the clicking, aching and swelling, he also gets pain which is worse when there is cold, damp weather, etc.
>
> * * *
>
> "X-rays of his right elbow show that the fracture of the head of the radius is healed, but there is a little step off deformity and makes the head of the radius more widened which will cause him some traumatic degenerative arthritis in the elbow as times goes on. However, he has full pronation and supination. He doesn't need to have this resected.

"I feel the patient's condition is stationary and that the claim could be closed with a permanent partial disability referable to the right elbow."

Claimant testified that he has difficulty with the right elbow locking and that he has suffered a loss of strength and motion. Claimant also has difficulty holding his right arm in a flexed position for a length of time. We conclude that the evidence is sufficient to support an award of 10% scheduled permanent partial arm disability. We have not considered that portion of Dr. Schuler's opinion relative to possible future impairment in making our determination.

ORDER

The Referee's order dated December 13, 1982 is affirmed in part and reversed in part. That portion of the Referee's order which awarded claimant no permanent partial disability for injury to his right elbow is reversed. Claimant is awarded 10% scheduled permanent partial right arm disability as a result of his March 10, 1981 injury. Claimant's attorney is allowed 25% of the increased compensation granted by this order as a reasonable attorney's fee, not to exceed $3,000, to be paid out of claimant's compensation and not in addition thereto. The remainder of the Referee's order is affirmed.

WILLIAM A. COOPER, Claimant
Richard Nesting, Claimant's Attorney
Wolf, Griffith, et al., Defense Attorneys

WCB 80-06978
July 27, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests review of those portions of Referee Gemmell's order which apparently ordered it to pay additional temporary total disability payments, assessed penalties for unreasonable unilateral termination of claimant's benefits and for unreasonable delay in payment of compensation, and increased claimant's award of permanent partial disability for his low back injury. The employer contends that it should not be required to pay additional temporary total disability compensation, its termination of such payments was reasonable, it did not unreasonably delay payment of compensation and that the award of permanent disability is excessive.

Claimant cross-requests review, asserting that he is permanently and totally disabled, that the Referee's order should be clarified as to the award of additional temporary total disability compensation and that the employer should be penalized for not paying that compensation while this claim was pending on Board review.

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

We recently held that the unilateral termination of benefits upon issuance of a partial denial is unlawful and unreasonable in

situations such as the case at hand. Phillip A. Bertrand, 35 Van Natta 869, WCB Case No. 81-11065 (June 30, 1983), modified on reconsideration, 35 Van Natta 1087 (July 21, 1983). Thus, the Referee was correct in assessing a penalty against the employer for the unilateral termination of benefits.

In what appears to be an oversight, the Referee failed to actually order the payment of temporary total disability compensation from the date of termination, September 10, 1980 through August 21, 1981, the date of the Determination Order closing the claim. Had the employer processed the claim correctly this amount would have been paid. Therefore, the employer must pay compensation for the above period. Phillip A. Bertrand, supra. However, due to the Referee's failure to order the payment of temporary total disability compensation in the order portion of her opinion, we do not believe a penalty is warranted for the employer's refusal to pay the compensation pending Board review.

ORDER

The Referee's order dated April 6, 1982 is modified. The employer is ordered to pay claimant temporary total disability compensation for the period from September 10, 1980 to August 21, 1981. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $200 as a reasonable attorney's fee for services rendered on Board review, to be paid by the employer.

ROLAND R. EDWARDS, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05167
July 27, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Nichols' order overturning its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome.

Claimant is a 44-year-old meat cutter. He alleges that his exposure while working for the employer in this case, Kummer Meat Company, aggravated his preexisting carpal tunnel syndrome. He argues that because he had a preexisting condition he need only prove that his work exposure was a material cause of a worsening of an underlying condition, Weller v. Union Carbide, 288 Or 27 (1979), rather than the major cause of the condition as required by SAIF v. Gygi, 55 Or App 570 (1982). The Referee held that claimant had failed to prove tht his carpal tunnel syndrome preexisted his exposure with Kummer. However, the Referee found that claimant had proven that his job exposure at Kummer was the major cause of his carpal tunnel syndrome.

We agree that claimant has failed to prove that his carpal tunnel syndrome preexisted his on-the-job exposure with Kummer. However, we find, contrary to the Referee, that claimant also has failed to prove his exposure at Kummer was the major cause of his carpal tunnel syndrome.

The evidence fails to establish any preexisting carpal tunnel

syndrome. Dr. McHolick, claimant's treating doctor, stated that there was no documentation of any preexisting problems. Dr. Butters, an orthopedist who examined claimant, referred to "known pre-existing problems." However, he did not explain in what way the preexisting problems were known. Claimant himself testified that he had never had any problems with his hands prior to his exposure at Kummer. The evidence is insufficient to prove that his condition was preexisting.

The evidence also fails to establish that claimant's job exposure at Kummer was the major cause of carpal tunnel syndrome. Dr. McHolick opined that, although he was not fully cognizant of all of claimant's job duties, he felt there was no substantial difference between claimant's on-the-job activities and his off-the-job acitivites, which including bowling, riding dirt bikes and wood working. Dr. Butters opined the on-the-job exposure was the major contributing cause of the worsening of claimant's preexisting condition. However, because he thought there was a preexisting condition, he did not voice any opinion as to whether the on-the-job exposure was the major contributing cause of the condition.

ORDER

The Referee's order dated November 9, 1982 is reversed. The SAIF Corporation's denial dated June 6, 1982 is reinstated and affirmed.

KENNETH HALL, Claimant
Evohl Malagon, Claimant's Attorney
Wiswall, et al., Defense Attorneys

WCB 82-00984
July 27, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer and the SAIF Corporation request review of those portions of Referee Nichols' order overturning SAIF's denial of claimant's aggravation claim.

Claimant sustained a compensable low back injury in December 1977. He was later operated on for a herniated disc at L5-S1. The claim was apparently closed in November 1978. In August 1978 Dr. Woolpert, the treating doctor, noted only occasional backache. Claimant saw a chiropractor in April 1980 complaining of leg cramps. He saw Dr. Woolpert in September 1980 complaining of back pain and leg spasms. These are the only medical reports between claim closure and the alleged aggravation.

In November 1981 claimant experienced a sudden and extreme onset of back pain while stacking wood at his sister's house. He apparently slipped while tossing wood on a woodpile. He heard a loud cracking noise.

Subsequently he was diagnosed as having a herniated nucleus pulposus at L4-5. A second surgery was then performed. SAIF has denied responsibility for the second surgery on the grounds that this incident (and others) caused the need for surgery. In essence SAIF argues that the compensable injury is not a material contributing cause of claimant's need for surgery.

In Grable v. Weyerhaeuser, 291 Or 387, 400 (1981), the Supreme Court held that:

> "*** [I]f 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' non-industrial cause."

Dr. Woolpert opined that claimant's need for surgery was related to his compensable injury. However, he based his conclusion, at least in part, on the history claimant gave him of being symptomatic during the intervening period. Consequently Dr. Woolpert's conclusion is suspect, as the Referee notes.

However, Dr. Anderson, a consultant, following a rather grueling cross-examination said that he believed that if claimant had leg spasms during the intervening period, then the need for surgery was causally related to the compensable incident. There is independent evidence that claimant had leg spasms during the intervening period in the form of the chiropractor's report in April 1980 and Dr. Woolpert's report in September 1980. In essence there is evidence apart from claimant's unreliable testimony and histories that he had leg spasm during the intervening period. Dr. Anderson stated those leg spasms convince him that the compensable incident was a material cause of the later aggravation. We believe Dr. Anderson's testimony is sufficient evidence that the 1977 compensable injury was a material contributing cause of his worsened condition.

We affirm the Referee's order.

ORDER

The Referee's order dated January 10, 1983 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney's fee for services on Board review, to be paid by the SAIF Corporation.

LAVERNE M. HENDRICKSON, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06967
July 27, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of that portion of Referee Leahy's order which set aside its denial of claimant's claim for an ulnar and median nerve condition in his arms. (Claimant's condition is referred to at some places in the record as bilateral carpal tunnel syndrome; however, that is a median nerve condition and we understand claimant's problems to involve primarily the ulnar nerve at his elbows.) Claimant initially cross-requested review, but claimant's brief only defends the portion of the Referee's order which SAIF challenges. We thus understand the only issue to be the compensability of the nerve condition in claimant's arms.

In Firkus v. Alder Creek Lumber, 48 Or App 251 (1980), the court concluded that, when a previously industrially injured worker is injured again while participating in a vocational rehabilitation program, the second injury remains the responsibility of the worker's original employer and its industrial insurer. We assume the same reasoning is applicable in this case in which claimant contends he contracted an occupational disease in the course of a vocational rehabilitation program. We also assume that, for this occupational disease claim to be compensable against anyone, claimant must establish that his rehabilitation activities were the major cause of the nerve condition in his arms.

We conclude that the preponderance of the medical evidence and the rather strong circumstantial evidence makes it more likely than not that claimant's rehabilitation activities, while studying to be a draftsman, were the major cause of the disease condition in question.

ORDER

The Referee's order dated April 12, 1982 is affirmed. Claimant's attorney is awarded $400 for services rendered on Board review, to be paid by the SAIF Corporation.

GLENDA P. JOHNSON, Claimant
Doblie, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 82-08235
July 27, 1983
Order on Review (Remanding)

Reviewed by Board Members Ferris and Barnes.

The employer requests review of Referee Wilson's order finding that claimant's claim for her back problems was prematurely closed. Premature closure is the only issue on review.

Claimant compensably injured her back on February 5, 1981 when a cardboard bailing machine door flew open and struck her on the left side. She was examined at a hospital emergency room and shortly thereafter began chiropractic treatments with Dr. Clibborn. He diagnosed lumbosacral and thoracic strain. A Determination Order issued on October 19, 1981 granting no permanent disability award. In late 1981 claimant's condition worsened. She saw Dr. Jigarjian, a California orthopedist, who diagnosed lumbosacral strain, cervical strain and elements of radiculopathy, and treated claimant until about March 1982. Claimant thereafter returned to Oregon and to the care of Dr. Clibborn.

Claimant was evaluated at the employer's request by Dr. Anderson on June 9, 1982. Dr. Anderson conducted a thorough examination and made a detailed report of the history, claimant's symptoms and his objective findings. He opined:

> "It would appear from the history and the objective physical findings that the patient initially sustained a minor bruise and strain of the muscles and ligaments of the cervical and lumbo-sacral spine. She has had very adequate treatment and diagnostic procedures. She is now stationary. She has reached maximum improvement."

Dr. Clibborn countered with a report dated August 9, 1982 in which he opined that claimant's lower back was still improving and that he expected her upper back and neck to also continue to improve. A Determination Order was issued on August 14, 1982 finding claimant stationary on June 9, 1982, the date of Dr. Anderson's examination.

In October 1982 claimant was evaluated by Dr. Fry. He initially wrote a report to Dr. Clibborn in which he discussed claimant's condition but voiced no opinion on whether she was medically stationary. He then wrote a nearly identical report for claimant's attorney in which he said claimant was not medically stationary but soon would be. He gave no explanation for that opinion.

We find that the evidence does not preponderate in favor of a conclusion that the claim was prematurely closed. We find Dr. Anderson's opinion more persuasive than Drs. Clibborn and Fry because he explains the basis for his conclusion that claimant is medically stationary. He believes that claimant's relatively minor injury had fully resolved in the sixteen months since the injury. It is certainly plausible for a minor injury to resolve in sixteen months or less and, in order to find that further treatment would improve claimant's condition, we would at least like to know what Dr. Clibborn's treatment consisted of, which is not explained in this record.

Because the Referee found the claim prematurely closed, he did not rate extent of permanent disability. We now find the claim was properly closed June 9, 1982 by Determination Order of August 14, 1982. Accordingly, we remand this case to the Referee to decide the issue of extent of disability.

ORDER

The Referee's order dated December 17, 1982 is reversed and this case is remanded to the Referee for further proceedings consistent with this order.

CORAL M. MONROE, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-06096
July 27, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Mannix's order overturning its denial of compensability of claimant's present medical conditions.

The Referee's order sets out the facts of this case in some detail. We adopt his findings of fact as our own.

In summary, the facts are: Claimant sustained a compensable neck and shoulder injury on August 15, 1972 when she slipped and fell on a piece of turkey in the poultry plant where she then worked. Claimant suffered no back or neck problems before her compensable injury, but since then has been continually plagued by

neck and back problems. Claimant has been treated for right neck pain, numbness of her right hand, pain in her shoulder blades, right upper arm pain, radiating left leg pains and low back pains. In April 1974 a cervical discectomy was performed on claimant. Her condition improved during 1975 but she did continue to experience pain symptoms. Claimant's subjective pain complaints were thought to be inconsistent with the objective orthopedic findings. Several doctors felt there was functional overlay present.

In August 1976 a Determination Order awarded claimant temporary total disability but no permanent disability. Claimant challenged the Determination Order. A Referee affirmed the Determination Order in an Opinion and Order which, in essence, relied on the Referee's conclusion that claimant was not credible and, therefore, her complaints were not compensable. On October 6, 1978 the Board reversed the Referee commenting that his opinion was directed essentially at the issue of compensability and that compensability was not then in issue. The Order on Review awarded claimant 20% unscheduled permanent disability.

Following the Board's order claimant continued to experience neck pain radiating down her right arm, as well as wrist and shoulder pain. Claimant had been diagnosed in 1977 as having bilateral carpal tunnel syndrome. A disputed claim settlement on the bilateral carpal tunnel syndrome and the surgery to correct it was approved on June 29, 1979. By 1979 claimant was complaining that she was sore all over. In 1980 one physician surmised that claimant's condition might be fibrositis rather than any cervical spine problem.

In November 1981 Dr. Stewart, who specializes in internal medicine, allergies and immunology, opined that claimant is suffering from reflex sympathetic neurodystrophy (RSN). Dr. Stewart has continued to see claimant and continues to adhere to that opinion.

In September 1982 Dr. Dow, a neurologist, evaluated claimant for SAIF. He totally disagreed with Dr. Stewart's diagnosis. Following Dr. Dow's report SAIF denied the compensability of claimant's current symptoms on the grounds that they are not related to her compensable injury.

Resolution of this case depends upon which of two doctors is most persuasive. Dr. Stewart opines that claimant's conditions are causally related to her compensable injury; Dr. Dow opines that they are not.

Dr. Stewart first saw claimant in November 1981. He recorded an extensive history. On examination he noted that the skin of her forearms has dry scaly eruptions. He said the hands have an erythematous hue with subcutaneous blanching. There are lesions on claimant's palms. He observed diminished strength in claimant's upper extremities. The cervical spine was limited in its range of motion on rotation. Claimant's hands were puffy. Joints in her hands were tender to range of motion. The laboratory data revealed a sedimentation rate of 17mm per hour which was a drop from the 30mm per hour another physician recorded in September 1981.

Dr. Stewart proferred two tentative diagnoses. He said it was remotely possible that claimant might have psoriatic arthritis, but he discounted this possibility because the lesions on her skin were not characteristically psoriatic. His other diagnosis was RSN. He thought it more likely that claimant has RSN because it would account for the poorly localized pain, the diffuse soft tissue swelling, the absence of other inflammatory signs and the negative serologies. He said RSN would account for the carpal tunnel problems as well as the course of pain and swelling.

Dr. Stewart again saw claimant for reevaluation on May 26, 1982. He noted essentially the same findings except that he said there was no soft tissue swelling apparent that day. He continued to opine that claimant has RSN. He said:

> "I believe that this patient has primarily a reflex sympathetic neurodystrophy of the upper extremities as a result of previous cervical trauma and surgery as well as a significant fibrositic component to her symptoms including stiffness, muscle spasm, tender trigger points and the significant anxiety reaction to seeing multiple physicians and not having an adequate explanation of her problem. Today her sedimentation rate is only modestly elevated and that coupled with her negative serologies and negative bone scan certainly mitigate against the other primary differential consideration in this case being psoriatic arthritis."

On September 22, 1982 Dr. Dow, a neurologist, examined claimant at SAIF's request. Dr. Dow declined to recite claimant's history but did indicate that he had read Dr. Stewart's version of claimant's history as well as reports of other physicians. He noted that claimant had never had blueness or sweating of the hands and on examination her hands were not cold or blue. He said that claimant resisted motions of her neck. He found diffuse tenderness in practically all joints and muscles. He said that he observed no temperature change, color change, sweating or other finding which would suggest RSN to him. He noted that he observed no active dermatitis at the time of the examination. In a letter to SAIF on September 24, 1982 he stated:

> "I do not believe that there is any evidence that this patient has a reflex sympathetic neurodystrophy. There is no evidence of any of the clinical findings nor the history suggestive of this condition. I am at a loss to understand how he arrives at this diagnosis. I do not agree with Dr. Stewart's statement that there is any fibrocystic component to the claimant's current symptom complex. In other words, the patient's symptoms and complaints far overshadow any objective abnormal neurological or orthopaedic findings that I am

> able to identify in this examination. Certainly, there are none of the clinical findings suggesting to me a diagnosis of reflex sympathetic or fibrocytic component."

Dr. Stewart testified at hearing, but Dr. Dow did not. At hearing Dr. Stewart explained that RSN is "a sequelae or aftermath reaction that happens with a characteristic set of symptoms and clinical findings." He identified those symptoms and findings as a reflex mechanism which causes blood vessels to dilate causing the skin to develop a particular appearance and causing swelling. He stated claimant had those characteristic findings. He said:

> "I have observed, myself, on several occasions, swelling, particularly in her right upper extremity....It is poorly localized. It doesn't swell around each joint, but more soft tissue swelling over the dorsum of each hand."

He also said claimant has a significant fibrositic component to her problem. He said he identified nine or ten of the classic trigger points associated with fibrositis including tenderness and some muscle spasm at each trigger point. He said claimant's psychological component is characteristic of fibrositis.

Dr. Stewart noted he had observed claimant's objective signs wax and wane during his treatment of her. He explained that if a physician only saw claimant once when her symptoms were minimal, the physician might discount the possibility of RSN or fibrositis. In response to specific questions about Dr. Dow's report, Dr. Stewart said that Dr. Dow was incorrect in saying there were no objective signs of RSN. Objective signs included swelling, nerve compromise of the median nerve, characteristic skin changes and an elevated sedimentation rate.

We find Dr. Stewart more persuasive than Dr. Dow because he is able to point to objective findings which substantiate his diagnosis of RSN and fibrositis. Dr. Dow merely says he sees no such objective signs. However, Dr. Stewart has had the opportunity to observe claimant over time and testified that the objective signs wax and wane. It seems likely that the signs had waned at the time claimant saw Dr. Dow. We find claimant's current problems compensable because Dr. Stewart specifically links the RSN and fibrositis to her compensable injury and the surgery which followed in its aftermath. Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated December 10, 1982 is affirmed. Claimant's attorney is awarded $550 as a reasonable attorney's fee for services on Board review, to be paid by the SAIF Corporation.

SALLY L. NICHOLSON, Claimant
Fred Allen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-09216
July 27, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Peterson's order granting claimant an unscheduled award of 55% for her low back and shoulder disabilities. The only issue is extent of disability.

Claimant is a 37 year old woman who injured her low back and shoulder on June 26, 1979 while pulling green chain. She has completed high school and a two year community college course in Forest Technology. The Referee found her impairment to be moderate. He then considered her impairment together with the relevant social and vocational factors and granted a 55% unscheduled disability award. We disagree with his finding that claimant's impairment is moderate and, therefore, modify the Referee's order accordingly.

Dr. Bert, claimant's treating physician, opined that claimant's impairment in both her back and shoulder are moderate. However, in the same report he indicates full range of motion in the back with no gross motor or sensory impairment in her legs. He notes some tenderness in her lower lumbar spine. He says that claimant has full range of motion in her shoulder but with crepitus about the glenohumeral joint which causes her a little discomfort. He says she should be restricted from heavy or medium work, but can do light work.

Orthopaedic Consultants opined that claimant's impairment is mild. They base this conclusion on detailed range of motion findings as well as claimant's subjective complaints of pain primarily in her shoulder. They agree with Dr. Bert that claimant is restricted to light work.

We conclude that claimant's impairment is mild because Dr. Bert's objective findings and description of claimant's symptoms do not explain his conclusion that claimant has a moderate impairment. In contrast, the mild rating given by Orthopaedic Consultants seems much more consistent with the objective findings and claimant's subjective complaints.

In determining the extent of claimant's disability we have applied the guidelines found in OAR 436-65-600 et seq. Claimant's education yields a -10 factor. Her adaptability yields a +5 factor because her former job is considered medium work and she is now restricted to light work. Labor market findings yield a +15 factor because a person with claimant's education and specific vocational preparation who is restricted to light work has only 3% of the labor force available. We have assigned a 20% impairment rating based on Orthopaedic Consultant's characterization of claimant's impairment as mild. Combining these figures and rounding to the nearest 5 results in a 30% disability award. Comparing claimant with other similarly situated injured workers, we believe that a 30% award accurately relfects the loss of claimant's earning capacity attributable to this injury.

ORDER

The Referee's order dated July 14, 1982 is modified. Claimant is granted an unscheduled disability award of 30% in lieu of all other awards for her injury of June 26, 1981. Claimant's attorney's fee shall be adjusted accordingly.

JAMES G. ROBINSON, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 81-09889
July 27, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests, and the employer cross-requests, review of Referee Nichols' order which awarded 5% unscheduled permanent disability, the Determination Order having awarded no permanent disability. Claimant contends his extent of disability is greater than that reflected by the Referee's award. The employer contends that claimant has not sustained any permanent impairment as a result of the injury for which it is liable. In addition, the employer raises an issue whether the Referee correctly admitted a number of exhibits offered by claimant where claimant furnished the documents to the employer 15 days before hearing but not "as soon as practicable" after claimant came into possession of them.

We have reviewed the record de novo and agree with the Referee that claimant has sustained some, albeit very modest, loss of wage earning capacity. In reaching this conclusion we have not relied upon the exhibits in question. In our opinion, the disputed exhibits do not add significantly to the evaluation of claimant's impairment or disability. Therefore, we decline to reach the evidentiary issue and affirm and adopt the Referee's order.

ORDER

The Referee's orders dated July 30, 1982 September 8, 1982 are affirmed.

DAYTON R. SIBLEY, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Brian Pocock, Attorney

WCB 80-00515
July 27, 1983
Order on Review (Remanding)

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Johnson's order which upheld the SAIF Corporation's denial of compensability for claimant's right shoulder condition and failed to impose penalties and attorney fees for alleged misconduct by SAIF. Claimant asserts that he compensably injured his right shoulder on October 23, 1978 and that it was improper for SAIF to accept the claim and then issue a back-up denial more than two years later.

Subsequent to the hearing in this case, there have been significant changes in the case law affecting the issuance of back-up denials and the procedures for contesting such denials.

First, the Court of Appeals' decision in Bauman v. SAIF, 62 Or App 323 (1983), prohibits the denial of a previously accepted claim once a final arrangement of compensation has been made in the case. However, we interpret the Bauman opinion to allow back-up denials in those cases where the extent of permanent disability is still being litigated either at the agency or judicial level. Darryl G. Warner, 35 Van Natta 814 (1983). The present claim is just such a case. The extent of permanent partial disability was at issue at the hearing and thus, SAIF's belated denial was permissible under Bauman.

The second recent decision affecting the present claim is Patricia G. Davis, 35 Van Natta 635 (1983). In Davis we held that when an insurer or employer issues a belated denial after previously accepting a claim, the insurer or employer has the burden of proving that the claim is not compensable. Although the burden of proof was shifted on Board review in Davis, the evidence in that case was quite convincing that the claim would have been found compensable -- regardless of who had the burden of proof.

In the case at hand, the Referee found that the claim was not compensable after concluding that claimant had not proven his case. Thus, under Davis, the burden of proof was placed on the wrong party. However, unlike Davis, the change in burden of proof in this case may affect the ultimate outcome of the compensability issue. We believe that the parties may have prepared and litigated this case differently had the burden of proof been placed on the insurer at the hearing. Insurer and claimant should be given the opportunity to present new arguments and evidence relevant to proving or disproving the insurer's case. We, therefore, set aside the Referee's order and remand the case to the Hearings Division.

ORDER

The Referee's order dated September 17, 1982 is vacated and the case is remanded to the Hearings Division for further proceedings consistent with this order.

DELMAR D. VENENGA, Claimant
Blair, MacDonald, et al., Claimant's Attorneys
Horne & Tenenbaum, Defense Attorneys

WCB 81-00247
July 27, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Wilson's order which affirmed the September 14, 1982 Determination Order which awarded claimant temporary total disability benefits from July 22, 1981 through May 17, 1982 and 15% unscheduled permanent partial low back disability; ordered the insurer to pay a penalty equal to 25% of the temporary total disability benefits due claimant from July 13, 1981 through February 11, 1982; found the insurer entitled to offset $4,760.20 in benefits paid claimant between the date he was found medically stationary and the date of issuance of the Determination Order; and awarded claimant's attorney a fee of $3,000.

Claimant contends that he is entitled to an award of permanent partial disability greater than that allowed by the Determination

Order, that he is entitled to additional benefits for temporary total and temporary partial disability, that he is entitled to additional penalties and that the Referee erred in allowing the insurer's offset for overpayment of time loss benefits pending issuance of the Determination Order.

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

With regard to the issue concerning extent of permanent partial disability, we affirm and adopt the relevant portions of the Referee's order. With regard to the issue of additional temporary total and temporary partial disability, with the exception of one minor correction, we affirm and adopt those portions of the Referee's order relevant to this issue as well. The Referee correctly concluded that claimant was entitled to temporary total disability benefits from July 13, 1981 through May 17, 1982. The September 14, 1982 Determination Order allowed such benfits from July 22, 1981 through May 17, 1982. Although claimant has been paid benefits from July 13, 1981, the Determination Order should be modified to reflect the correct temporary total disability dates.

Claimant argues that in addition to the 25% penalty awarded by the Referee against the temporary total disability benefits payable from July 13, 1981 through February 11, 1982, he is entitled to a penalty equal to 25% against the amounts of all medical benefits denied by the insurer. We disagree. We find no legal basis for imposition of such a penalty in this case. Although claimant's initial injury claim was accepted by the insurer and benefits paid until closure, the aggravation claim which is the subject matter of the dispute, was denied on November 24, 1981. The insurer was under no obligation to provide any benefits in relation to the aggravation claim subsequent to its denial, and prior to its "voluntary" acceptance of the claim on April 29, 1982. Cf ORS 656.313. Once the claim was accepted, the insurer immediately paid all of the medical bills related to claimant's aggravation claim. The insurer was certainly subject to a penalty for delaying payment of the temporary total disability benefits it owed claimant for the period July 13, 1981 through February 11, 1982. Although it accepted the claim on April 29, 1982, it did not pay claimant these accrued benefits until October 18, 1982. There was, however, no concomitant failure to pay medical benefits. Therefore, there is no additional penalty due.

The same reasoning applies to claimant's contention that the insurer should be subject to penalties for all time loss payable prior to April 29, 1982, rather than for that payable before February 11, 1982. Since the claim had been denied, the insurer was under no obligation to make any time loss payments prior to its acceptance of the claim on April 29, 1982 (except perhaps any interim compensation benefits not paid prior to the denial). We fail to see how the insurer could be penalized for amounts paid subsequent to the denial and prior to its voluntary acceptance of the claim.

With regard to claimant's contention that the Referee should not have allowed the insurer to offset its overpayment of time loss

benfits which were paid pending issuance of the September 14, 1982 Determination Order, we affirm and adopt the relevant portions of the Referee's order.

ORDER

The Referee's order dated January 14, 1983 is affirmed and the September 14, 1982 Determination Order is modified to provide temporary total disability benefits from July 13, 1981 through May 17, 1982.

ASON BARSUKOFF, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-02536
July 28, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Seymour's order awarding claimant permanent total disability, overturning SAIF's partial denial of payment for certain medical services and imposing a penalty and attorney's fee for unreasonable denial. Extent of disability, the propriety of SAIF's denial and the reasonableness of SAIF's denial are the issues on review.

Claimant is a 38 year old man who was compensably injured on October 16, 1975 when a tree fell on him injuring his right shoulder and rendering him unconscious for a time. He was diagnosed as having a minor fracture of the eleventh rib. By February 1976 it was felt that the fracture, as well as any muscle strains, should have cleared up. However, claimant complained of severe pain and sensitivity to touch in his right shoulder at that time. Dr. Harwood, a consultant to SAIF, examined claimant and opined:

> "As far as objective findings are concerned, these were at a minimum. Subjective symptoms and complaints were beyond belief in this case. It is felt by this examiner the only improvement that could be accomplished with this claimant would be a neuropsychiatric consultation."

Dr. Spady, claimant's then treating physician, indicated that he agreed with Dr. Harwood's report but added:

> "I do not feel that this claimant is a malingerer. It would appear to me that he is a frightened and confused person, manifesting significant functional problems relative to his injury."

Claimant continued to visit physicians who continued to opine that he had little in the way of objective symptoms and who continued to suggest psychological counseling.

Despite these suggestions, claimant did not see a mental health professional until September 1976, almost one year after his

industrial injury. Dr. Hickman, a clinical psychologist, evaluated claimant at that time. He diagnosed claimant as suffering from "traumatic neurosis with anxiety, persistent depression, feelings of fear and inadequacy, and incipient psychotic developments identifiable as a paranoid type of schizophrenia."

He felt that claimant was not medically stationary but voiced concern over his prognosis for improvement. He said that the almost one-year delay in getting psychological help for claimant after his injury would cause problems in treating the condition. He too opined that claimant is not a malingerer.

Dr. Sullivan, another clinical psychologist, saw claimant in November 1976 at the request of SAIF. Dr. Sullivan noted that claimant complained of a variety of pains in the right side of his body, muscle weakness in the right side, extreme pain upon any exertion of the right side and kidney problems. Dr. Sullivan noted that he was unable to find any evidence that claimant's complaints were motivated by any hope of gain. He felt that the fact that claimant is a member of the Russian "Old Believers" community was significant.

> "He feels pressed by the religious and social leaders of the Old Believers Russian community who enforce the view that members of their group should never take 'welfare' and convey strong disapproval to Mr. Barsukoff for his having received disability payments. These injuries do interact with his religious beliefs and he holds the conviction that he was hurt because of sin....Even if Mr. Barsukoff were to receive a permanent complete disability grant, the pressure and disapproval he receives from his cultural group would not relent, and I do not believe the financial rewards would be sufficient to motivate him to make such a move against strongly held cultural norms."

Dr. Sullivan said that he thought claimant's pain was primarily a psychological reaction to his physical injury. He specifically noted that claimant was not malingering.

Throughout 1977 claimant continued to visit Dr. Hickman and Dr. Fleming at the psychology center. He also saw Dr. Ho, an osteopathic physician, who indicated that he thought the major portion of claimant's pain was psychological. In September 1977 claimant first saw Dr. Rinehart, M.D., who is the only physician who believes that claimant has objective physical problems.

In August 1978 Dr. Parvaresh, a psychiatrist, evaluated claimant for SAIF. Dr. Parvaresh opined that claimant "has much uncontrolled anxiety associated with psychophysiological musculoskeletal disorder." Dr. Parvaresh felt that claimant was essentially seeking nurturance and that the workers' compensation system was providing that nurturance for him.

Orthopaedic Consultants also evaluated claimant in August 1978. They felt claimant was suffering from "post-traumatic

neurosis." They were unable to document any orthopedic disability because of inconsistencies in the examination. They recommended "inpatient treatment with a psychiatric emphasis" in a pain center.

In January 1977 a vocational rehabilitation counselor opined that due to the time since the original accident and lack of progress in other rehabilitation efforts, "it appears the chances of returning Mr. Barsukoff [to the labor market] are very slim."

Dr. Kloos, a neurological surgeon, reported to Dr. Rinehart in February 1979 that he felt claimant's complaints of severe pain in his right side had no organic basis. He felt they were "functional." He urged that claimant be encouraged to attend the Northwest Pain Clinic.

Shortly thereafter claimant was evaluated by the Northwest Pain Clinic. The clinic staff felt that claimant suffered from a moderate hysterical conversion reaction. They felt the prognosis for increased activity and reduction of emotional component was moderate but for return to work was poor. Dr. Yospe, a staff psychologist at the Pain Clinic, opined that claimant was not malingering, but had learned to use the pain symptoms as a means of satisfying strong dependency needs and of dealing with his feelings of inadequacy.

In April 1979 Dr. Ho reported that claimant felt he was losing his mind at times.

Claimant attended the Pain Clinic during March 1979. Following his discharge the prognosis for his return to work was considered only fair.

In September 1979 claimant began a vocational rehabilitation program at Tualatin Valley Workshop. The program was terminated because claimant reported that it caused pain which he could not tolerate.

In March 1980 Dr. Chester, M.D., reported that claimant was severely impaired (80%-100%) by his psychophysiological musculoskeletal disorder. He felt that claimant was totally disabled and could do no work except possibly self-employment.

Dr. Roberts, a psychiatrist, evaluated claimant at claimant's attorney's request in May 1980. He saw claimant three times in preparation for his written evaluation. He noted that claimant was alert and oriented in all spheres. Claimant's thought association is described as being good, his memory adequate and his intellect normal. Dr. Roberts felt that claimant's insight into his problem was nil. He felt that claimant's belief that he is physically disabled borders on delusional. He noted that claimant denied hallucinations. Dr. Roberts said that after the first two visits he did not believe claimant was delusional but by the third visit he came to believe claimant was delusional. He diagnosed:

> "At least a severe mixed-type neurosis, predominately hysteric in nature with conversion symptoms; however, after my third session as described with the

patient, I am inclined to believe that in actuality I may be dealing with a pseudo-neurotic form of schizophrenia."

In June 1980 claimant was admitted to the emergency room of the Silverton hospital with complete right side paralysis. He was diagnosed there as having a chronic anxiety state and hysterical paralysis.

In July 1980 Dr. Roberts reported that he continued to see claimant. He opined that claimant's psychiatric difficulties were work-related. He specifically noted that he did not believe that claimant was malingering. In January 1981 Dr. Roberts reported that claimant had stopped seeing him. He noted at that time that the prognosis remained guarded.

In February 1980 Dr. Parvaresh again evaluated claimant. He continued to diagnose anxiety tension associated with psychophysiological musculoskeletal disorder. He felt that claimant suffered from exogenous depression, that is depression related to specific situations. He placed claimant's psychiatric impairment in the mild category and recommended permanent partial disability of 15% because he felt that his present psychiatric impairment was a worsening of his underlying condition.

At the same time Orthopaedic Consultants evaluated claimant and felt that there was no objective evidence of neurological or orthopedic impairment. They noted a marked improvement in the examination from their previous examination.

Dr. Rinehart disagreed with Orthopaedic Consultants' report because he felt there were objective signs of claimant's pain.

In March 1982 Dr. Roberts again saw claimant. He noted that since he had last seen claimant, claimant's manner of living had continued to deteriorate. Claimant told him that he believed that God was punishing him for being a bad person. He noted that claimant seemed unable to concentrate. There was looseness of association of thoughts. His intelligence seemed impaired. Claimant reported hearing voices, particularly a woman's voice. His memory was markedly reduced. Dr. Roberts opined that his anxiety was well within the psychotic range. He noted that claimant had become suicidal. He felt claimant's judgment and insight were markedly impaired compared to the previous contacts. Dr. Roberts said:

> "Diagnostically, this individual has a chronic, undifferentiated form of schizophrenia, and in my opinion is not capable of gainful employment, and is only questionably capable of managing his own funds. Unfortunately, his cultural background and family conflicts probably prevent any realistic thought of his having a favorable prognosis...."

Dr. Roberts' testimony at the hearing was consistent with his written reports.

Following the hearing, Dr. Parvaresh reviewed the hearing tes-

timony and again examined claimant. He disagreed with Dr. Roberts, finding no evidence of thought disorder, delusions or hallucinations. He continued to opine that claimant is only mildly disabled by anxiety tension.

The Referee noted that this is a case in which the battle lines are clearly drawn.

> "Do I believe Dr. Roberts and conclude that this man is permanently and totally disabled, or do I believe Dr. Parvaresh and therefore deny the claimant any benefits...."

The Referee concluded that Dr. Roberts was more persuasive. We agree. SAIF argues that Dr. Roberts' opinion should be entitled to little weight because his "diagnosis and rating were based on an incorrect assumption." It is true that the history of the compensable incident which Dr. Roberts recited in his testimony is erroneous. However, the compensability of claimant's psychological condition is not in issue; rather the issue is the extent of his disability. It is irrelevant to determining the extent of claimant's psychological problems whether the psychiatrist believes claimant was hit on the head by a tree and rendered unconscious or hit on the chest by a tree and rendered unconscious. SAIF points to no incorrect assumptions by Dr. Roberts which are relevant to the issue at hand.

Dr. Roberts had the benefit of seeing claimant many more times than Dr. Parvaresh. Dr. Roberts observed that it took him several visits with claimant before he began to realize the full extent of claimant's psychological condition. In addition, he described in detail significant deterioration in claimant's condition over several years which Dr. Parvaresh apparently did not observe. Dr. Roberts observed signs of delusions. The fact that those signs were not present during any of Dr. Parvaresh's examinations does not mean they do not exist. Dr. Roberts' conclusion that claimant could not work is based on detailed findings made after much observation. It is bolstered by the fact that no one has ever implied that claimant is malingering, yet several professionals have felt that claimant's prognosis for ever returning to work is poor.

We find that claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

We agree with the Referee that the denial of medical services should be overturned as too broad; however, we believe the Referee erred in imposing a penalty and attorney's fees for unreasonable denial. SAIF's denial was based on the report of Orthopaedic Consultants which stated that they felt no further treatment was appropriate for claimant. While SAIF should have confined its denial to specific treatment which it found unnecessary, its denial was based on and phrased in language similar to that used by medical experts and could not be said to be unreasonable. Accordingly, we reverse the Referee on the issue of a penalty and attorney's fee for unreasonable denial.

ORDER

The Referee's order dated September 22, 1982 is affirmed in part and reversed in part. Those portions of the Referee's order awarding claimant permanent total disability and overturning SAIF's denial of medical services are affirmed. Those portions of the Referee's order imposing a penalty and attorney's fee for unreasonable denial are reversed. Claimant's attorney is awarded $650 as a reasonable attorney's fee for services on Board review, to be paid by the SAIF Corporation.

Board Member Barnes Dissenting:

It is Dr. Roberts' opinion, as I understand it, that claimant's psychological problems arise from guilt feelings and peer group pressures because of claimant's receipt of workers compensation benefits. If Dr. Roberts' opinion is found persuasive, as it was by the Referee and is by the Board majority, claimant's continued disability is insured: Claimant will continue to receive workers compensation benefits, will continue to have guilt feelings and will continue to suffer peer group hostility. In a sense, we are creating total disability by awarding total disability. Not willing to do something that is so illogical, I would reverse the Referee's award of total disability and, therefore, respectfully dissent.

AGNES BRECH, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-00582
July 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The employer/insurer requests review of Referee Foster's order which found claimant entitled to receipt of compensation for temporary total disability in connection with an aggravation claim by which claimant seeks additional medical services, which the employer/insurer is willing to provide. The employer/insurer, however, issued a partial denial of time loss benefits because claimant had previously retired; the Referee in effect, set aside that partial denial. The issue is whether time loss compensation must be paid to a claimant who, because of prior retirement, does not lose any wages due to compensable problems.

The parties stipulated to the facts. In November 1976 claimant fell at work and sustained compensable injuries to her legs and hip. That injury led to hip replacement surgery. Claimant was ultimately awarded compensation for 5% loss of the right leg, 20% loss of the left leg and 35% unscheduled disability. 29 Van Natta 424 (1979). In December 1980 claimant's attorney submitted a claim on claimant's behalf for additional compensation. That request was accompanied by a report from Dr. Hayhurst that suggested that claimant's artificial hip joint possibly required revision surgery. On January 27, 1981 the insurer took the position that it would pay for surgery but would not pay claimant time loss benefits:

"Please be advised that we will continue to

> pay for medical treatment for your hip condition as per ORS 656.245. However, our information is you were retired at the time of your aggravation. You have not, therefore, suffered any wage loss. We must decline to pay any temporary total disability payments while you are pursuing this medical treatment."

The date and circumstances of claimant's retirement were not covered by the parties' stipulation, but the parties did "stipulate that at the time of her [December 1980] claim for re-opening, claimant was not regularly employed, nor had she sought employment since her last arrangement of compensation."

We have concluded in Ralph R. Cutright, WCB Case No. 80-06928, 35 Van Natta 1142 (decided this date), that a retired, nonworking claimant is not entitled to receive benefits for temporary total disability following acceptance of an aggravation claim for additional and temporarily disabling medical services. For the reasons stated in Cutright, the Referee's order in this case must be reversed.

ORDER

The Referee's order dated July 6, 1981 is reversed. The insurer's partial denial dated January 27, 1981 is reinstated and affirmed.

RALPH R. CUTRIGHT, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 80-06928
July 28, 1983
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Fink's order to the effect that the employer's acceptance of claimant's aggravation claim obligated the employer to pay claimant compensation for temporary total disability even though claimant had retired before the worsening of his condition that gave rise to his aggravation claim. The issue is whether time loss compensation must be paid to a claimant who, because of prior retirement, does not lose any wages due to compensable problems.

The parties stipulated to the facts. Claimant sustained a compensable head, neck and upper back injury in April of 1977. In a prior proceeding, WCB Case No. 78-04455, it was ultimately determined that claimant was entitled to compensation for 15% loss of the right arm and 30% unscheduled unscheduled disability. Ralph R. Cutright, 27 Van Natta 186 (1979), aff'd 42 Or App 617 (1979). While that prior proceeding was being litigated through the various levels, claimant retired in December 1978.

In May 1980 Dr. Blaylock reported that claimant's cervical condition had worsened, that the worsened condition was causally related to claimant's April 1977 industrial injury and that surgery was indicated. Dr. Blaylock performed a cervical laminectomy in June 1980. The self-insured employer accepted claimant's aggravation claim in the sense of paying for all medical services. How-

ever, even though claimant was obviously unable to work following surgery, the self-insured employer did not pay compensation for temporary total disability. When claimant's attorney asked for an explanation, the employer responded:

> "It is our position that Mr. Cutright has retired and is receiving social security benefits as well as company pension. It would appear to us that he is no longer in the labor market, and therefore not losing wages. It is our understanding that temporary disability benefits are to be a wage loss replacement, and in that sense, Mr. Cutright is not losing wages."

In disagreeing with the employer's position and concluding that claimant was entitled to temporary disability compensation, the Referee reasoned:

> "ORS 656.273 provides when a [worker's condition] becomes aggravated the worker is entitled to additional compensation. There is no exception made for retired workers. Nor is there an exception made in ORS 656.210.
>
> * * *
>
> ". . . it is well known many retired persons return to the labor market on a part time or casual basis. Whether or not claimant did so engage, at the time of his hospitalization and surgery in June 1980 he would not have been able to engage in any type of employment because of being temporarily and totally disabled."

The Referee's latter point -- that benefits for temporary disability are intended to compensate for loss of opportunity to earn wages, not just lost wages -- is the strongest point in support of the Referee's order. However, the Referee's first point -- that the issue before us is one of legislative intent -- requires examination of the relevant statutes.

A common theme or assumption in the Workers' Compensation Law is that the Law applies to workers injured while earning wages and that some benefits are based in part on wages earned. ORS 656.027, 656.005(27), 656.005(28). There are some exceptions. The Law also can apply to unpaid municipal volunteers, ORS 656.031; to certain unpaid students and trainees, ORS 655.615, 656.033, 656.135 and 656.138; and to possibly unpaid jail inmates, ORS 656.041. But even in these exceptional situations, the Law provides for the establishment of an "assumed wage" upon which premiums and benefits are then based.

Thus, the statute governing temporary total disability, ORS 656.210, provides that when a worker is injured and unable to work "the worker shall receive during the period of that total disability compensation equal to 66-2/3 of [the worker's actual or assumed] wages. . ." (Emphasis added.) This is consistent with the stated purpose of providing "income benefits to injured workers and their dependents." ORS 656.012(2)(a) (emphasis added).

The question of paying temporary total disability to a retired claimant could not arise under an original injury claim because, by definition, for an injury to arise out of and in the course of employment, the claimant would have been earning wages at the time of the injury. The question of paying temporary total disability to a retired claimant could arise under an original disease claim because, due to the latency period of some work-related diseases, it is possible that the claimant would have retired before the disease was diagnosed. And, as in the present case, that question can arise in the context of an aggravation claim if the claimant retires before his or her condition worsens.

We do not think the aggravation statute, ORS 656.273, sheds much light on the present issue. It creates an entitlement "to additional compensation . . . for worsened conditions resulting from the original injury" without any definition of what type of compensation should be provided. This lack of definition has caused us to previously note that the generic term, "aggravation claim," covers requests for any and all forms of additional compensation, including just requests for medical services, which is how the employer processed the aggravation claim here in issue. Willard B. Evans, 34 Van Natta 490 (1982), rev'd on other grounds, Evans v. SAIF, 62 Or App 182 (1983); Mary Ann Hall, 31 Van Natta 56 (1981). In short, we do not think the reference in ORS 656.273 to "additional compensation" in connection with an aggravation claim constitutes legislative direction that temporary disability benefits should be paid to a retired claimant after the employer/insurer accepts that retired claimant's aggravation claim.

Nor do we agree completely with the Referee's reasoning about the lack of any exception for retired persons in ORS 656.273 or 656.210. We deal with a system in which the rights to various forms of compensation benefits are created by statute. Entitlement issues thus necessarily involve questions of statutory construction. The absence of an express statutory exception may be some small indication of legislative intent, but we think it would turn normal statutory construction doctrine on its head to conclude that legislative intent to create an entitlement is per se established by the absence of an express statutory exception. For example, the statutes have been interpreted as expressing a legislative intent that pain (as distinguished from disabling pain) is not compensable, even though there is no express statutory exclusion of compensation for pain. Walker v. Compensation Department, 248 Or 195 (1967). Likewise, it is universally assumed that the present statutes do not permit compensation for scarring or disfigurement, even though there is no express statutory exclusion.

Finally, as for the suggestion that the legislature's intent on the question now before us is proven by its failure to enact various bills, we can only repeat what the appellate courts have often said: "The failure of the legislature to pass a particular proposal is of dubious value in interpreting the legislation which was passed." OSEA v. Workers' Compensation Dept., 51 Or App 55, 59 (1981).

The Court of Appeals has commented on the intent behind time loss benefits, albeit not in the precise context now before us. In Taylor v. SAIF, 40 Or App 437, 440 (1979), the court observed:

> "Temporary total disability is compensation for loss of income until claimant's condition becomes stationary in order to enable a claimant to support self and family during that period. The rate of payment for temporary total disabilty is calculated on the basis of claimant's wages at the time of the injury, ORS 656.210, and the total amount depends on the length of time claimant's condition is unstable. ORS 656.268(1)."

In other words, we understand Taylor to say the rationale of benefits for temporary total disability is to replace lost wages. See also Hedlund v. SAIF, 55 Or App 313 (1981).

A question in Stone v. SAIF, 57 Or App 808 (1982), review dismissed 294 Or 442 (1983), was whether, pending claim acceptance or denial, an employer/insurer should pay interim compensation to a claimant who had previously retired. The Court of Appeals answered that question in the affirmative:

> "The interim compensation provided for in ORS 656.262(4) prevents an employer from delaying acceptance or denial of a claim. Jones v. Emanuel Hospital, 280 Or 147, 151-52, 570 P2d 70 (1977). The liability for interim compensation attaches even if the claim is ultimately held noncompensable. Jones v. Emanuel Hospital, supra.
>
> There is no authority for denying compensation due to the age or retirement status of a claimant."

In other words, we understand Stone to say the principal rationale of interim compensation benefits is in the nature of a penalty to encourage prompt acceptance or denial of a claim.

Taylor and Stone can be readily reconciled -- up to a point. Stone identifies a legislative intent to require payment of interim compensation pending acceptance or denial of claims as a way to promote employer/insurer efficiency in responding to claims. Taylor identifies a legislative intent to require payment of temporary total disability compensation after claim acceptance as a replacement for lost wages. Thus, given the different purposes of these different forms of compensation, it is possible that a retired claimant would receive interim compensation until the time of claim acceptance, but then not be entitled to time loss compensation after claim acceptance. Strange as it may seem, such a result appears fully consistent with both Taylor and Stone. However, we are not sure that result is consistent with a concept expressed in Petshow v. Ptld. Bottling Co., 62 Or App 614, 619 (1983), that "there is little difference between [temporary total disability] on an accepted claim and 'interim compensation' paid by an undecided insurer" because "both are derived from the same statute." Carried one small step toward the logical conclusion, Petshow suggests that: (1) Either both pre-acceptance time loss

("interim compensation") and post-acceptance time loss should be paid regardless of actual loss of wages; or (2) neither should be paid unless there is an actual loss of wages. Cf. Anthony A. Bono, 35 Van Natta 1 (1983) (interim compensation need not be paid to a claimant who is actually working at the time the claimant makes a claim).

We conclude that the analogous precedents are inconclusive. We also conclude that there is little or no direct indication of whether the legislature intended that time loss on an accepted claim be paid to a retired claimant; indeed, we are not even sure the legislature ever considered that specific question. We thus rely on the best available indications of legislative intent, including the possibility of trying to identify the probable legislative answer had it considered the question of time loss compensation for retired persons.

One thing that is rather clear is that for most claims and most claimants, time loss compensation is tied to actual loss of wages. The exceptional situations, involving municipal volunteers, certain students, etc., are all expressly spelled out by statute and all involve time loss compensation based on "assumed" wages. We think this is some indication that, unless a claim arises under one of the exceptional assumed-wage statutes, the legislature intended time loss compensation to replace truly lost wages. It would follow that a retired claimant who is not losing or has not truly lost wages due to compensable physical problems should not receive time loss compensation.

However, there remains the possibility, noted above, that a retired claimant who is physically unable to work has a cognizable loss that the legislature would have wanted to compensate -- the opportunity to return to the labor market. In this case, for example, following claimant's June 1980 cervical surgery, it would have been impossible for claimant to seek employment had he wanted to do so. For retired claimants as a class, there is no doubt that this loss of opportunity is real; the question, as we see it, is whether it is a loss of sufficient magnitude that the legislature would have intended the same level of temporary disability be paid that would be paid to replace an actual wage loss.

There are indications in other contexts that loss of opportunity is not fully compensated. The claimant in Reed v. SAIF, 63 Or App 1 (1983), had two jobs, working full-time as a draftsman and working part-time as a service station attendant. He was injured while working at his part-time job and that injury resulted in an award for permanent total disability. The issue litigated in Reed was whether the claimant's permanent total disability benefits should be calculated on the basis of only his income from his part-time job, or instead should be calculated on the basis of his income from both of his jobs. In the sense of the "opportunity" to earn income, the claimant in Reed had a more immediate and graphic loss than the stipulated facts in this case suggest this retired claimant had. Nevertheless, the Court of Appeals concluded in Reed that total disability benefits were to be calculated only on the basis of wages earned on the job the claimant was doing when injured. Stated differently, loss of opportunity was not fully compensated in Reed.

The claimant in Bold v. SAIF, 60 Or App 392 (1982), also had two jobs, teaching full-time during the school year and welding during the summer months. While recovering from a compensable injury, the claimant was found to be physically able to return to his teaching position, but not yet physically able to return to welding work. The issue litigated in Bold was whether the claimant should be paid compensation for temporary total disability during the summer months. In the sense of the "opportunity" to earn income, the claimant in Bold had a more immediate and graphic loss than the stipulated facts in this case suggest this retired claimant had. Nevertheless, the Court of Appeals concluded in Bold that the claimant was not entitled to compensation for temporary total disability during the summer months. Stated differently, loss of opportunity was not fully compensated in Bold.

When the question arises of paying time loss compensation to a retired claimant, there is theoretically an intermediate position between across-the-board all or nothing answers; that intermediate possibility is to require proof of the specific loss to a specific claimant. We have adopted such an intermediate position in cases arising under our own motion jurisdiction pursuant to ORS 656.278.

> "When we grant own motion relief, we order compensation for temporary total disability for a claimant who was working or seeking work at the time his physical condition worsened; and we order compensation for temporary total disability for a claimant who was not working or seeking work due in whole or in significant part to physical problems causally linked to the prior compensable injury; but we do not order compensation for temporary total disability for a claimant who was not working or seeking work for any other reason, such as voluntary withdrawal or retirement from the labor market." Vernon Michael, 34 Van Natta 1212, 1213 (1982).

Although, for the reasons stated in Michael, we think that is an appropriate and reasonable policy position, we conclude it is not sufficient to resolve this case. This case involves an aggravation claim under ORS 656.273; the claimant thus has certain statutory rights; the question here is the scope of those rights. By contrast, a request for own motion relief under ORS 656.278 is addressed to the Board's discretion, Michael, supra, 34 Van Natta at 1214; and cases like Michael are indications of how we generally exercise that discretion. Our position on matters the legislature has entrusted to our discretion after expiration of aggravation rights is not a satisfactory basis upon which to determine what the legislature intended to be the nature and extent of aggravation rights.

Moreover, as this case has been litigated, the only options the parties present are all or nothing answers. Claimant does not contend, nor would the stipulated facts support a finding that he would have been working or seeking work at any time after June 1980 but for his compensable surgery that month. Rather, claimant

primarily contends that all retired claimants are entitled to compensation for temporary total disability upon acceptance of an aggravation claim. The employer responds that no retired, nonworking claimant is so entitled.

As a construction of silent statutes, neither alternative is irresistibly attractive. However, pulling all of our thoughts together: (1) There is a strong indication in the entire statutory scheme that time loss compensation is primarily intended to replace lost wages, usually actual wages or sometimes assumed wages; (2) retired claimants, by definition, cannot and do not lose wages due to worsened physical conditions -- all forms of retirement income continue notwithstanding worsened physical conditions; (3) however, retired claimants' loss of opportunity to seek or to obtain employment because of physical inability to work certainly can be a tangible loss, albeit rather difficult to quantify for retired claimants as a class; (4) as discussed above, the opportunities the claimants in the Reed and Bold cases lost were very tangible, but were not fully compensated; and (5) ultimately, we could not explain or justify a system that does not allow compensation for the more tangible loss in Reed and Bold, while granting compensation for the more theoretical loss in this case. For all of these reasons, we conclude that the legislature most likely would not intend that retired claimants receive compensation for temporary total disability upon acceptance of an aggravation claim.

ORDER

The Referee's order dated April 2, 1981 is reversed. The self-insured employer's partial denial of compensation for temporary total disability dated August 4, 1980 is reinstated and affirmed.

Board Member Lewis Dissenting:

Neither the statutes nor the case law support the majority's holding that a retired worker is not entitled to temporary total disability compensation when a work-related injury becomes disabling as a result of an aggravation. ORS 656.273 states that "an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury." The Legisature has not made an exception for injured workers who have retired at the time their condition worsens and this Board should not attempt to legislate by administrative order.

Proposals to reduce the workers' compensation benefits to retired workers repeatedly have been presented to the Legislature without success. See H.B. 2806, 62nd Leg. (1983), and H.B. 2234, 60th Leg. (1977). The Legislature has not even been willing to pass bills which would merely allow limited setoffs of workers' compensation benefits for claimants who are receiving social security retirement payments. If the Legislature has not allowed a mere offset of retirement benefits, it is inconceivable that it intended to completely exclude retired workers from temporary total disability compensation, regardless of whether they were receiving any additional retirement income.

The majority seems to be stating that because an injured worker has retired and is no longer employed or seeking employment, the worker experiences no compensable loss. I do not believe there is a statutory duty to be employed or to seek work in order to receive temporary total disability compensation under ORS 656.273. In fact, such a requirement would be directly contrary to the purpose of temporary disability compensation, i.e., to provide sustenance while the claimant is unable to work.

Regardless whether the claimant is retired or not, when a compensable condition becomes disabling as the result of a worsening, the claimant is unable to work if he should choose to do so. The claimant's earning capacity has been reduced and the reduction is the result of a compensable injury. The apparent established practice of employers and certainly the opinion of this Board has been that employers are to pay temporary disability compensation to workers whether or not they are working at the time of the aggravation. In Elvin Ornbaun, 9 Van Natta 270 (1973) we stated:

> "Employer suggests that claimant has simply opted not to work since the injury and therefore it should not be liable for time loss compensation because the aggravation has not deprived the workman of wages. This suggestion ignores the fact that due to the aggravation of the original injury, claimant no longer has the option to work or not as he chooses. He is now temporarily prevented from working regardless of whether he wanted to work or needed to work, or not." 9 Van Natta at 271.

Given the existing practice and the fact that the Legislature has consciously chosen not to limit workers' compensation benefits on the basis of retirement or age, I find the majority's conclusion that there is a lack of legislative intent on this issue to be unfounded. The Legislature has clearly had the opportunity to limit workers' compensation benefits for injured workers who have retired and has amended ORS 656.273 for other reasons in the 1981, 1979, 1977 and 1975 sessions, yet no retirement restriction has been enacted. In such circumstances, it is proper to presume that the intent of the Legislature is to allow retired workers to collect compensation for aggravations of their industrial injuries. See D. Sands, 2A Sutherland- Statutes and Staturory Constuction, §§49.09 & 49.10 (4th Ed. 1973); Bay Creek Lumber Co. v. Cesla, 213 Or 316, 323 (1958).

Further, even if one assumes the statutes are ambiguous, the longstanding rule is that any such ambiguity is to be construed in favor of the claimant. Fossum v. SAIF, 289 Or 777 (1980); Colvin v. SIAC, 197 Or 401 (1953).

Taylor v. SAIF, 40 Or App 437 (1979), Bold v. SAIF, 60 Or App 392 (1982), and Reed v. SAIF, 63 Or App 1 (1983), from which the majority has extrapolated its theory, have little relationship to the question at hand. Neither case raised any issue relating to the effect of retirement on temporary total disability whatsoever.

The majority minimizes the Court of Appeals holding in Krugen v. Beall Pipe & Tank Corp., 19 Or App 922 (1974), and the most recent court case, Stone v. SAIF, 57 Or App 808 (1982), where the effect of retirement on entitlement to workers' compensation benefits was at issue. In Stone, the Court of Appeals stated quite plainly: "There is no authority for denying compensation due to the age or retirement status of a claimant." 57 Or App at 812. I do not believe this statement was phrased so broadly and unequivocally by accident.

I, therefore, respectfully dissent and would affirm the Referee's order of April 2, 1981.

FRANCISCO SOSA, Claimant
Karol Wyatt Kersh, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-06332
July 28, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Seifert's order granting him a 15% award for unscheduled low back disability. Extent of disability is the only issue on review.

Claimant is a 29 year old forklift driver with a fourth grade education. He does not speak English. He compensably injured his low back on September 25, 1981 when he backed his forklift into a metal post. He was initially diagnosed as having a mild diffused strain.

In May 1982 claimant was evaluated by Dr. Bolin at the SAIF Corporation's request. Dr. Bolin opined that claimant had lordotic scoliosis, extension of the L4-5 disc and anterior osteophytosis. He said all these conditions were unrelated to claimant's industrial injury. He thought claimant's thoraco-lumbar strain from the compensable injury was resolved.

Also in May 1982 a doctor recommended a myelogram to determine if claimant had a disc herniation. Claimant declined the myelogram.

Also in May 1982 Dr. Llewellyn evaluated claimant and opined that claimant has a knife clasp deformity of the sacrum which is congenital and unrelated to claimant's compensable injury. He felt that claimant's lumbosacral sprain had resolved with minimal impairment. Dr. Llewellyn said that claimant should not return to his previous work because of his minimal impairment superimposed on his preexisting defects.

In June 1982 a Determination Order issued with no award for permanent disability. The Referee found that claimant had sustained a minimal impairment and granted claimant a 15% unscheduled disability award.

We agree that claimant sustained a minimal permanent physical impairment as a result of his compensable injury. However, we believe that the relevant social/vocational factors are more adverse than the Referee apparently believed them to be. After

previously working mostly in jobs in the medium to heavy range, a range in which there is generally more emphasis on physical skills than on mental skills, claimant is now limited to jobs in the light to medium range, a range in which there is relatively more emphasis on mental skills; yet claimant confronts seeking work in this range with only a fourth grade education. Considering all relevant factors and a comparison of other similar cases, we conclude that claimant would be more appropriately compensated for his loss of earning capacity by an award of 25% unscheduled disability.

ORDER

The Referee's order dated January 3, 1982 is modified. Claimant is awarded 80° for 25% unscheduled low back disability as a result of his September 1981 compensable injury. This award is in lieu of all prior awards. Claimant's attorney is allowed 25% of the increased compensation granted by this order (80°) as and for a reasonable attorney's fee, in lieu of the fee allowed by the Referee, to be paid out of and not in addition to claimant's compensation.

PAUL L. STIENNON, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-02978
July 28, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Seymour's order which required it to pay claimant compensation for temporary total disability for about a five month period in 1982 after claimant had retired in 1979. The issue is whether time loss compensation must be paid to a claimant who, because of prior retirement, does not lose any wages due to compensable problems.

Claimant sustained a compensable right knee injury in August of 1979. The claim was accepted and processed to closure. Claimant became 65 years old in December 1979 and retired. In early 1982 claimant's doctor decided that right knee surgery was indicated. By letter dated March 22, 1982, a SAIF claims representative advised claimant that this medical service would be provided under the terms of ORS 656.245 ("we will be taking care of medical bills in regard to this surgery"), but that: "This letter is to adivse you that we will not be paying you temporary total disability benefits while you undergo this surgery, as there is no loss of wages involved."

About two weeks later claimant requested a hearing on the issues of his entitlement to temporary total disability benefits and penalties. The Referee ordered SAIF to pay claimant time loss benefits from April 1, 1982 (the date of hospitalization for surgery) to August 9, 1982 (the date claimant's doctor stated claimant's condition was stationary). The Referee also assessed a penalty of 25% of the amount of those time loss benefits because of "the effect [of prior nonpayment] upon the claimant" -- an effect that is far from clear to us because claimant suffered no reduction in income between April and August 1982.

In any event, we have concluded in Ralph R. Cutright, WCB Case No. 80-06928, 35 Van Natta 1142 (decided this date), that a retired, nonworking claimant is not entitled to receive benefits for temporary total disability following acceptance of an aggravation claim for additional and temporarily disabling medical services. For the reason stated in Cutright, the Referee's order in this case must be reversed.

ORDER

The Referee's order dated December 29, 1982 is reversed. The SAIF Corporation's partial denial of compensation for temporary total disability dated March 22, 1982 is reinstated and affirmed.

JIMMY F. ADAMS, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-04335
July 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Shebley's order which approved the insurer's April 28, 1981 denial of claimant's March 25, 1981 myocardial infarction.

At hearing the evidence centered around the opinions of two board certified cardiologists, Dr. Wysham and Dr. Trelstad. Dr. Wysham was of the opinion that claimant's physical and emotional stress at work on March 25, 1981 was a material precipitating cause to claimant's myocardial infarction, thereby subscribing to the medical school of thought that an episode of stress can precipitate a myocardial infarction. On the other hand, Dr. Trelstad does not subscribe to that school of thought and gives the opinion that claimant's infarction was a random event and was not in any way related to the physical or emotional stress of claimant's job on March 25, 1981.

In reaching his conclusion that claimant had not met his burden of proving medical causation by a preponderance of the evidence the Referee stated:

> "The medical evidence, in my view, is in equipoise. While Dr. Wysham has more experience than Dr. Trelstad and has the additional advantage of having actually examined and spoken to claimant, Dr. Trelstad's opinion appears to be in harmony with the Special Report (Ex. 21) relied upon by both of these gentlemen in their testimony. Accordingly, I reluctantly conclude that claimant has failed to meet his burden of proof."

The Special Report referred to by the Referee was a 1976 report from the American Heart Association entitled "Report of the Committee on Stress, Strain and Heart Disease." In that report the view is given that a single isolated episode of stress, be it

physical or emotional, in individuals that are susceptible to sustaining an infarction because of underlying heart disease, may only possibly, as opposed to probably, precipitate a myocardial infarction.

Claimant contends that the Referee's reliance on that report and his comparison of which doctor's opinion was more in harmony with that Special Report was improper. Claimant correctly points out that the court has held that the "precipitating stress" school of thought cannot be discounted as a rule of law, but rather each case must be looked at individually and the facts of that case must determine whether or not the myocardial infarction was caused in material part by an episode of stress." Bales v. SAIF, 294 Or 224, 235 n. 4 (1972), decided on remand, 61 Or App 613 (1983). We agree that the Special Report should not be used as the only standard for determining the correctness of medical opinions regarding the causation of myocardial infarctions.

In reviewing this case we emphasize that, although we have considered this Special Report as part of the evidence in the record, we have not considered it the standard by which the persuasiveness or nonpersuasiveness of the doctors' opinions have been measured. When the evidence is taken as a whole, including claimant's 30-year smoking habit, his history of hypertension including treatment for hypertension nine days before the myocardial infarction, his underlying coronary heart disease, his family history predisposing him to heart disease, and the events of his work activity on March 25, 1981, we find we must agree with the Referee in this difficult case that claimant has failed to meet his burden of proving that he suffered a compensable injury. Robert J. Queen, 61 Or App 702 (1983); Eugene Voris, 35 Van Natta 439 (1983).

ORDER

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

JOHN T. ALESKUS, Claimant
Paul H. Gunderson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-07773
July 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Shebley's order which affirmed the SAIF Corporation's denial of his request for authorization for surgery and found claimant's aggravation claim not compensable. The Referee also denied claimant's alternative claim for interim compensation allegedly due pending SAIF's disposition of an aggravation claim associated with the surgery, as well as penalties and attorney fees for SAIF's failure to pay the interim compensation.

The Referee affirmed the denial of liability for the surgery on the ground that claimant and his treating physician failed to comply with the administrative rules regarding major elective surgery and on the further ground that the surgery was not reasonable or necessary. The Referee found against claimant on the issue of aggravation based upon his conclusion that claimant

had not experienced a worsening of his condition since a prior hearing on a prior aggravation claim. The Referee further denied interim compensation on the ground that claimant failed to provide medical verification of inability to work as part of his aggravation claim. Lastly, since he determined that there was no compensation "then due," no penalties or attorney fees were imposed. See ORS 656.262(9).

The issues are: (1) Whether the Referee correctly found SAIF not liable for the surgery, either on the ground of claimant's failure to follow the administrative rules regarding elective surgery, or on the ground that the surgery was not reasonable or necessary; (2) whether claimant has a compensable aggravation claim; and (3) whether claimant is entitled to interim compensation and an associated penalty and attorney's fee.

I.

Claimant was injured in a compensable motor vehicle accident in April 1978. Following a period of unsuccessful conservative treatment, a myelogram was administered which revealed the existence of a large extradural defect at L4-L5. Claimant's treating orthopedist, Dr. Blaylock, and his office partner, Dr. Nash, performed a laminectomy and partial discectomy in August 1978. Claimant testified that following the surgery he enjoyed about 50% relief of the pain he had been experiencing since the accident. His claim ultimately was closed in April 1979 with an award of 5% permanent disability.

The medical evidence indicates that in May 1979 and August 1979 claimant sought medical attention for low back pain associated with certain activities, but that those incidents promptly resolved with nothing more than conservative treatment measures. In February 1980 claimant again sought medical attention, complaining of aches in his low back, pain below the scar area from the 1978 laminectomy and a tingling and itchy sensation in his left leg. Apparently at some point prior to April 1980, repeat surgery was suggested because in April 1980, at the request of the insurer, claimant was examined by a psychologist who reported that claimant was the type of person who tends to somatize emotional problems and seek medical services in an effort to achieve relief from pain which is primarily caused by psychological rather than physiological factors. The psychologist suggested that from that point of view claimant was not a good candidate for surgery.

A repeat myelogram done in May 1980 revealed questionable indentations at L5-S1 which were minimally present in the 1978 myelogram and more evident in 1980. Also in May 1980 Dr. Grimm, a neurologist in the same clinic as Dr. Blaylock, administered an electromyogram. Dr. Grimm's report indicates that he found the left leg to be essentially normal but that the right leg evidenced an abnormality suggesting "an old neurogenic lesion . . . and more recent activity now in repair." Although neurological findings were not significant, based on the results of the myelogram, the EMG, and the consistency between this objective evidence of an abnormality and subjective symptoms, Dr. Blaylock opined that

claimant either had an extension of the L5-S1 nerve root damage from the original injury, or had the problem since the injury, which was simply missed because of the more obvious defect at L4-L5 in 1978. In light of the failure of conservative treatment and worsening symptoms, Dr. Blaylock recommended exploratory surgery and excision of the disc if pathology was found.

In August 1980 Dr. Kloos conducted an independent medical examination of claimant and opined that repeat surgery was not advised. He based that opinion on the absence of symptomatology or findings indicating nerve root involvement and work activities on claimant's part inconsistent with reported severe low back pain. In November 1980 claimant was then examined by Dr. Rafal, who is a partner or shares office space with Dr. Blaylock at the Hillsboro Neurological Center. Dr. Rafal recommended that claimant be treated with anti-inflammatory agents, suggesting that if claimant's pain did not respond to that treatment, he could be considered for a second surgery, but only if claimant understood that the prospects were modest for improvement in his low back pain. In December 1980 Dr. Blaylock again requested authorization for the proposed repeat laminectomy. In December 1980 the insurer referred claimant to another neurologist, Dr. Stolzberg, who opined that claimant was somatizing personal problems and that surgery was unlikely to be beneficial. Subsequently, Dr. Blaylock reported that he disagreed with Dr. Stolzberg's opinion that claimant's pain was due to psychological factors and reiterated his opinion that surgery afforded the best chance of relieving his pain. Dr. Blaylock indicated that claimant was scheduled for surgery in January 1981.

Apparently the surgery was not carried out as scheduled. In February 1981 Dr. Norton, SAIF's in-house medical consultant, opined that the objective findings did not support repeat surgery, that repeat surgery ran the risk of increased scarring, and that other residuals of surgery could make claimant's condition even worse. In March 1981 the insurer denied authorization for the surgery on the ground that it was not reasonable or necessary.

Claimant requested a hearing, and the matter came for hearing in June 1981. At some point apparently the insurer raised a new defense to liability for the surgery, namely a failure on the part of claimant's physician to comply with the administrative rules for major elective surgery. With respect to this latter defense, Referee Gemmell ruled, inter alia, that following receipt of a second opinion from the independent medical exam arranged by the insurer recommending against the surgery, Dr. Blaylock had an obligation to arrange for a third examination and report from an independent physician before proceeding further. The Referee further ruled that although Dr. Blaylock did arrange for a third opinion, the opinion was sought from another physician-member of the Hillsboro Neurological Center; therefore, the exam was not an "independent" exam within the meaning of the administrative rules (then OAR 436-69-130[2] and 436-69-005[13]). The Referee also ruled that claimant failed to prove an aggravation claim.

In January 1982 Dr. Blaylock referred claimant to Dr. Parsons for yet another examination, presumably in order to comply with the administrative rules regarding major surgery. Dr. Parsons

opined that claimant's pain was not radicular; therefore, claimant would not benefit by a repeat laminectomy and exploration of the nerve root, but that there was a possibility of a facet joint problem which might respond to a fusion. Notwithstanding this opinion, Dr. Blaylock continued to believe that there was a possibility of a defect at L5-S1 which should be explored and notified the insurer that he would proceed with surgery scheduled for the last week of May 1982. The insurer again denied responsibility for the proposed surgery.

In May claimant underwent the proposed surgery, described in the hospital admitting records as an exploratory laminectomy. The surgery was done by Dr. Nash with Dr. Blaylock assisting. Some scar tissue was found and excised from the nerve root at L5 on the left, the site of the original surgery. The surgical report continues as follows:

> "Our attention was then turned to the L5-S1 area where on reflection of the dura a large, near spontaneously herniating disc was encountered. The intraspinal portion of the disc was removed and a large quantity of additional degenerative material was removed from the intervertebral space.
>
> "It should be noted that it was a very large, soft disc which compressed the nerve which was entrapped posteriorally by a dense ligneous scar tissue."

On June 14, 1982 claimant wrote to the insurer directly, advising that he had undergone the surgery as scheduled on May 23, 1982, and requested confirmation that the insurer was responsible for the medical benefits and time loss. Claimant's letter was received by SAIF on June 16, 1982. SAIF again denied responsibility for the surgery, although its letter to claimant, dated July 30, 1982, is not a formal denial. The matter came on for a second time, giving rise to this proceeding.

At hearing claimant testified that, four months post-operatively, he was enjoying virtually total relief from the pain he had been experiencing since the original motor vehicle accident in 1978. At hearing Dr. Blaylock testified that had he been in the position of doing an independent examination of claimant's case, he probably also would have recommended against the proposed surgery, but that since he had been following claimant for three years and watched the progression of symptoms without response to conservative treatment, in light of claimant's understanding of the risks involved he believed the surgery was appropriate. Dr. Blaylock opined that the scarring he found was related to the 1978 surgery and that the disc probably was related to the 1978 accident.

Also at hearing Dr. Norton testified that a bulging or deteriorating disc that has not yet herniated is characterized by back pain that does not necessarily or consistently radiate into

the legs, below the knee or into the foot. He reiterated his opinion that the surgery was not recommended because of the absence of evidence of radicular pain, plus the inconsistency between Dr. Grimm's report which suggested, if anything, compression on the right nerve root, whereas the alleged disc defect and surgery were on the left. Dr. Norton further testified that the fact that claimant was supposedly virtually pain free at the time of hearing was of little significance because typically it takes about one year for scar tissue to fully grow back, and that within one year after the surgery claimant may be back where he was prior to the second surgery, or worse. He also thought that it was impossible to measure the success of the surgery, due to the fact that there were no radicular symptoms claimant was experiencing which the surgery could have corrected.

II.

We first address the issue of whether the insurer is liable for the back surgery that has been performed. The Referee affirmed the insurer's denial on the ground that claimant's physician again failed to comply with the administrative rules regarding major elective surgery, on the ground that the surgery was not reasonable or necessary, and on the further ground that the disc excised in the second surgery was not related to the 1978 injury.

The Referee reasoned that under OAR 436-69-501, formerly 436-69-130, after receiving Dr. Parson's opinion recommending against the proposed surgery, Dr. Blaylock should have obtained a third opinion before proceeding with the surgery, and that since he failed to do so, the insurer could not be held liable for the surgery. We reject that reasoning for two reasons. First, claimant has been subjected to no less than six orthopedic or neurological examinations, three of which were done by physicians not connected in any way with the treating physician's office (Drs. Kloos, Stolzberg and Parsons). Second, Dr. Blaylock notified the insurer of his intent to proceed with surgery numerous times, including prior to the time surgery actually was performed. Following this last notice in May 1982, the insurer did not notify Dr. Blaylock that it wished yet another opinion, even though it had ample opportunity to do so.

We believe that the rule regarding major elective surgery was designed to provide the employer/insurer an opportunity for full investigation of a proposed medical procedure before the surgery is done. Otherwise, evidence relating to the need for surgery and its possible relation to the compensable event may be altered or destroyed without the employer/insurer being given an opportunity to consider the claimant's pre-surgery condition. Here, the insurer was not only given the opportunity to obtain second and third opinions, the multiple opinions were in fact obtained. Accordingly, no violence has been done to the underlying purpose of the rule.

A more difficult question is whether the proposed surgery was reasonable and necessary. Admittedly, the objective evidence definitely weighs in favor of a finding that the surgery was not necessary and/or reasonable. However, as the claimant argues, results should count for something. We would add that in this

case the treating physician's opinion based simply on professional judgment in dealing with a particular patient also should count for something. Dr. Blaylock candidly admitted that if he were doing a one-time examination, he would recommend against the surgery but went on to say that in light of claimant's continuing problems which did not respond to conservative treatment, he felt the surgery was justified. Moreover, in this case we have the benefit of the fact that the surgery has been done, and the surgery revealed that there was scarring at the nerve root site of the former surgery and a bulging disc. We are also influenced by the fact that claimant is obviously an intelligent person who was well aware that the surgery might not work, why it might not work, and that his pain may well have been functional in origin rather than the result of actual pathology in the low back. Considering the record as a whole, we are persuaded that the surgery was reasonable and necessary.

The most difficult question is whether the surgery was related to the 1978 injury. We are satisfied that to the extent the surgery began as exploratory surgery it is compensable, Jimmy K. Layton, 35 Van Natta 253 (1983), and that the portion of the surgery devoted to removing the scar tissue from the nerve root at the site of 1978 injury also is compensable. We are persuaded by the barest of margins that the removal of the disc at L5-S1 also is related, based on the fact that claimant had more or less continuous back complaints since the 1978 accident which were virtually totally relieved by the 1982 surgery. We are influenced to a lesser degree by the lack of evidence to support Dr. Norton's theory that the 1982 disc surgery was necessitated by the natural degeneration of claimant's disc; the question being, why has claimant not evidenced any degenerative disc disease at levels other than the site of the original injury?

III.

With respect to the aggravation claim, first, we note that the Referee and the parties applied an erroneous standard. The fact that in a previous proceeding claimant failed to establish a compensable aggravation claim does not mean that he now must prove a worsening since that hearing. The standard remains the same: Has claimant's condition worsened since the last arrangement of compensation, which in this case was the April 1979 Determination Order. Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982), affirmed Tektronix Corp. v. Twist, 62 Or App 602 (1983).

In any event, we are satisfied that between the date of the last arrangement of compensation (in April 1979) and immediately prior to the surgery in 1982, claimant's condition did not worsen. What did change was claimant's tolerance for the pain he experienced prior to the second surgery. This is insufficient to support a finding that claimant's condition worsened. Claimant argues, however, and we agree that the surgery itself, presuming it is reasonable and necessary, constitutes a worsening because the effects of major surgery obviously "worsen" one's condition until one recovers from the surgery. Cf. Gary A. Becker, 34 Van Natta 1654 (1982).

Accordingly, we conclude that claimant has established a compensable aggravation claim as of the date he entered the hospital on May 23, 1982 for the second surgery.

IV.

With respect to whether the insurer erred in failing to commence interim compensation upon receipt of claimant's post-1982 surgery letter requesting payment of the medical bills and time loss, we believe that claimant's letter perfected an aggravation claim. Dr. Blaylock had repeatedly corresponded with the insurer, indicating that claimant needed the surgery, and in May 1982 he notified the insurer that claimant would be hospitalized in the last week of May for surgery. In his letter claimant attested that he was in fact hospitalized on May 23, 1982 and underwent surgery which kept him hospitalized for several more days.

We believe that Dr. Blaylock's pre-surgery letter, together with claimant's post-surgery letter, clearly indicated to the insurer that claimant was alleging his inability to work due to a worsening of his compensable condition as well as medical verification of the same. Accordingly, in the absence of a denial, SAIF was obligated to commence payment of interim compensation within 14 days of receipt of claimant's letter. SAIF did not deny within this period, and it failed to pay interim compensation; therefore, it is liable for a penalty. For the reasons stated in Zelda M. Bahler, 33 Van Natta 478, 481-482 (1981), reversed on other grounds, 60 Or App 90 (1982), and Janie Smith, 34 Van Natta 1055, 1059 (1982), we find that an additional attorney's fee pursuant to ORS 656.382(1) is not warranted.

ORDER

The Referee's order dated November 17, 1982 is reversed. Claimant's claim for surgery performed on May 24, 1982 for lumbar laminectomy and discectomy is remanded to the SAIF Corporation for acceptance and payment of benefits according to law, including payment for temporary total disability from May 23, 1982 until closure pursuant to ORS 656.268. SAIF shall pay to claimant 25% of the compensation due from June 16, 1982 as a penalty for failure to pay interim compensation. Claimant's attorney is awarded $1,750 as a reasonable attorney's fee for services before the Referee and the Board, to be paid by the SAIF Corporation.

LESTER W. BARKLEY, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 82-02822 & 82-02823
July 29, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Danner's order which: (1) Set aside its March 29, 1982 denial of aggravation of claimant's March 19, 1976 right knee claim; and (2) affirmed a separate denial dated March 29, 1982 which denied that claimant's current right knee condition was related to a compensable July 16, 1980 low back and left leg injury.

On review SAIF contends that either claimant's right knee worsening is solely due to a 1945 non-work-related injury or that the March 29, 1982 denial pertaining to the aggravation claim should have been approved rather than the denial pertaining to the low back and left leg injury, because of the opinion of Dr. Kenneth R. Freudenberg, the treating orthopedic surgeon.

Dr. Freudenberg feels that claimant's current right knee problem originally began with a 1945 non-work-related fracture to the lower right fibula and tibia. That fracture resulted in a malunion of the bones in claimant's right lower leg, causing claimant to develop degenerative arthritis in the right knee joint due to improper bone alignment. We find that, although Dr. Freudenberg had the opinion that claimant's right knee problem was basically secondary to the degenerative joint disease which began with the 1945 injury, Dr. Freudenberg also stated that the disease had been aggravated by claimant's need to favor the right leg due to a work-related July 16, 1980 back and left leg injury. The need to favor his right leg caused an increase in subjective symptoms of the right knee, which eventually required surgery in the form of a right knee medial meniscectomy for a posterior horn tear. Therefore, although we do recognize that claimant had preexisting degenerative arthritis in his right knee, we also find that claimant's need to favor his right leg was due to his intervening left leg injury which caused a worsening in his right knee, eventually necessitating surgery.

We do not find that the worsening and surgery were a result of a "natural worsening" of the March 19, 1976 right knee injury. In 1976, while working for the same employer, claimant injured his right knee while lifting a concrete culvert at work. The claim was accepted, and claimant was treated by an osteotomy of the bones in the lower right leg which corrected the misalignment in the right knee. That claim was closed on May 12, 1977 with an award of temporary disability, but no permanent disability. That award was not appealed. Between 1977 and 1980 there is some evidence that claimant had slight intermittent pain in the right knee, but it is clear that he had no need to seek treatment for his right knee, nor did he lose any time from work due to any right knee disability. It was not until after his compensable low back and left leg injury, which caused him to lean heavily on his right leg, that he began complaining to his doctor of increased right knee pain. As was noted above, this increased pain eventually caused the need for the February 26, 1982 medial meniscectomy.

We find the facts in this case to be very similar to those of Florence v. SAIF, 55 Or App 467 (1981). In that case the claimant had degenerative arthritis in his right knee. He suffered a compensable injury to his left knee which caused him to shift more weight to the right knee, resulting in increased pain and the need for medical services for the right knee. The court found that the right knee condition should be accepted as a part of the accepted industrial injury to the left knee since the injury to the left knee materially contributed to the increased symptoms of the claimant's right knee. The court concluded that the right knee condition was to be regarded as arising out of the compensable injury to the left knee. Similarly, we find that the claimant's right knee worsening in this case was caused by the low back and left leg injury of July 16, 1980. Therefore, we modify the Referee's order to reflect our finding.

ORDER

The Referee's order dated November 12, 1982 is modified.

Regarding WCB Case No. 82-02822, Claim No. D 147572, the denial of aggravation dated March 29, 1982 is affirmed. Regarding WCB Case No. 82-02823, Claim No. D 466388 (low back and left leg injury), the denial dated March 29, 1982, which disclaims any relation of the right knee worsening to the July 16, 1980 injury, is disapproved.

Claimant's attorney is awarded $500 as a reasonable attorney fee on Board review for prevailing on the issue of compensability, payable by SAIF Corporation.

PAUL H. DOUILLARD, Claimant
Evohl F. Malagon, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-02334 & 81-09456
July 29, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Nichols' order which approved the June 21, 1982 aggravation claim denial issued by EBI Companies as insurer for the employer, Trend Veneer, approved the July 1, 1982 aggravation claim denial issued by INA as insurer for Desert Seed Company and found claimant entitled to 25% unscheduled permanent partial disability in relation to his October 1978 Trend Veneer injury, that being an increase of 15% over and above all prior awards and arrangements of compensation relative to that injury.

For his first contention, claimant argues that the Referee erred in finding his current cervical and low back conditions unrelated to either his 1978 Trend Veneer injury or his 1981 Desert Seed injury. Claimant indicates he is not concerned with regard to the question of which of the two potentially liable employers is found responsible, so long as one of them is. For his second contention, claimant argues that if we determine that the Referee was correct in finding his current conditions not compensable, we should find him entitled to a greater award of permanent partial disability, up to and including permanent total disability. Finally, claimant requests that, in the event we agree with the Referee's determination concerning the noncompensability of his current cervical and low back conditions, we remand the matter to the Referee in order to allow him an opportunity to solicit additional opinion evidence from Dr. Schossberger concerning the compensability question.

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

With regard to the issue concerning the compensability of claimant's current cervical and low back conditions, although we find it to be somewhat of a close question, we affirm. There are basically three factors which we find to be particularly convincing.

Our first reason relates to the myelographic and computerized tomography findings contained in the record. Claimant's first myelogram was performed by Dr. Golden in December 1979, approximately one year after his 1978 Trend Veneer injury. The myelogram was interpreted as normal. Following his 1981 injury at Desert

Seed, Dr. Karmy ordered a CT scan to be carried out on the claimant. This test was conducted on February 15, 1981. The findings were moderate changes of spondylosis at L4-5 with minimal change at L5-S1. No evidence of a herniated disc was found. Claimant was found medically stationary on February 19, 1981.

On June 3, 1982, Dr. Schossberger performed a second myelogram on claimant. This myelogram revealed multiple disc abnormalities with L4-5 disc herniation, L5-S1 anulus prominence, herniated C5-6 disc and AP canal defects at C3-4 and C4-5. Although Dr. Schossberger opined that these conditions were the result of the 1978 injury, he was unaware of the previous myelographic and CT scan findings. Dr. Karmy, who was aware of the previous findings, was of the opinion that since the diagnostic studies prior to the June 1982 myelogram were negative, and since the latter myelogram showed multiple defects, this was supportive of his opinion that claimant's problem was due to degenerative disc disease unrelated to either of his injures. Dr. Karmy's opinion does, therefore, appear to be consistent with the facts and is more persuasive than Dr. Schossberger's, who set forth his opinion before he had adequately reviewed prior medical records.

A second reason for our finding relates to the fact that claimant was found to have a herniated disc and additional defects in the cervical area. However, there is nothing in the record which indicates that claimant ever sustained an injury of any kind to the neck. Dr. Karmy found this fact to further support his opinion that claimant's problems are due to nonindustrially-related degenerative disc disease.

The third reason for our agreement with the Referee relates to the fact that there are chart notes from Drs. Tysell and Schafer from February 1978 which indicate that claimant "has had a long history of non-radiating pain in his mid-cervical spine and his lower back." The chart notes also relate that claimant was in an automobile accident some 13 years prior to his examination for which he received multiple cortisone injections and was taking up to 14 aspirin per day. Although claimant denies that he was even involved in such a motor vehicle accident, the chart notes do at least relate that claimant was suffering from cervical and low back difficulties prior to either his October 1978 or January 1981 injuries. Additionally, as noted by the Referee, there are other discrepancies contained in the record which are not adequately explained (for example, the discrepancy concerning the time and nature of claimant's injury at Trend Veneer and the claimant's apparent failure to relate any cervical complaints to Dr. Karmy).

Based on the above, we conclude that the Referee's finding on the compensability issue must be affirmed.

Since we have affirmed that portion of the Referee's order which found claimant's cervical and low back conditions unrelated to his injury, it is unnecessary to address the question of responsibility between Trend Veneer and Desert Seed.

With regard to claimant's second contention, we find that the

extent of claimant's compensable disability relative to his 1978 injury was more than adequately recognized by the 25% awarded by the Referee. We also agree with the Referee that there is no evidence that claimant sustained any permanent disability as a result of his 1981 injury. Claimant's argument relative to permanent total disability is without support in the record. We affirm and adopt the portions of the Referee's order relevant to this issue.

Claimant argues that, in the event we affirm the Referee's determination on the compensability issue, we should remand the matter to the Referee to allow him an oppurtunity to supplement the record with additional material in the form of opinion evidence from Dr. Schossberger. Specifically, claimant argues that a remand is appropriate because:

> "Claimant's attorneys have learned that, after the hearing . . . claimant underwent surgery of the low back by Dr. Schossberger.
>
> "This enabled Dr. Schossberger to further view claimant's low back difficulty and, presumptively, gather additional information about the nature of claimant's difficulty which would be material evidence with regard to the issues before the referee."

Claimant also states that he was not aware until the time of the hearing that Dr. Schossberger did not have a complete medical history concerning the claimant, and that a remand is in order to allow Dr. Schossberger to present another opinion after considering claimant's complete medical file.

With regard to claimant's latter argument, we do not find this to be an adequate basis for remand. Claimant does not allege that prior to the hearing he was not in possession of a copy of Dr. Schossberger's chart notes dated July 7, 1982, in which he indicates that he did not have a complete medical history concerning claimant. Claimant does not indicate why he took no action in light of that statement by Dr. Schossberger. He does not indicate why, with due diligence, he could not have provided the necessary material to Dr. Schossberger prior to the hearing. Robert A. Barnett, 31 Van Natta 172 (1981); Ora M. Conley, 34 Van Natta 1698 (1982). Claimant does not indicate why he did not request the Referee to leave the record open in order to allow him to solicit the additional information from Dr. Schossberger. The only explanation claimant offers is that he was led to believe that the employer(s) would be submitting the necessary information to Dr. Schossberger for his review, and he, therefore, believed it was unnecessary to do so himself. This argument is simply not convincing.

With regard to claimant's argument that remand is appropriate for consideration of possible information obtained following claimant's post-hearing lumbar surgery, we note that we previously addressed a similar argument in Robert Delepine, 35 Van Natta 72 (1983). Four months subsequent to his hearing, the claimant in Delepine underwent lumbar surgery. He then moved the Board for an order remanding the case to the Referee for consideration of any

additional evidence generated as a result of that surgery. Although the compensability of the surgery was in issue at the hearing, the claimant postponed surgery while awaiting the Referee's compensability determination. The Board, quoting from Barnett, supra, denied the motion to remand:

> "We appreciate that the course of an injured worker's recovery can be protracted and dynamic, with medical treatment and vocational training, etc., starting, stopping and starting again. In many cases, this dynamic process undoubtedly presents the practical problem of when are matters stable enough to litigate disputed issues at a hearing. The Board expects the parties to make that decision. 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." Delepine, 35 Van Natta at 73, 74.

The current situation is almost identical to Delepine. Claimant was well aware of the proposed low back surgery prior to the hearing. However, as indicated in Dr. Schossberger's chart notes, claimant determined that he would not proceed with the surgery until after a determination had been made at the hearing concerning compensability. Even if the Referee had determined the compensability issue favorably to claimant, the responsible employer still would not have been required to pay for claimant's surgeries until it had exhausted its avenues of appeal. ORS 656.313(4). In other words, claimant would not actually be certain that the surgery was compensable until a final order had been entered by either the Board, the Court of Appeals or possibly the Supreme Court. Thus, the argument that surgery has been postponed until a determination at a hearing is not a particularly convincing argument to make when requesting remand.

In addition to the above, there is no allegation that claimant actually has come into possession of any additional material from Dr. Schossberger which would be relevant to the issue of compensability. He only indicates that any such material which there may be would "presumptively" be relevant to that issue. Thus, the request is based only on claimant's speculation that such evidence exists or might be generated and that such evidence might possibly be beneficial to his position. We find that it would be inappropriate to allow remand on such a purely speculative basis, and we decline to do so. See Martha Mount, 35 Van Natta 557 (1983).

ORDER

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

RICHARD A. FILONCZUK, Claimant
Lynch & Siel, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10911
July 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Leahy's order which refused to grant him any additional award for unscheduled permanent disability beyond the 30% he previously had received through Determination Orders. Extent of disability is the only issue on review. Claimant contends that he is permanently and totally disabled.

Claimant is a 60 year old man who on September 12, 1979 sustained a compensable injury to his low back when a 500 pound cabinet fell on him. Prior to this injury he had a stable work history. He was diagnosed as having a compression fracture at L4. He was treated conservatively and released to return to his regular work in a nursery on March 3, 1980 by his then treating physician, Dr. Struckman. Dr. Struckman said:

> "I feel this man really is capable of performing any type of activity and feel his fracture is healed and that his pain is largely psychogenic in origin. I find little evidence of organic disease in this man and at this time feel he is capable of returning to work with the limitation that he should do no repetitive lifting of over 50 pounds."

A Determination Order issued on May 27, 1980 granting claimant a 15% disability award. In June 1980 claimant began treating with Dr. Thomas, an orthopedist. Dr. Thomas opined that claimant was not then medically stationary. He notes that claimant had attempted to return to his old job without success. In July 1980 Dr. Thomas noted that objective findings were minimal.

In December 1980 claimant was evaluated for admission to the Portland Pain Center. He was admitted to the pain center in January 1981. Following a week in the pain center he was given outpatient treatment for six weeks. Following the outpatient treatment, Dr. Renholds, of the pain center staff, opined:

> "Mr. Filonczuk indeed has a compression fracture of L4, I believe. He does have severe back pain and bilateral muscle spasm. He also has some degenerative arthritic change. He has pain related to this, attendant muscle spasm and also some sacroiliac pain. I do not doubt that he has pain. I have never seen a pain syndrome so severe related to his particular injuries and x-ray changes. I am certainly willing to give him the benefit of the doubt....
>
> "I believe that he does have a pain syndrome....I do believe that he should make another attempt at going back to work

> for Mr. Klupenger and seeing what can be done in some way to help him once again be productive job wise. I have great doubts whether this will be successful....I think that his attitude and his emotional problems at the moment related to the whole aspect of his injury, make it extremely doubtful that he will be able to return to productive work."

In May 1980 Orthopaedic Consultants evaluated claimant. They opined that his loss of function was mildly moderate and his loss of function due to his industrial injury was mild. They noted, however, a hostile attitude as well as unrelated conditions including a psychological condition, obesity and hypertension.

On June 10, 1981 a Determination Order granted an additional 15% disability award.

In September 1981 Dr. Deena Stolzberg, a psychiatrist, examined claimant. She opined:

> "In my opinion, he has no psychological pathology resulting from his industrial accident with the exception that he appears to be entrenching into a disabled state with continued compensation benefits."

Orthopaedic Consultants again saw claimant in September 1981 and voiced an opinion similar to their earlier report. They noted severe functional interference in the form of refusals, inconsistencies, histrionics, give-way and over-reaction.

The claim was again opened by stipulation and was closed on November 4, 1981 by a third Determination Order which granted no additional award for permanent disability. Claimant has appealed from that Determination Order.

On April 5, 1982 Dr. Thomas opined that claimant "is essentially totally disabled."

Claimant was next evaluated by Dr. Duff, an orthopedic surgeon, who said:

> "His overall level of true physical impairment is difficult to evaluate, but probably in the range of mildly moderate and not progressive. His psychological disability is severe and becoming worse with every attempt to return him to work and a total dependence upon his wife, his medications, his physicians, and the hospital. He would appear to be deteriorating into a completely vegetative state physically and mentally and to require urgent psychiatric care. Whether his psychological state would be ascribable to his work injury and compensable should

> be evaluated by further psychiatric evaluation....However, any attempt to retrain him or return him to work would appear to be absolutely useless."

In July 1982 claimant was evaluated by Dr. Holland, a psychiatrist. Dr. Holland opined:

> "I believe his psychogenic pain disorder is related to his industrial injury, in part. His industrial injury provided the initial nociceptive source, while his basic pre-existing personality structure has impacted upon his injury....I believe there is a significant amount of unconscious deception going on with Mr. Filonczuk and in this way I feel his attitude would be markedly enhanced if her[sic] to return to work.... Since being totally disabled is a state of
>
> mind, in his case, totally unsupported by physical findings, I would say he was disabled by his psychological condition. I view his accident as only one part of a highly interactive process and not the most substantial cause of his concurrent disabling condition."

The Referee found that claimant had failed to sustain his burden of proving permanent total disability. He relied on the work search requirements of ORS 656.206(3), noting that since the latest Determination Order the only work search claimant had made was to accompany his wife to the employment office.

We agree that claimant has failed to satisfy the requirements of ORS 656.206(3). As late as February 1982, claimant's former employer offered to provide a job for him. We held in Keith Phillips, 35 Van Natta 288 (1983), that where a claimant is actually offered a job, he has an obligation to attempt to do that job before he can be found permanently and totally disabled. Because claimant has not attempted to do the job offered by his employer, he has not satisfied ORS 656.206(3). He is, therefore, not permanently and totally disabled.

We disagree, however, with the Referee's conclusion that claimant's psychological problems are not compensable. In Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972), the court said that if a compensable injury materially contributes to a claimant's psychological condition then the condition is compensable. It adopted the following statement from Larson:

> "' [W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable.

> Dozens of cases, involving every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom or personality disorder, have accepted this rule.'" Id at 508 quoting, 1A Larson's Workmen's Compensation Law 622.162, Personal Injury by Accident §42.22.

We are convinced by Dr. Holland's report that claimant's compensable injury was a material contributing cause of claimant's psychological problems. Dr. Holland explains quite cogently how the injury, superimposed upon claimant's preexisting personality structure combined to make claimant the chronically disabled person he appears to be today. We find Dr. Holland more convincing than Dr. Stolzberg because, although she states that claimant has no pathology as a result of his compensable injury, she does not explain why a person such as claimant with a stable work history would become psychologically disabled following a compensable injury if that injury did not in some way affect his underlying psychological condition. We also note that Dr. Renholds apparently believed that claimant has a real pain syndrome which was occasioned by his compensable injury. We find that claimant's compensable injury materially contributed to the psychological condition, which severely disables him.

After comparing this case with other similar cases, and noting that the consensus of the medical evidence is that claimant is severely disabled by his psychological problems, we conclude that an appropriate award is 75% unscheduled permanent partial disability.

ORDER

The Referee's order dated December 17, 1982 is reversed. Claimant is awarded an additional 144° or 45% unscheduled permanent partial disability for a total unscheduled award to date of 75% permanent disability. Claimant's attorney is allowed 25% of this increased compensation as a reasonable attorney's fee, not to exceed $3,000, to be paid out of and not in addition to claimant's compensation.

HOWARD LOCKHART, Claimant
Rolf Olson, Claimant's Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 81-00543
July 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seymour's order awarding an additional 5% unscheduled disability above the 5% previously awarded by a Determination Order and refusing to adjust the amount of claimant's temporary total disability payments. Extent of disability and the amount of temporary total disability are the issues on review.

We affirm and adopt the Referee's order with the following comment. Reports from several doctors were sent to the Board after

the record closed in this case. We have not considered those reports because we are constrained by statute to consider only the record transmitted to us by the Referee. ORS 656.295(5). We also decline to remand the case to the Referee to consider those reports because there has been no showing that they were unavailable through due diligence prior to the time of the hearing. Ora M. Conley, 34 Van Natta 1698 (1982); Robert A. Barnett, 31 Van Natta 172 (1981).

ORDER

The Referee's order dated January 31, 1983 is affirmed.

RICK E. O'DELL, Claimant
Evohl Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 82-06105 & 82-06104
July 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Foster's order which found that the SAIF Corporation's processing of temporary total disability payments pursuant to a June 25, 1982 stipulation was not unreasonable and, therefore, found that an award of penalties and attorney fees for failure to comply with the stipulation was not warranted.

Claimant contends that the late payment of compensation was unreasonable in that the greater portion of the agreed upon compensation was not paid until 29 days after the stipulation was approved. This was 15 days past the 14 day grace period allowed by statute. Claimant further contends that SAIF has made no reasonable explanation for the late payment. Claimant contends that actually no reason was given at hearing for the delayed payment of compensation. It was not until the case came on for Board review that SAIF embraced the Referee's explanation for the late payment -- that being that SAIF needed time to send out a work questionnaire to claimant to determine whether claimant had worked during part of the period during which the compensation was to be paid.

On review SAIF asserts the position that it sent out its work questionnaire to claimant within a reasonable time and that, after receiving that questionnaire back from claimant, it paid claimant the sum of compensation that was still owing as quickly as possible.

Claimant replies that SAIF had ample opportunity to determine the dates claimant may have worked such that the delay of payment of the major portion of that compensation, almost a full 30 days later, was unreasonable. Claimant points out that great hardship was placed on claimant due to the delay and that had any overpayment been made due to prompt payment of the compensation SAIF could have recovered that overpayment from future benefits. Claimant further states that the workers' compensation laws are written with the purpose in mind that workers should not be required to absorb the hardship of delayed payment. Rather, the insurer should shoulder the burden of underwriting prompt claim processing.

We agree with claimant and award a penalty and attorney's fee due to SAIF's unreasonable delay of payment of compensation. The timing of events was as follows: On June 25, 1982 a stipulation was entered into by the parties which began time loss payments effective November 18, 1981 and which continued the time loss payments until the claim was again closed pursuant to ORS 656.268. The stipulation also provided that claimant would be paid $500 as a penalty assessed against SAIF. On June 25, 1982 claimant had personally driven to Salem with the stipulation for approval, received approval at the Hearings Division and personally presented it to SAIF that same date asking for his payment at that time. SAIF agreed to pay the $500 penalty that day, but refused to pay any temporary disability compensation at that time stating that they wanted to determine if there were periods of time after November 18, 1981 to the present that claimant had been working. There is no evidence that SAIF attempted to find out that information at the time claimant was in their office. At that point, SAIF had 14 days within which to begin payment of the compensation due pursuant to the stipulation. However, it was not until the 14th day, July 8, 1982, that SAIF even sent the questionnaire to claimant asking him what dates he may have worked during the period after November 18, 1981. Also at that time, on the 14th day SAIF did make partial payment for the time loss that was due from November 18, 1981 to January 1, 1982 ($693.52). Claimant sent the questionnaire back to SAIF and it was received by SAIF on July 14, 1982. Not until July 23, 1982 did claimant receive the remainder of the temporary disability compensation which made his payments current up to date ($3,003.21). SAIF has given little or no explanation of why their investigation of claimant's work could not have been carried out more promptly, especially in the face of claimant's personal appearance at their office and request for speedy processing of his claim.

We find that the payment made on July 23, 1982 was made 15 days later than the 14 day grace period allows and that there was little explanation given for the delay other than SAIF stated they just needed a certain amount of time in which to process the information regarding claimant's periods of work after November 18, 1981. We agree with SAIF that a claimant bears some responsibility in aiding the insurer in the investigation of a claim, Frank Gonzales, 34 Van Natta 551 (1982), and we find that claimant made reasonable efforts to be available to the insurer to process payment pursuant to the stipulation more quickly. Therefore, we find that SAIF is liable for a penalty equal to 10% of the amount that was paid late to claimant on July 23, 1982.

ORDER

The Referee's order dated November 5, 1982 is reversed. SAIF shall pay claimant a penalty for unreasonably delayed payment of compensation equal to 10% of $3,003.21; and further shall pay claimant's attorney $200 as a reasonable attorney's fee pursuant to ORS 656.382(1).

VIRGINIA M. QUINTON, Claimant
Michael B. Dye, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 82-02473
July 29, 1983
Order on Review

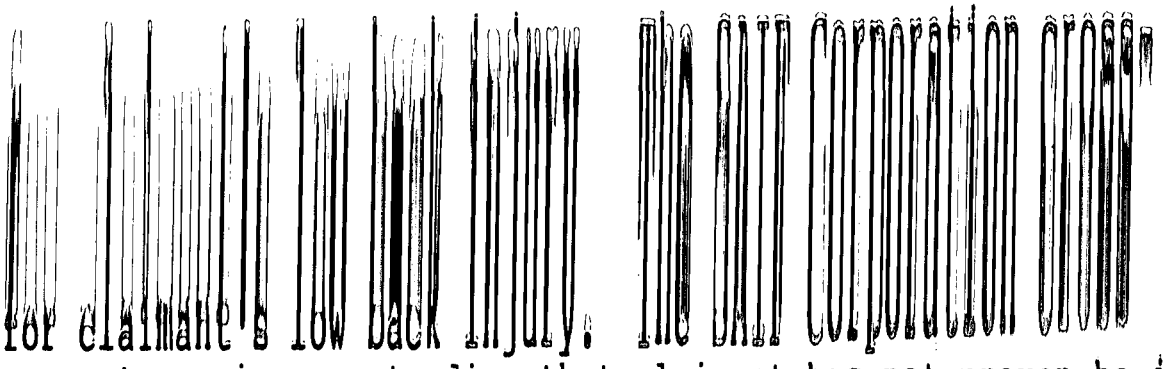
Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee McCullough's award of 40% unscheduled permanent partial disability granted claimant for her low back injury. The insurer asserts that the award is excessive. We agree.

Based on the medical evidence in the record we find that claimant has suffered a 10% impairment. The guidelines set forth in OAR 436-65-60 et seq., yield the following values for claimant's social/vocational factors. Claimant was 34 years old at the time of the hearing (-1 value). She has completed the 10th grade and earned a GED certificate (0 value). Claimant was working as a housekeeper at the time of her injury, which has an SVP of 3 (+3 value). We believe the work claimant was performing at the time of her injury should be catagorized as heavy and the restrictions placed on her future work activities limit her to light work (+10). The psychological/emotional factors are unremarkable (0 value). Claimant is apparently of normal intelligence (0 value). A compilation of the above factors indicates claimant has 26% of the labor market open to her (0 value). After combining the above factors, the guidelines indicate claimant has suffered a 20% unscheduled permanent partial disability. Considering the guidelines, the record as a whole and other cases similar to this one, we find that the Referee's award was excessive and that claimant is entitled to an award for 20% unscheduled disability.

ORDER

The Referee's order dated December 21, 1982 is modified. The Referee's award of 40% unscheduled permanent partial disability is reduced to an award of 20% unscheduled permanent partial disability for claimant's low back injury. This is in lieu of the award provided in the November 1, 1982 Determination Order. The attorney's fee allowed by the Referee is adjusted accordingly. The remainder of the Referee's order is affirmed.



requests review, contending that claimant has not proven he is entitled to any award for permanent disability.

In applying the facts of this case to the disability rating guidelines at OAR 436-65-600, et seq., and comparing this case to similar cases, we find that claimant has sustained permanent disability due to his compensable injury, but that he would be adequately compensated by an award of 48° for 15% unscheduled low back disability. Therefore, we modify that portion of the Referee's order to reflect our finding.

ORDER

The Referee's order dated November 30, 1982 is modified. Claimant is awarded 48° for 15% unscheduled low back disability in lieu of that awarded by the Referee. Claimant's attorney's fee should be adjusted accordingly.The remainder of the Referee's order is affirmed.

WINONA M. SMITH, Claimant
Pozzi, et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 82-04096
July 29, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Gemmell's order which increased claimant's award of unscheduled permanent partial disability to 50% for her low back injury. The insurer contends that the award is excessive.

Based on the medical evidence in the record, we find that claimant has suffered a 15% impairment. The guidelines set forth in OAR 436-65-60, et seq., yield the following values for claimant's social/vocational factors. Claimant was 55 years old at the time of the hearing (+9 value). She completed high school and attended two years of Bible school. We do not believe her post-high school education has contributed significantly to her employability and thus, assign a 0 value for her education. Claimant was working as a machine operator, which has an SVP of 2 (0 value). Claimant was doing heavy work at the time of the injury and is now restricted to light work (+10 value). The

DARWIN TING, Claimant
Myrick, et al., Claimant's Attorneys
Spears, et al., Defense Attorneys

WCB 81-10780
July 29, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The self-insured employer requests review of those portions of Referee Brown's orders which set aside its denial of claimant's occupational disease claim for a "disease" which the Referee refers to as "stress" or "overwork." The issue is compensability.

Claimant was employed as a truck driver for Pacific Motor Trucking on February 4, 1981 when he was examined by Dr. Russell because of a rash on his arms and legs. Dr. Russell noted that claimant felt he was under emotional pressure at work. Claimant was again examined by Dr. Russell on April 14, 1981, complaining of a severe cough which caused him to pass out at work. The cough was attributed to claimant's cigarette smoking. Claimant was referred to Dr. Wheatley, an otolaryngologist. Dr. Wheatley diagnosed an ear infection and prescribed antibiotics on April 16, 1981.

Claimant's ear infection eventually resolved and Dr. Wheatley referred claimant to Dr. Kelly. Dr. Kelly's May 12, 1981 chart note indicates that claimant:

> ". . . has numerous questions surrounding his health especially regarding stress which has been ongoing on his job. He states he is quite angry concerning a supervisor who is constantly causing him some difficulty and feels that he is trying to cause [claimant] to lose his job. He states this kind of stress is causing him some worry and he wonders if this could be leading to possibly some problems with his heart."

Dr. Kelly noted that the claimant felt there was "something wrong" in his brain and wanted further evaluation. Dr. Kelly's September 14, 1981 chart note indicates that claimant had returned with the same complaints that he had in May, and that he:

> ". . . continues to complain of dizziness whenever he is standing up and also significant problems with work related anxieties. Wonders if he is being 'worked too hard.' Also wonders if there is any fullness in his head that might be explained by possible tumor."

On September 18, 1981, Dr. Kelly referred claimant to Dr. Campagna. Dr. Kelly advised Dr. Campagna:

> "The patient is a very exasperating one and you will appreciate the level of his anxiety following discussion with him. He gives some symptoms which may be paranoid

ideation. The consultation for which I am sending him to you is primarily based on my frustration level but also upon his insistence on finding out 'everything' to do with his particular problem. He is certain that his particular physical problems now will most likely render him unable to work. As you have ascertained from the above, I have found no discernible specific neurological problem with this man and in view of his insistence am sending him to you for second opinion along these regards."

Dr. Campagna reported that claimant related that he had problems with "head pressure" for about one and one-half years and that he felt the problem could be related to his being "overworked." Claimant also complained of nausea, lack of coordination, memory loss, head pain and dizziness. Dr. Campagna diagnosed cervical cephalgia secondary to cervical spondylosis at C5-6.

Claimant thereafter filed an 801 form indicating that he suffered a "back injury caused while driving tractor and semi[trailers] down the highway. Too much pounding over a prolonged period of time." The employer denied this claim on November 16, 1981. The Referee affirmed this denial, and claimant has not appealed that decision. Any further reference to claimant's back condition in this order is thus historical in nature only.

Claimant continued to treat with Dr. Campagna for his cervical condition. On March 25, 1982 Dr. Campagna reported that claimant had returned to give him an "addendum" to the history which he previously related:

"He states when the original history was given he could not specify an actual on the job injury but did feel his symptoms could be from being 'overworked.'

"He states his symptoms have continued since the original history of 9/29/81 and have worsened. He states he feels his symptoms are greatly aggravated by his work and were actually developed from his work. He states for approximately two years that he has been driving cab-over trucks . . . He states in the two year period he would make runs to Seattle three times a week. He states the ride was rough and he was bounced up and down quite a bit. He states he would sometimes have to drive old model trucks with poor air cushioned seats which don't always function properly and cause you to feel every bump.

"He also states that in some trucks seats have been reupholstered and peak of

upholstery rides right at the end of the tailbone. He states he would not get proper rest and relaxation between trips to and from Seattle. He states he was pushed hard during this two year period and states if the truck ran, you made the trip.

"He states, consequently, with over work and poor conditions, his symptoms have developed and worsened. He states he presently continues to have pressure in the neck which causes pressure on top of the head and occasional sharp headache pain."

On July 6, 1982 the employer issued a second denial which denied responsibility for "pressure in the head, neck pain and headaches which you attribute to stress and overwork while employed by Pacific Motor Trucking Company."

On August 5, 1982 claimant was examined by Dr. Tennyson, a neurosurgeon. Dr. Tennyson noted claimant's various complaints and recited claimant's belief that these "symptoms" were related to his work. Dr. Tennyson stated that claimant's symptoms were a reflection of a depressive reaction.

At the hearing, claimant contended that his symptoms were a result of having to drive a truck long hours, difficulty in getting his vehicle repaired when necessary, disagreements with his supervisors and the fact that the employer's Portland drivers received better treatment than the Medford drivers (of which claimant was one).

Claimant's terminal manager, Wayne Conner, testified at the hearing. The Referee found his testimony to be totally credible. Mr. Conner indicated that although claimant was a chronic complainer, he had several opportunities to take himself off the Seattle run if he had so desired, but he never availed himself of any such opportunity. Mr. Conner also testified that he had offered to give claimant time off anytime he felt he was not getting enough rest, and that any more favorable treatment the Portland drivers received was due solely to the terms of the Portland union contract. Claimant testified that he understood the contract problem and did not disagree with the employer abiding by the union contract. (The Medford drivers were covered by a different union contract.)

The Referee concluded that the "overwork" claim was compensable. We are uncertain on just what basis the Referee so concluded. He indicated that the medical evidence was very imprecise as to just what condition claimant was suffering from but concluded that, "taken as a whole," it was sufficient to establish a compensable occupational disease claim. We disagree and reverse.

We perceive the main issue in this case to be whether claimant has proven that he actually suffers from a disease, much less a compensable occupational disease. The Referee was certainly correct in noting that the medical evidence is imprecise as to just what condition, if any, claimant is suffering from. The record

establishes only that claimant has made a number of complaints to the various physicians who have examined him. No physician has indicated that any of claimant's complaints require any type of treatment. There is nothing indicating that claimant ever suffered any disability as a result of this "stress" or "overwork." No physician has opined that claimant is suffering from any type of physical or psychological condition related to his employment. As we noted in Cynthia K. Bowman, 33 Van Natta 582, 583 (1981):

> "Not every physical discomfort of life is a disease. Claimant's intermittent headaches, nausea, nervousness, etc., are not established by this record to be manifestations of any known disease."

Such is the case here. The record reflects that claimant has nothing more than numerous somatic complaints with no associated physical or psychological condition. At least on this medical record, we do not believe somatic complaints or "discomforts" alone constitute a compensable disease.

Even if we were convinced that claimant did suffer from some type of disease, there is nothing in the record which would support a conclusion that it is related to his employment. There is not a single medical opinion to that effect in the record. The most that any physician does is to repeat claimant's belief that his symptoms are related to his work. This is generally insufficient. See Oakley v. SAIF, 63 Or App 433 (1983).

It is unfortunate that claimant is dissatisfied with his job. It is unfortunate that he is unhappy driving older model trucks; that he is unhappy over the Portland drivers receiving some preferential treatment by virtue of their union contract; that he does not like the upholstery in the trucks he drives; or that he feels he has been working too hard. However, we are not aware that being dissatisfied with one's job, with nothing more, has ever been held to be a compensable occupational disease, and we are unwilling to be the first to so hold.

ORDER

The Referee's orders dated August 31, 1982 and September 20, 1982 are affirmed in part and reversed in part. Those portions of the Referee's orders which set aside the employer's July 6, 1982 denial and awarded claimant's attorney an associated attorney's fee of $1,000 are reversed, and the employer's denial is reinstated. The remainder of the Referee's orders is affirmed.

WILLIAM DAY, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-06780
August 3, 1983
Order Denying Motion to Correct Transcript

Claimant has moved for an order correcting the transcript of the hearing in this case. Based upon the affidavit of the court reporter, the Board finds there is insufficient evidence to support correcting the transcript. Accordingly, the motion is denied.

Claimant has 20 days from the date of this order in which to filed his Respondent's brief in this matter.

ORDER

IT IS SO ORDERED.

EDWARD NIXON, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 83-0178M
August 4, 1983
Own Motion Order

Claimant has requested that the Board exercise its own motion authority and reopen his June 19, 1961 industrial injury claim for payment of medical expenses allegedly related to his original injury. Claimant's aggravation rights have expired.

Claimant's injury occurred prior to January 1, 1966, the effective date of ORS 656.245, which provides workers injured on and after that date with continuing rights to compensation for reasonable and necessary medical services for treatment of conditions related to their original injury. Claimant has no such continuing rights and must address the Board pursuant to ORS 656.278 in order to obtain this compensation. William A. Newell, 35 Van Natta 629 (1983). The SAIF Corporation has refused to voluntarily reopen the claim for payment of medical benefits pursuant to ORS 656.278(4), for the stated reason that there is no curative treatment indicated in this case.

As a result of claimant's original injury, he suffered a compression fracture of the twelfth thoracic vertebra. Surgery was performed in 1965, and a second surgical procedure followed in 1971.

Claimant previously has been granted own motion relief, and his total disability award is equivalent to 60% of an arm for unscheduled disability. Claimant has been diagnosed as having a chronic pain syndrome, and it is rather apparent that his pain syndrome is materially attributable to the residuals of his original industrial injury. Claimant uses a TNS unit with four electrodes in the mid portion of his back. He uses small amounts of painkillers and muscle relaxants prescribed by his treating physician, Dr. Leman. The batteries, tape, and other equipment for maintenance of the TNS unit, as well as claimant's prescription medications, are the subject of claimant's request for own motion relief. In addition, Dr. Leman has recommended that claimant be evaluated by a pain clinic in Portland, which SAIF presumably has failed to authorize. Claimant was examined by

the Orthopaedic Consultants on referral by SAIF in May 1983. The Consultants commented that claimant's chronic pain syndrome would be unimproved by additional treatment and recommended no curative treatment.

Claimant makes no claim for reopening for payment of temporary total disability or additional permanent disability benefits, and it is questionable based upon the record presently before us, whether claimant could substantiate a claim for such benefits. However, it is quite apparent that claimant is seriously disabled as a result of his original industrial injury and that the medical expenses he has incurred and for which he seeks payment are reasonable, necessary and related to his industrial injury. We, therefore, find claimant is entitled to payment of compensation for the medical services forming the basis of this request for own motion relief.

With regard to Dr. Leman's recommendation that claimant be referred for evaluation at a pain clinic in Portland, on questions concerning the need for medical treatment, including referral to a pain clinic, the Board generally defers to the claimant's treating doctor in the absence of some compelling reason not to do so. Glen R. Pettey, WCB Case No. 82-02562 (July 8, 1981); Lucine Schaffer, 33 Van Natta 511 (1981).

There are different considerations that apply when a claimant seeks medical services by exercise of the Board's own motion authority, as compared to a claimant who has continuing rights to receive such medical services pursuant to the provisions of ORS 656.245. Although Petty and Schaffer and other cases like it have been decided in the context of claims involving medical services pursuant to ORS 656.245, deference to a treating physician's recommendation for certain treatment is nevertheless appropriate, in the absence of a compelling reason to act otherwise, even in cases arising under ORS 656.278, particularly where the recommended treatment is clearly related to the original industrial injury.

Claimant is sixty-five years old. Orthopaedic Consultants noted that he is markedly restricted because of pain resulting from his chronic pain syndrome. His pain syndrome in turn is materially caused by his industrial injury. It appears that claimant enrolled in a pain clinic program approximately ten years ago. Although Orthopaedic Consultants has indicated that no curative treatment is recommended, they have not expressed an opinion concerning Dr. Leman's suggestion for referral for a pain clinic program. Our present understanding of current pain clinic "treatment" is that it is not curative in the sense of being directed toward improvement of a person's existing condition; but that it is intended to instruct individuals experiencing chronic pain in methods that will assist them in coping with their pain problem and thereby live a better life, in spite of serious disabilities.

Based upon the foregoing, we find that Dr. Leman's suggestion that claimant be evaluated at a pain clinic is reasonable; and if upon evaluation the pain clinic staff finds that claimant is a good candidate for enrollment in a program, we find that SAIF should pay for claimant's pain clinic treatment.

ORDER

Claimant is awarded compensation for medical services and SAIF is directed to pay claimant's outstanding bills for medical services, including prescriptions for medication and maintenance of claimant's TNS unit. SAIF shall continue to be responsible for payment of medical expenses reasonably and necessarily incurred as a result of claimant's original industrial injury. SAIF further is ordered to refer claimant for evaluation at the Portland pain clinic of Dr. Leman's choosing; and if, upon evaluation, the pain clinic staff finds that claimant will benefit from a program, SAIF shall pay for claimant's enrollment in the pain clinic program.

DONNA J. CAMPBELL, Claimant
Elliott Lynn, Claimant's Attorney
Breathower & Gilman, Defense Attorneys

WCB 81-00167
August 5, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Pferdner's order which: (1) Found that left shoulder surgery should not be authorized at this time; (2) found that claimant is not entitled to an award of permanent disability over and above that awarded in the October 29, 1981 Determination Order (a total of 20% unscheduled disability compensation for claimant's left shoulder and neck, and 5% scheduled permanent disability compensation for her left arm); and (3) found that claimant's condition was medically stationary as of October 9, 1981. Claimant also has submitted a motion to remand this case to the Hearings Division for the taking of additional evidence, or in the alternative, has made a motion to have additional medical evidence admitted on Board review.

The Board does not have the authority to consider evidence that was not offered at hearing. Therefore, we deny claimant's alternative motion for admission of additional medical evidence before the Board. Secondly, our examination of the medical records that claimant would like to have considered on remand shows that, although the additional evidence may be relevant to the case, there is no showing that this evidence could not have been procured with due diligence before the hearing. The mere fact that the evidence was not available because it had not been requested prior to the hearing is insufficient. Since we have not been provided with a sufficient explanation of why the medical reports were not obtainable prior to the hearing, we must deny claimant's motion to remand the case for the taking of additional evidence. Ora M. Conley, 34 Van Natta 1698 (1982); Robert A. Barnett, 31 Van Natta 172 (1981).

We affirm the Referee's order with the exception of his holding regarding the extent of disability suffered by claimant due to her left shoulder injury. Claimant can abduct and flex her shoulder only to 70°. She has diffuse weakness and moderately disabling pain in the shoulder. Additionally, she has undergone a discectomy and fusion at the C5-6 cervical spine level due to her shoulder injury. Her cervical right and left rotations are limited to 75% to 80% of normal.

Claimant is now limited to light or sedentary work, whereas she was able to perform at a medium strength job prior to her injury. Claimant's age is 38 and she has a high school education with one or two months of business college. Her work history is limited to brief periods as a hospital receptionist, a computer data entry operator and a warehouse person. Considering all these factors, applying the guidelines found at OAR 436-65-600 et seq. and comparing this case to similar cases, we find that claimant would be compensated more adequately by an award of 30% unscheduled disability compensation for her left shoulder and neck disability, an increase of 15% over that awarded by the October 29, 1981 Determination Order.

ORDER

The Referee's order dated July 12, 1982 is affirmed in part and reversed in part. Claimant is awarded 96° for 30% unscheduled disability compensation for her left shoulder and neck. This award is in lieu of prior awards. The remainder of the Referee's order is affirmed. Claimant's attorney is allowed 25% of the increased compensation awarded by this order as a reasonable attorney's fee, not to exceed $3,000, payable out of and not in addition to claimant's compensation.

RICHARD A. FILONCZUK, Claimant
Lynch & Siel, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10911
August 5, 1983
Amended Order on Review

The Board has noted an error in its Order on Review of July 29, 1983. Accordingly, we supplement and amend our order as follows.

The Order on Review does not make it clear that the SAIF Corporation denied compensability of claimant's psychological condition by a denial dated August 23, 1982. The effect of the Order on Review is to overturn that denial. Consequently, attorney's fees are payable by SAIF rather than out of compensation as our order stated.

ORDER

The Order on Review dated July 29, 1983 is amended to provide that claimant's attorney is awarded an insurer-paid attorney's fee of $2,000 in lieu of the attorney's fee awarded in that order. The July 29, 1983 Order on Review is republished in all other respects.

WILLIAM F. KELLY, Claimant
Robert L. Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-11105 & 82-03383
August 5, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of that portion of Referee Quillinan's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim for a herniated cervical disc. (There is some reference in the record to claimant's cervical condition possibly being a consequence of his September 1980

low back industrial injury, which is in accepted status; however, as we understand claimant's arguments on review, the cervical claim is being pursued on an occupational disease theory.)

We note first that claimant has submitted additional evidence with his brief on review. We cannot and have not considered this evidence in our review of this case. Brown v. SAIF, 51 Or App 389 (1981). Viewing claimant's submission of additional evidence as an indirect request to remand to the Referee, we decline to remand for the reasons stated in Ora M. Conley, 34 Van Natta 1698 (1982), and Robert A. Barnett, 31 Van Natta 172 (1981).

We are not sure of the relevance of the Referee's analysis based on Weller v. Union Carbide, 288 Or 27 (1979). Upon discovery that claimant had a herniated cervical disc, it would seem to be rather clear that the underlying pathology of his neck condition had "worsened."

We think the major issue is causation. Claimant's neck problems first appeared in November or December of 1981 in connection with, according to most medical histories in the record, some form of flu infection. For several months before the neck symptoms became apparent, claimant had been doing lighter work because of limitations imposed due to his September 1980 low back injury. There was no traumatic incident or the onset of pain in connection with claimant's work; his neck symptoms gradually worsened between about November 1981 and May 1982. Judging by the number of times that various doctors comment on it, we infer that there is some suspected connection between claimant's flu infection and his herniated cervical disc. All doctors' references to the possibility of work causation are just that: speculation about possibilities. On this record, we are not persuaded that claimant established a major-causation link between his reduced work activities and his herniated cervical disc by a preponderance of the evidence.

ORDER

The Referee's order dated August 31, 1982 is affirmed.

DANIEL J. CANNON, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Schwabe, Williamson, et al., Defense Attorneys

WCB 82-02247
August 11, 1983
Interim Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests and the insurer cross-requests review of Referee Pferdner's order in this enforcement proceeding. We understand the issues now before us to be: (1) Whether the Referee correctly imposed a 25% penalty on approximately four months of time loss that the insurer did not timely pay after a Referee's order in a prior proceeding ordered claimant's claim accepted; (2) whether claimant is entitled to additional time loss in addition to the four months previously paid and, if so, whether a penalty is appropriate for nonpayment; (3) whether, in any event, the Referee erred in this case by assessing a penalty on compensation possibly to be awarded in the future by Determination Order; and (4) whether the insurer timely paid for claimant's medical services and, if not, whether a penalty is appropriate.

We find the procedural facts to be as follows:

Late October 1979: Claimant injured his back while lifting at work. A claim was filed and denied.

January 28, 1982: A Referee issued an order in a prior proceeding, WCB Case No. 80-03401, that set aside the insurer's denial. In the kind of general language that seems to often plant the seeds of further litigation, in that proceeding the Referee ordered: "The case is remanded to the employer for processing under the Workers' Compensation Law of the State of Oregon."

March 5, 1982: The insurer paid claimant compensation for temporary total disability for the period January 22, 1980 to May 20, 1980. There is no explanation in the record for the January 22, 1980 starting date, but we do not understand claimant to take issue with that date. Rather, most of the present dispute centers on whether the insurer should have continued to pay time loss beyond May 20, 1980.

April 23, 1982: The insurer paid all outstanding medical bills for claimant's treatment in connection with this claim.

I

We start with consideration of the duties imposed by the January 28, 1982 Referee's order in the prior proceeding and confront a difference in the applicable rules governing payment of time loss and payment for medical services.

As for temporary disability, OAR 436-54-310(3)(e) provides that payment is timely if made "no later than the 14th day after . . . the date of any litigation order which orders temporary disability." This rule was adopted by the Workers Compensation Department. It has become fashionable in some quarters to cite SAIF v. Baer, 60 Or App 133 (1983), for the proposition that rules adopted by the Department are not binding on the Board. We nevertheless feel that OAR 436-54-310(3)(e) is applicable in this case.

Under this administrative rule, the insurer was obligated to pay claimant compensation for temporary disability not later than the fourteenth day after the January 28, 1982 Referee's order. Payment on March 5, 1982 was thus not timely.

As for medical services, there are a variety of Department rules that address timely payment -- rules that we discussed at some length in Billy J. Eubanks, 35 Van Natta 131 (1983), basically concluding that bills for medical services must be paid or denied within 60 days of notice or knowledge of the claim. The present case requires some refinement of what we said in Eubanks. All Department rules about timely payment for medical services have to be consistent with statutes. ORS 656.313(3) provides that disputed medical service bills should not be paid by an industrial insurer until "the issue of compensability . . . has been finally determined." ORS 656.289(3) provides that a Referee's order does not become final until 30 days have passed without any party requesting Board review. Thus, when a Referee's order concludes directly or indirectly that bills for medical services must be paid, there is no actual duty to pay until that order becomes

final, which cannot be sooner than 30 days after the Referee's order was issued.

Therefore, whatever the applicable rule about the time limit for paying medical services after litigation order, it is important to first understand that "day one" of the limitation period is the thirty-first day after the date of the litigation order, if the order has not been appealed.

The question of the applicable time limit in which medical services ordered paid by litigation order must be paid is far from clear. None of the Department's rules -- OAR 436-54-245(3), 436-54-305, 436-54-310(7) and (8), 436-69-501, and 436-69-801(5) and (7), all discussed in Eubanks -- really address this question. And we are not aware of an answer from any other source. Left to our own devices, then, we conclude that payment for medical services ordered paid by litigation order is reasonably timely if paid within 60 days of the finality of such an order or, stated differently, if paid within 90 days of an unappealed litigation order. In this case, judged by that standard, the insurer's April 23, 1982 payment of medical services pursuant to a January 28, 1982 litigation order was timely.

We appreciate that the distinction we here draw between timely payment of temporary disability (within 14 days of litigation order) and timely payment of medical services (within 90 days of unappealed litigation order) may seem hypertechnical. However, that technicality is built into ORS 656.313. Temporary disability must be paid pending review and appeal. ORS 656.313(1). Thus, for purposes of payment of temporary disability, the finality or lack of finality of a litigation order is irrelevant: This type of compensation must be paid even if there is a request for review or appeal of the litigation order. In sum, the duty to pay compensation for temporary disability is activated by the first litigation order that requires payment; and the Workers Compensation Department, operating within what we regard as its proper rulemaking sphere, has said payment must be made within 14 days of the date of the litigation order. By contrast, the legislature has provided that disputed medical services do not have to be paid by an industrial insurer pending review or appeal. ORS 656.313(3). The duty to pay compensation for medical services is only activated by the finality of the ultimate litigation order that requires payment.

It follows that claimant is not entitled to a penalty based on untimely payment for medical services because the payment was timely. It also follows that claimant is entitled to a penalty for untimely payment of time loss because the insurer's March 5, 1982 payment was not made within 14 days of the Referee's January 28, 1982 order in WCB Case No. 80-03401, and the insurer offers no explanation or excuse for the delay.

As to the amount of the penalty, we concluded in Zelda M. Bahler, 33 Van Natta 478 (1981), rev'd on other grounds 60 Or App 90 (1982), that when there is a delay in paying compensation due, a delay of up to 25 days would generally justify a penalty of up to 15% of the compensation due. The delay in this case was less than 25 days, and we see no reason to depart from the Bahler guidelines.

It follows that the Referee's assessment of a 25% penalty on the compensation paid on March 5, 1982 was excessive and that penalty should be reduced to 15%.

II

Another aspect of the penalty ordered by the Referee can be disposed of briefly. The Referee assessed as a penalty "an amount equal to five percent of any additional temporary total disability compensation hereafter found to be due by the Evaluation Division of the Workers' Compensation Department as evidenced by the Determination Order to be issued in this claim." Since the date of the Referee's order, we have concluded that penalties cannot be assessed as a percentage of compensation determined in the future to be due. Alfred M. Norbeck, 35 Van Natta 802 (1983).

III

We turn to the question of whether the insurer was justified in only paying time loss to May 20, 1980. In support of its action, the insurer first relies on Dr. Wisdom's May 9, 1980 report of his April 16, 1980 examination of claimant:

> "I encouraged him to continue with his exercises and begin some walking in the area around his house and try to increase his endurance. I advised him that I had little more to offer him, but as his stamina increased he should be able to notice progressive improvement and return to work in the near future. I suggested that he consider returning to work in about 4 or 5 weeks. I would suggest that if he is not capable of doing this that an independent examination be carried out on this individual with an eye toward claim closure."

The May 20 time loss cut-off date selected by the insurer was "about 4 or 5 weeks" after Dr. Wisdom's examination of claimant that led to these comments.

A medical release to return to regular work does authorize an insurer to terminate compensation for temporary disability. However, we concluded in John R. Daniel, 34 Van Natta 1020 (1982), that a work release should be clear and unambiguous before temporary disability compensation is terminated. Judged by the Daniel standards, we think Dr. Wisdom's above-quoted comments are too equivocal to justify terminating claimant's time loss on May 20.

And it matters not whether we would regard Dr. Wisdom's comments as a finding that claimant would be medically stationary "in about 4 or 5 weeks" because, even if claimant were stationary, that would only authorize claim closure; it would not authorize the insurer to terminate time loss compensation. Mark L. Side, 34 Van Natta 661 (1982).

The insurer next relies on Dr. Robinson's report, for Orthopaedic Consultants, dated October 12, 1982:

> "I would feel that his condition should probably be considered stationary since about May of 1980 when last seen by Dr. Wisdom. According to the patient's own story, there has been no overall change in the fluctuating situation of his back since that time.
>
> "Also, I would think that he would have been able to be released in about May of 1980, though probably not to his regular work, if it required lifting 115 lbs. frequently.
>
> "In my opinion the patient's condition remains medically stationary and he can return to work now as soon as he can find a job, though he may need some help to find same.
>
> "Occasionally heavy lifting he could do, but repeated heavy lifting he should avoid."

Aside from the several qualifications in Dr. Robinson's expression of his opinions, we have grave doubts about the ability of a doctor who first examines a worker in 1982 to be able to offer any illuminating opinion on the worker's status in 1980. We are not persuaded that Dr. Robinson's 1982 report supports terminating claimant's time loss on May 20, 1980.

In justification of its action, the insurer primarily relies on claimant's vocational history after May 20, 1980. Although, as discussed more fully below, the matter is not well-developed in the record, between about May 1980 and the October 1982 hearing claimant was generally working or collecting unemployment compensation. Apparently claimant went on unemployment compensation during the summer of 1980. Claimant then worked at one job for about a week in August 1980. Claimant then worked full-time, even with some overtime, as a gas station attendant for "a year and a couple of months," apparently from late 1980 or early 1981 until early 1982. Claimant testified at the hearing that he had been receiving unemployment compensation since he left the gas station job.

Despite this vocational history after May 1980, claimant seemingly argues that under the terms of the January 1982 litigation order in WCB Case No. 80-03401 he is entitled to compensation for temporary total disability continuously since May 1980 until his claim is properly closed. The insurer responds that claimant is entitled to no workers' compensation benefits after May 1980 because he was either earning wages or receiving another form of compensation premised on ability to work.

We disagree with both parties. It is possible for a worker to be both earning wages and entitled to workers' compensation

benefits. That possibility is recognized by ORS 656.212 and OAR 436-54-222. The concept is called temporary partial disability. This form of benefits is calculated as follows:

> "The rate of temporary partial disability compensation due a worker shall be determined by:
>
> "(a) subtracting the post-injury wage earnings available from any kind of work; from
>
> "(b) the wage earnings from the employment at the time of, and giving rise to, the injury; then
>
> "(c) dividing the difference by the wage earnings in (b) to arrive at the percentage of loss of earning power; then
>
> "(d) multiplying the current temporary total disability compensation rate by the percentage of loss of earning power." OAR 436-54-222(1).

In Edwards v. Employment Division, 63 Or App 521 (1983), the Court of Appeals recognized the possibility that post-injury receipt of unemployment compensation could be treated the same way as post-injury receipt of wages. The court noted that workers' compensation benefits for temporary total disability are premised on an inability to work; that unemployment compensation benefits are generally premised on being able to work; and that, therefore, receipt of one form of benefits can give rise to an inference of nonentitlement to the other form of benefits. The court also noted the rather common situation in which an industrially injured worker is released to modified work, but no modified work is available in the employment that gave rise to the industrial injury. Such a worker, as we understand the Edward decision, may be entitled to receive both unemployment compensation and workers' compensation in the form of temporary partial disability benefits: ". . . a worker receiving temporary partial disability under ORS 656.212 . . . may be 'able to work' [within the meaning of the unemployment compensation statute, ORS 657.115(1)(c)]." 63 Or App at 525.

We conclude the court's suggestion in Edwards represents a reasonable and workable solution to the recurring problem of an injured worker's receipt of different forms of benefits. Until the worker has been released to regular work or has been found medically stationary pursuant to ORS 656.268, the worker should receive workers' compensation benefits in the form of compensation for either temporary total or temporary partial disability. Receipt of post-injury wages should be calculated into a worker's temporary partial disability rate in accordance with OAR 436-54-222. "If the post-injury wage earnings [or unemployment compensation benefits] are equal to or greater than the wage earnings at the time of injury, no temporary disability compensation is due." OAR 436-54-222(2). If post-injury wages or

unemployment benefits are less than wages at the time of injury, temporary partial disability should be paid to make up the difference based on the formula in OAR 436-54-222(1).

The present record does not permit application of this rule. We know that claimant was generally working or collecting unemployment benefits between May 1980 and the October 1982 hearing. We do not know the exact dates, the amount of wages earned or the amount of unemployment benefits received. We confronted a similar situation in Frank R. Gonzales, 34 Van Natta 551 (1982), in which we noted that this kind of problem requires an exchange of information between employer/insurer and claimant:

> ". . . the parties have yet to furnish any comprehensive (or even intelligible) evidence about claimant's medically authorized time loss. While, as noted above, we think it is primarily the employer's duty in processing the claim to ascertain this information, when a claimant has legal representation as this claimant has had continuously at least since the proceeding before Referee Braverman, we think the claimant bears some responsibility to clearly identify what periods of time loss are claimed. The claimant obviously is in a superior position to know when he is working, when he is not working, when he was hospitalized, etc. The record in this case does not reveal that claimant has ever furnished the employer with such information." 34 Van Natta at 554.

The same is true here. We conclude that claimant is entitled to some form of benefits beyond May 20, 1980 until the closure of his claim. We also conclude that those benefits should be in the form of compensation for temporary partial disability during the periods that claimant was working or collecting unemployment benefits. We finally conclude that, because of a lack of information about dates and amounts, it is not now possible to finally determine the issues presented.

We remanded Gonzales to the employer/insurer to ascertain the necessary information. We understand that remand only gave rise to another request for hearing. In the interest of resolving the pending issues without creating further litigation, we have decided in this case to instead issue this Interim Order on Review which abstractly states our position on the pending issues; inserting dates and amounts ascertainable by the parties or already known to the parties (primarily claimant) should permit a final resolution. Therefore, the parties are directed to advise the Board, within 20 days of the date of this order, of their positions on how to best proceed. It may be possible to supplement the record by stipulation. It may be necessary to remand to the Referee to take additional evidence. Upon receipt of the parties' statements, we will issue a final Order on Review incorporating the views expressed in this interim order and making such further disposition as may be appropriate in light of the parties' statements.

IT IS SO ORDERED.

SHAUN M. CUTSFORTH, Claimant
SAIF Corp Legal, Defense Attorney

WCB 83-01194
August 11, 1983
Order Denying Request to Dismiss

The Board has received respondent's request for dismissal of the claimant's request for Board review on the grounds claimant has not filed an appellant's brief.

There is no requirement in the workers' compensation law or the Board rules which indicates that a brief must be filed by appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

GREGORY L. GODELL, Claimant
Callahan, Hittle, et al., Claimant's Attorneys
Gilah Tenenbaum, Defense Attorney

WCB 82-06244
August 11, 1983
Order Denying Request to Dismiss

The Board has received respondent's request to dismiss the claimant's request for Board review on the grounds claimant has not filed an appellant's brief.

There is no requirement in the workers' compensation law or the Board rules which indicates that a brief must be filed by appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

JAVIER R. ISARRARAS, Claimant
SAIF Corp Legal, Defense Attorney

WCB 82-06994
August 11, 1983
Order Denying Request to Dismiss

The Board has received respondent's request to dismiss claimant's request for Board review on the grounds claimant has not filed an appellant's brief.

There is no requirement in the workers' compensation law or the Board rules which indicates that a brief must be filed by appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

NED T. MATTHEWS, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
Foss, Whitty, et al., Defense Attorneys

WCB 80-10828
August 11, 1983
Order Denying Request to Dismiss

The Board has received respondent's request for dismissal of the employer's request for Board review on the grounds employer/ insurer has not filed an appellant's brief.

There is no requirement in the workers' compensation law or the Board rules which indicates that a brief must be filed by appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

ROBERT W. NORTHEY, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Minturn, et al., Defense Attorneys

WCB 82-00476
August 11, 1983
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Foster's order which set aside its denial of claimant's aggravation claim. The issue on review is whether claimant has established a compensable worsening of his condition since the last award or arrangement of compensation. See ORS 656.273(7).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 1, 1982 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney's fee for services on Board review, to be paid by the SAIF Corporation.

Board Member Barnes Dissenting:

Claimant sustained a low back injury in 1978. The claim was accepted and processed to closure. A hearing was held on July 24, 1979 which resulted in a Referee's order declaring claimant permanently and totally disabled. The Board modified the Referee's award and granted claimant compensation for 60% unscheduled permanent partial disability. 28 Van Natta 599 (1980). The Court of Appeals affirmed the Board's order without opinion. 47 Or App 655 (1980).

Claimant began treatment with Dr. Kovachevich in October 1979 subsequent to the July 1979 hearing on extent of disability. On November 4, 1980 Dr. Kovachevich reported that claimant was experiencing severe back pain and expressed the opinion that, although claimant may have been granted an award for 60% disability, in terms of function, claimant was then totally disabled. On August 18, 1981 Dr. Kovachevich reported that he had been seeing claimant on a monthly basis for the preceding several months and that, in his opinion, claimant's condition was primarily due to his industrial injury. In response to a question from claimant's attorney regarding a worsening of claimant's condition, the doctor responded:

> "There gets to be a point when someone is in significant and constant pain that detecting gradual increases in pain becomes exceedingly difficult. Based on subjective complaints I feel that he is worsening. The

objective findings, however, have not changed."

In September 1981 Dr. Kovachevich reported that claimant's pain appeared to be worsening and that he believed claimant would be an excellent candidate for a pain clinic. Dr. Kovachevich, who is a family practitioner, referred claimant to Dr. Kendrick for a neurological evaluation. Dr. Kendrick examined claimant in November 1981 and recommended a CT scan in order to rule out foraminal encroachment at L5-S1. The results of the CT scan were equivocal.

In a November 6, 1981 report to SAIF Dr. Kovachevich stated his opinion that, since the time of his initial meeting with claimant, his condition had gradually deteriorated, admitting the difficulty of substantiating his conclusion in objective terms.

When the CT scan proved to be indefinite, Dr. Kendrick recommended a repeat myelogram, which was performed, revealing no evidence of a herniated disc. Dr. Kendrick reported to SAIF on December 21, 1980 that diagnostic tests had revealed no evidence of lumbar stenosis or disc rupture, and that based upon the tests performed, it was his feeling that claimant would be unlikely to benefit from surgery at that time. He stated his agreement with Dr. Kovachevich regarding the recommendation of referral to a pain clinic: "I do not have any suggestions, as noted above, for curative treatment, and I do think that the Pain Center would be palliative." Dr. Kendrick also stated that claimant had findings of spasm in his paraspinous musculature, stating, "In this way, certainly he is worse than he was at the time of his closure in 1979."

In a report dated December 4, 1981 Dr. Kovachevich reiterated his impression that, based upon his two years of treating claimant, it was his opinion that claimant's condition had worsened. He also stated that claimant suffered from severe degenerative disease, which he believed had worsened, although it was difficult to identify objective evidence of this worsening. "As I have said in previous correspondence, once a person gets bad enough it is difficult to pick up objective evidence of worsening. * * * Objective findings again are almost impossible to come up with because they have been so severe all along."

SAIF denied claimant's request for reopening on January 5, 1982, indicating that it would continue to provide palliative treatment, including a pain clinic referral.

Claimant was enrolled in the Northwest Pain Center during the month of February 1982. The records from the Pain Center, as well as claimant's testimony, clearly indicate that claimant benefited from his experience at the Pain Center, learning several techniques to assist in coping with his chronic pain problem. After discharge from inpatient treatment at the Pain Center, claimant returned for periodic evaluation and examination. Reports dated July 14, 1982 indicate that claimant was experiencing a higher level of pain than that which he was experiencing at the time of his admission to or discharge from the Pain Center, due to having recently overextended himself.

A September 9, 1982 report from Dr. Kovachevich to SAIF indicates that claimant's disability continued unchanged and that his condition was in no way improved, other than in terms of his ability to tolerate everyday pain as a result of his experience at the Northwest Pain Center.

The transcript of the prior extent-of-disability hearing was submitted as an exhibit in this case. I agree with Referee Foster's assessment in the present case of the comparison between claimant's testimony at the July 1979 hearing and the September 1982 hearing before Referee Foster: "His testimony as to problems as they exist today, [is] very similar to those described at the [1979] hearing . . . .It is difficult to say, from the [testimony], if the claimant is any worse today than at the time of his previous hearing in July 1979." Referee Foster found, however, based upon the opinion of Dr. Kovachevich and, to a certain extent, that of Dr. Kendrick, that "beyond a doubt" claimant's condition had worsened since the time of the previous hearing in 1979.

I agree with the Referee that claimant's successful enrollment in a pain center, and his resultant apparent ability to better cope with his chronic pain problem, do not necessarily dictate the conclusion that claimant's condition has not worsened. I agree with the Referee's finding that Dr. Kovachevich found no objective improvement in claimant's condition subsequent to enrollment in the pain center, and that the only improvement to be found was in claimant's ability to tolerate and live with his daily pain. Unlike the Referee, however, I am not persuaded by the statements of Dr. Kovachevich, who has repeatedly expressed the opinion that claimant's condition has worsened, in light of the evidence of claimant's condition at the time of the 1979 hearing. According to claimant's testimony at that hearing, he was then experiencing constant back spasm. Dr. Kendrick's statement that claimant's more recent recurrent back spasm would indicate a worsened condition is, therefore, apparently based on incorrect information. Dr. Kovachevich expresses the opinion that claimant's degenerative disease process is worse; however, he offers no objective evidence to substantiate this conclusion, one which is generally verifiable by x-ray comparison.

Claimant was severely disabled at the time of the hearing in 1979. I am unable to identify any significant differences between his complaints of pain in 1979 and his complaints of pain in 1982. He has not worked since the time of the injury. Although claimant testified to some slight reduction in his activities about the home, such as gardening, the evidence as a whole does not persuade me that his condition has worsened. In comparing the available evidence of claimant's condition as of July 24, 1979, which, for present purposes is the last award or arrangement of compensation, with the evidence of claimant's condition since that time, I am unable to find that claimant has proven by a preponderance of the persuasive evidence that he has sustained a worsening of his condition entitling him to claim reopening pursuant to ORS 656.273. Cf Oakley v. SAIF, 63 Or App 433 (1983).

I would reverse the Referee's order and, therefore, respectfully dissent.

EDUARDO YBARRA, Claimant
Doblie & Francesconi, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 83-02081
August 11, 1983
Order of Abatement

Claimant requested review of the Referee's June 20, 1983 order and thereafter withdrew his request. The Board entered an order of dismissal on July 20, 1983, pursuant to claimant's withdrawal of his request for review. At the same time that claimant withdrew his request for Board review, he requested that the Referee reconsider his order, identifying particular evidentiary matters which he believed the Referee may have overlooked. Prior to the Board's issuance of its order of dismissal, the Referee issued a letter intended to "reopen and continue the hearing (effective this date) on this matter in order to preserve jurisdiction, if it does exist, to entertain claimant's motion for reconsideration." Claimant subsequently requested that the Board rescind its order of dismissal and remand the case to the Referee for further consideration.

Claimant's attorney's letter withdrawing claimant's request for Board review was received by the Board on July 14, 1983. The letter to the Referee requesting reconsideration of his order was received that same date. The Referee's above-referenced letter is dated July 18, 1983. As mentioned, the Board entered an order of dismissal on July 20, 1983, exactly 30 days after the date of the Referee's order.

It is axiomatic that upon the filing of a request for Board review, the Referee is divested of jurisdiction. See also OAR 436-83-480. Whether a lower tribunal once divested of subject matter jurisdiction can thereafter be revested with jurisdiction, in the absence of remand by the appellate tribunal, is a question we presently need not decide. We are satisfied that the Referee lacked jurisdiction to "reopen and continue the hearing" as he purported to do by the letter of July 18, 1983, and that claimant's only remedy is to request reinstatement of the proceedings on Board review.

Assuming arguendo that the Referee could be revested with jurisdiction in the event of a request for Board review, withdrawal and dismissal of the request, all within 30 days of the Referee's order, no action could be taken by the Referee until the Board had made a disposition of the request for review, including dismissal pursuant to the appellant's withdrawal of the request. In other words, the mere act of notifying the Board that a request for review is withdrawn does not serve to terminate the proceeding on review. In this case, the Referee purported to act on claimant's request for reconsideration premised upon claimant's withdrawal of his request for review, prior to the Board acting on the withdrawal and, therefore, during the pendency of the proceedings on Board review. We can appreciate the practical reasons for the Referee's actions; however, we believe it was wrong.

In stating that he desired to withdraw his request for review, claimant gave no indication that he intended to request that the Referee reconsider his order. Claimant now requests that we rescind the order of dismissal and remand this proceeding to the Referee for that purpose.

We decline to grant the relief requested based upon the information presently before us; however, we deem it appropriate to abate the order of dismissal previously entered herein in order to give both parties an opportunity to inform the Board as to how they wish to proceed.

ORDER

The Order of Dismissal entered herein on July 20, 1983, hereby is abated, and the parties shall advise the Board within fifteen (15) days of the date of this order as to how they wish to proceed.

THOMAS L. BLACK, Claimant
Robert Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Cowling & Heysell, Defense Attorneys

WCB 82-07602 & 82-07768
August 12, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation, as insurer for the City of Myrtle Point, requests review of Referee Brown's order which set aside its denial of claimant's aggravation claim and upheld Jackson County's denial of claimant's alternative new injury claim. We understand the only issue to be employer/insurer responsibility.

Claimant initially injured his right knee in October of 1978 while working for the City of Myrtle Point. That injury required surgery and ultimately led to an award for 40% loss of claimant's leg.

Claimant thereafter began working for Jackson County. While he was working on July 24, 1982, claimant's right leg suddenly gave away when he stepped down on his right foot while walking. Claimant did not trip, slip or fall.

On this record, we agree with and adopt the Referee's following analysis:

> "I view [claimant's 1982] knee collapse as a temporary worsening of his chronic condition resulting from [prior] compensable surgery [in connection with the 1978 claim]. His [1978] claim should be reopened for that period of time for which there is medical verification of an inability to work. In this case, that time period commences on July 26, 1982."

We also agree with the Referee's observations that, in cases that involve only a temporary worsening of a compensable condition, this Board has both allowed aggravation claims and rejected aggravation claims. The distinction, admittedly ephemeral and probably debatable in most cases is: Sometimes a prior disability award is based on an expectation that a worker's physical condition may wax and wane in the future and thus not every temporary exacerbation can or should be the basis for aggravation reopening; but when a temporary exacerbation exceeds what was reasonably forseeable at the time of a prior disability award, aggravation reopening can be

appropriate. We think the Referee recognized that very distinction in this case: "[Claimant] had a temporary worsening of his condition which took him off work in excess of the level contemplated by the prior award." While such a finding goes to the compensability of an aggravation claim, which we think is beyond the responsibility issue raised on review, we agree with the Referee's assessment.

ORDER

The Referee's order dated November 30, 1982 is affirmed. Claimant's attorney is awarded $250 for services rendered on Board review, to be paid by the SAIF Corporation.

RALPH C. BRATTEN, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05438
August 12, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Howell's order which set aside that portion of its June 7, 1982 denial by which SAIF denied the compensability of claimant's March 31, 1982 myocardial infarction. The issue for review is compensability.

Claimant was employed as a log truck driver by Pat Essary Trucking. On the morning of March 31, 1982 claimant drove his pick-up truck to work, arriving at approximately 9:00 a.m. Rather than driving a log truck, however, claimant began performing maintenance work on one of the trucks. Utilizing an air powered impact wrench, he removed two mounted tires weighing approximately 150-200 pounds from the truck, and rolled them on the floor. Claimant did not normally perform such strenuous duties. After installing a different tire on the truck, claimant began to experience chest pain. He then sat down, smoked a cigarette and rested for a time. After the pain subsided claimant began working on the second tire, but experienced chest pain once again. Claimant was transported to Douglas County Hospital emergency room.

The hospital admitting history, taken by Dr. Cervi-Skinner, an internist specializing in internal medicine and endocrinology, states that claimant awoke on the morning of March 31, 1982 "with a sensation of midsternal crushing chest pain." The report further states that claimant prepared his breakfast, drove his truck to work and again noted the onset of the same type of pain except that it was more intense with radiation to the left shoulder and arm. An electrocardiogram demonstrated that claimant was experiencing an acute anterior myocardial infarction. Subsequent diagnostic procedures revealed the presence of significant atherosclerotic heart disease present in claimant's coronary system.

On April 5, 1982 claimant filed a Form 801 contending that his heart attack was the result of an occupational disease or injury. The claim was subsequently denied by SAIF on June 7, 1982. SAIF indicated in its letter of denial that, "medical information indicates that your heart condition was pre-existing and the result of a natural progression of coronary artery disease with no relationship to your work activity."

At the time of his heart attack claimant was 54 years of age and weighed 225 pounds. He smoked an average of one package of cigarettes a day for thirty years and suffered from hypertension for several years. Claimant's mother, father and one brother died as a result of heart attacks and his sister and another brother have also suffered heart attacks.

On April 30, 1982 Dr. Cervi-Skinner reported that although claimant had experienced some symptomatology upon arising on the morning of March 31, 1982, that this resolved after a short time and that he, therefore, interpreted it as an episode of angina. He additionally stated:

> "In my opinion, the acute infarction occurred at the time of work and one has to presume that the work activity was a contributing cause to the acute myocardial infarction even though the condition was pre-existing and the result of the natural progression of coronary artery disease."

On May 24, 1982 Dr. Kloster, head of the Division of Cardiology at the University of Oregon Health Sciences Center, reported that he had reviewed claimant's medical records and noted that claimant experienced ischemic chest pain on the morning of March 31, 1982. Dr. Kloster believed that this chest pain represented the beginning and first symptoms of claimant's heart attack. Dr. Kloster further reported:

> "I believe that his infarction was due to preexisting coronary atherosclerotic heart disease and that the infarction was in the process of occurring and would have occurred regardless of his work activity on that date.
>
> "Mr. Bratten had important risk factors for the development of coronary heart disease including hypertension, a heavy and long-standing cigarette smoking history and a
>
> strong family history for coronary heart disease. It is my opinion that he developed coronary atherosclerosis leading to myocardial infarction because of these risk factors and that his work activity was not a material contributing cause of his underlying coronary atherosclerosis."

On June 16, 1982 Dr. Cervi-Skinner again reported that the temporal relationship between claimant's activity of changing tires and the heart attack was significant and that the activity, therefore, had to be interpreted as a "major factor in causing and/or aggravating his acute myocardial infarction," even though claimant did have underlying coronary artery disease. On September 20, 1982 Dr. Cervi-Skinner reported that he had read Dr. Kloster's report, that he had no major disagreements with him and that, ". . . I am in complete agreement with Dr. Kloster as to diagnosis and the fact

that work alone did not precipitate Mr. Bratten's acute myocardial infarction." However, Dr. Cervi-Skinner qualified his agreement with Dr. Kloster by stating:

> "It is my impression that we are penalizing Mr. Bratten for his ignorance and inability to recognize the early symptoms in the morning as a warning or perhaps the early stages of his infarct. * * * Again, by denying this claim, in my opinion we are penalizing him for his ignorance and his failure to consult at the onset of his first symptoms."

Claimant testified at the hearing that he did not remember whether or not he experienced chest pain prior to going to work on March 31, 1982.

The Referee concluded, and we agree, that this claim is better treated as a claim based on injury rather than occupational disease. He correctly noted that Dr. Kloster was of the opinion that claimant's coronary heart disease was the result of his numerous identified risk factors unrelated to claimant's work, and that the heart attack was the result of this underlying disease rather than claimant's work activities. The Referee then inexplicably stated: "Although he [Dr. Kloster] did feel that the heart attack was a consequence of claimant's pre-existing disease, he did not offer an opinion as to whether claimant's work activities precipitated or accelerated the occurrence of the heart attack." He then concluded that Dr. Kloster's opinion did not contradict that of Dr. Cervi-Skinner, and that claimant, therefore, had established that his heart attack was work-related. We disagree and reverse.

In order to establish the compensability of a heart attack, it is necessary for claimant to show exertion in carrying out his job activities (legal cause), and that the exertion was a material contributing factor in producing the heart attack (medical cause). Coday v. Willamette Tug & Barge Co., 250 Or 39 (1968). In Harris v. Farmer's Co-op Creamery, 53 Or App 618 (1981), the court stated that:

> ". . . in determining the etiology of a heart attack [there] is nothing about the nature of the treatment which would enhance one's diagnostic abilities by virtue of having examined and treated the patient (citing Hammons v. Perini Corp., 43 Or App 299 at 301 (1979)."

Dr. Cervi-Skinner's opinions are, therefore, entitled to no additional weight due to the fact that he initially treated claimant upon his admission to the hospital on March 31, 1982.

Whether or not claimant has established legal causation is a difficult question. Clearly claimant exerted himself at work on the morning of March 31, 1982. SAIF, however, argues that claimant's heart attack began on that same morning, but prior to his arrival at work. If that is indeed the case, legal causation has

not been established. The hospital admitting history and Dr. Cervi-Skinner's subsequent reports indicate that claimant did indeed experience chest pains prior to arriving at work. Claimant did not contradict these reports by his testimony at the hearing. He only testified that he did not remember. That being the case, we believe that reliance on the medical reports which were prepared reasonably contemporaneously with the actual events is appropriate.

Dr. Kloster believed that claimant's pre-work chest pains represented the beginning of claimant's heart attack. It is difficult to determine if Dr. Cervi-Skinner disagrees or agrees with Dr. Kloster in this respect. In his report of September 20, 1982, Dr. Cervi-Skinner initially seems to indicate his agreement with Dr. Kloster, that claimant experienced infarction symptoms prior to arriving at work on the morning of March 31, 1982; but then states: "One question that we will probably never be able to answer is that if the symptoms had occurred prior to his work activity, did they represent actually[sic] infarction at that time or were they just pre-infarction angina . . ." We are uncertain just what position Dr. Cervi-Skinner is taking and we, therefore, find that a preponderance of the evidence indicates that claimant began experiencing his myocardial infarction prior to arriving at work.

Even if legal causation has been adequately established, we find that the claim must fail due to a lack of convincing medical evidence which would implicate the work-related exertion as the cause of claimant's heart attack. We find that Dr. Kloster quite clearly concluded that claimant's work activities did not precipitate or accelerate the occurrence of his heart attack, and he could not have so stated in terms clearer than those in his May 24, 1982 report. Dr. Kloster believed that claimant's heart attack was already in the process of occurring prior to his arriving at work and that it was the result of claimant's unrelated coronary heart disease rather than his work activities. Dr. Cervi-Skinner does not deny that claimant suffers from preexisting coronary artery disease and agrees that this was a factor in producing claimant's heart attack. The only basis for his opinion relating the heart attack to claimant's employment is the temporal relationship between the work activities and the symptomatology. It would appear, however, that Dr. Kloster was not impressed by the temporal relationship, especially considering that claimant's heart attack began, as he believed, prior to claimant's arrival at work. Additionally, we do not believe that a temporal relationship alone is sufficient to establish causation in heart attack cases. Cf Hall v. Home Insurance Co., 59 Or App 526 (1982).

We conclude that Dr. Kloster's opinion is more consistent and, therefore, more persuasive than that of Dr. Cervi-Skinner. It is clear what Dr. Kloster's opinion is, but it is not at all clear what Dr. Cervi-Skinner's opinion is. Additionally, although not necessarily persuasive, we note that Dr. Kloster is a specialist in cardiology whereas Dr. Cervi-Skinner specializes in internal medicine and endocrinology. See Thurston v. Mitchell Bros. Contractors, 58 Or App 568 (1982).

Based on the above we conclude that claimant has failed to meet his burden of proving by a preponderance of the convincing evidence that his work activities were a material contributing factor in the production of his heart attack.

ORDER

The Referee's order dated November 8, 1982 is reversed. The SAIF Corporation's June 7, 1982 denial is reinstated and affirmed.

ROLAND R. EDWARDS, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05167
August 12, 1983
Order on Reconsideration

Claimant requests reconsideration of our Order on Review dated July 27, 1982. Claimant asserts that we erred in not affirming a portion of the Referee's order which the SAIF Corporation did not challenge on Board review. We agree with claimant.

Accordingly, the "order" portion of our Order on Review dated July 27, 1983 is withdrawn, and the following is substituted:

ORDER

The portion of the Referee's order dated November 9, 1982 which set aside the SAIF Corporation's denial dated June 6, 1982 is reversed and SAIF's denial is reinstated and affirmed. The remainder of the Referee's order is affirmed.

CHARLES R. JACKSON, Claimant
Doblie, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-04320
August 12, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The employer, Wallboard Applicator, and its insurer, EBI Companies, request review of Referee Gemmell's order which awarded claimant 75° for 50% scheduled permanent disability of the (right) hand, that being an increase over the award made by Determination Order of 40% of the index finger (of the right hand). The employer/insurer contends that the award was excessive and that the Determination Order should be reinstated.

Claimant sustained a crushing injury to his right index and middle fingers. The index finger required surgery to repair the damage. Following an appropriate recovery period, claimant's treating orthopedic surgeon assessed the degree of residual impairment as follows: 50% loss of range of motion at the distal phalanx of the index finger, 75% loss of pinch strength involving that finger and a 30% loss of grip strength in the right hand as measured against the left hand. Claimant also was evaluated at the Callahan Center. The evaluation there revealed, with respect to range of motion in the index finger, minimal loss of the ability to extend the phalanx, numbness in the second and third digits and 80% loss of grip strength attributable to pain-response sensitivity to the instrument used to measure grip strength. Claimant further testified to his residual loss of grip strength, inability to pick up and handle some tools because of hypersensitivity and numbness in the injured fingers, and increased sensitivity of his right hand to the cold.

We assess the amount of compensable impairment using the guidelines set forth in OAR 436-65-510, 65-515 and 65-530. We agree with the Referee and claimant that claimant is entitled to an award beyond that attributable to just the index finger. There is some residual impairment at the tip of the third finger as well as numbness and hypersensitivity to pain on pressure in the index finger. There also is a residual loss of grip strength arising from hypersensitivity upon applying pressure to the index finger. Claimant made an attempt to return to work and found that the residual impairment in both fingers rendered him unable to perform his job (sheetrock finisher) properly.

Under ORS 656.214(4), impairment to two or more fingers may be rated as a proportionate loss of the hand, and under OAR 436-65-530, a loss of grip strength is rated as a partial loss of the forearm. Thus, claimant is entitled to an award of compensation based upon a proportional loss of the forearm rather than the hand, although as a practical matter it makes no difference because, under ORS 656.214(2)(b), the forearm and hand are rated equally.

Although claimant's loss of grip strength emanates from sensitivity in the index finger (the site of the injury), the residual loss of function affects claimant's ability to use his hand and forearm to grasp and manipulate objects. Disability is assessed at the site of loss of function, not necessarily at the site of the injury. Letty Louden, 34 Van Natta 1156 (1982), affm'd without opinion, ___ Or App ___ (May 17, 1982; Julia I. Hicks, 33 Van Natta 497 (1981), aff'd without opinion, 57 Or App 838 (1982). It follows that claimant is entitled to an award for a partial loss of the right forearm, not the hand or the index finger. We recognize that this application of the rules is inconsistent with our previous holding in Hiroshi Hitomi, 33 Van Natta 609 (1981). We, therefore, overrule Hitomi insofar as it is inconsistent with this order.

Although the value of a hand and forearm is the same, we cannot agree that the Referee's award equal to 50% loss of the hand (or forearm) is warranted. Claimant's treating physician noted the loss of motion at the distal phalanx joint at 50%. Under OAR 436-65-510, a 50% loss of range of motion at the distal interphalangeal joint is equal to a 25% loss of the finger. Thus, no additional value is assigned for the loss of pinch strength. Claimant has residual numbness in the index and middle fingers. That residual numbness appears to be in the minimal to moderate range. Under OAR 436-65-530, it appears to us that claimant is entitled to a value of no more than one-half of 60% of 25% for each finger, or 7.5% of each finger. Allowing up to 7.5% additional impairment value for numbness in the index and middle fingers yields a combined impairment value of 28% for the index finger and 7.5% for the middle finger. Applying the Conversion Table accompanying OAR 436-65-515 indicates that a 28% loss of the index finger and a 7.5% loss of the middle finger is equivalent to a 7% to 8% loss of the hand.

Claimant's physician rated claimant's loss of grip strength at 50% without indicating what the loss was attributable to. The Callahan Center rated the loss at 80%, due to hypersensitivity of

the index finger to pressure. Regardless of the mechanism, it is clear that claimant has sustained a loss of grip strength as a result of the compensable injury. OAR 436-65-530 does not appear to comtemplate a loss of grip strength attributable in a finger to sensitivity in a finger which results in pain upon pressure. Analogizing loss of grip strength due to hypersensitivity to pressure (or numbness), to loss of grip strength due to atrophy or tissue loss, a loss of grip strength in the 50% to 80% range appears appropriate. A 50% to 80% loss of grip strength is equal to a 25% to 40% loss of the forearm. Our best assessment is that claimant's residual loss of grip strength should be valued at a 30% loss of the forearm. Converting the hand loss value of 7% to 8% into a forearm value and combining that with the 30% value attributable to loss of grip strength yields a 35% to 36% impairment value. In addition, claimant experiences some numbness and hypersensitivity to the cold. Considering those factors along with the factors discussed above we believe that claimant will be adequately compensated for his loss due to the compensable injury by an award of 35% scheduled permanent disability for the (right) arm.

ORDER

The Referee's order dated December 14, 1982 is modified. Claimant is awarded 35% scheduled permanent disability for the (right) forearm. This is in lieu of all prior awards arising from the same condition. Claimant's attorney's fee shall be adjusted accordingly.

WILLIAM H. McCALL, Claimant
Blair, et al., Claimant's Attorneys
Schwabe, Williamson, et al., Defense Attorneys

WCB 81-05558
August 12, 1983
Order on Reconsideration

The Board issued its Order on Review herein on July 26, 1983. Claimant has requested reconsideration of that portion of the order which awarded claimant's attorney $400 as a reasonable attorney's fee for prevailing on the "compensability" and penalty issues. Claimant requests that the Board award an additional fee.

In our Order on Review, we found that the partial denial issued by the employer in this case was an unlawful and unreasonable attempt to circumvent the claim closure provisions of ORS 656.268. We ordered the employer to pay claimant that compensation it would have paid had it followed the appropriate statutory procedure for effecting claim closure and an additional amount as a penalty for the employer's unreasonable claims processing. In awarding claimant's attorney a fee, we failed to identify which portion of the fee was payable to claimant's attorney for prevailing on a "denied claim," ORS 656.386(1), and which portion of the fee was payable pursuant to ORS 656.382(1), in association with the penalty. As a practical matter, the distinction may be of little significance, in view of the fact that both provisions authorize payment of a fee in addition to compensation, as opposed to a fee payable out of the claimant's award; however, we believe it is preferable to state the respective amounts, in view of the different reasons for awarding each fee.

Attorney fees payable pursuant to ORS 656.386(1) are based upon efforts expended by an attorney and the results obtained in

behalf of the claimant. OAR 438-47-010(2). Attorney fees associated with a penalty are imposed, in significant part, as a measure of the relative unreasonableness of the employer/insurer's claims processing action. Cf Zelda M. Bahler, 33 Van Natta 478, 481 (1981), reversed on other grounds 60 Or App 90 (1982).

It may be argued that this case involves no issue concerning a denied claim, and that, therefore, any attorney fee to which claimant's attorney is entitled is payable out of claimant's compensation as opposed to being paid in addition thereto. ORS 656.386(2). The basic issues in this litigation essentially have been claimant's entitlement to temporary total disability and the propriety of the procedural avenue followed by the employer in terminating claimant's temporary total disability benefits. The employer, however, did issue a denial, and claimant, therefore, was required to retain the services of an attorney in order to establish his right to receive the ten or eleven days of time loss involved. Claimant's attorney clearly was instrumental in overturning the denial. Accordingly, an insurer-paid fee is appropriate under ORS 656.386(1).

On reconsideration of the amount of the fee awarded by our Order on Review, we find that amount inadequate in view of the fact that claimant "prevailed finally" before the Board and is, therefore, entitled to a fee for services before the Referee, in addition to services before the Board on review. OAR 438-47-040(2). We modify our order accordingly.

ORDER

On reconsideration of the Order on Review dated July 26, 1983, we modify that order to award claimant's attorney $500 as a reasonable attorney's fee for services before the Referee and the Board, to be paid by the employer. ORS 656.386(1). The employer further is ordered to pay claimant's attorney $300 as a reasonable attorney's fee in association with the previously imposed penalty. ORS 656.382(1). Except as modified herein, the Board adheres to its former order, which hereby is reaffirmed and republished.

RANDY R. POSVAR, Claimant
Gary Susak, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 82-05950
August 12, 1983
Order of Dismissal

The employer/insurer moves to dismiss claimant's request for Board review on the grounds that claimant failed to serve a copy of his request for review on the employer/insurer within 30 days of the date of the Referee's order herein, and that the employer/insurer failed to receive actual notice of claimant's request for review within the statutory period. See ORS 656.289(3), 656.295(2).

The Referee's order was entered on May 18, 1983. Claimant timely requested review within 30 days of the date of the Referee's order. See OAR 436-83-700(2). The Board acknowledged rece pt of claimant's request for review on June 24, 1983, more than 30 days after the date of the Referee's order.

The employer/insurer has alleged by affidavit that it neither received a copy of claimant's request for review, nor received actual notice of the request, within the thirty-day period. We so find. Accordingly, the Board lacks jurisdiction to review the Referee's order, and claimant's request for review must be dismissed. Argonaut Insurance Company v. King, 63 Or App 847 (1983); see also Edward Hanson, 35 Van Natta 1107 (1983).

ORDER

Claimant's request for review of the Referee's May 18, 1983 order is dismissed.

EDWARD J. RICHARD, Claimant
Jack Ofelt, Jr., Claimant's Attorney
Bullard, Korshoj, et al., Defense Attorneys

WCB 82-07814
August 12, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Pferdner's order which sustained the August 11, 1982 denial of compensability for claimant's peptic ulcer disease. The employer has cross-requested review contending that the Referee erred when he excluded Exhibit 10 because it did not meet the 10-day requirement of OAR 436-83-400(3).

Dealing with the procedural issue first, we find that Exhibit 10 should have been admitted because it was submitted exactly ten days prior to the hearing. The hearing was held on March 7, 1983. The exhibit was submitted on February 25, 1983. Excluding March 7th and counting backwards from the hearing date to the date the exhibit was submitted, we find that February 25th was the tenth day prior to the hearing and that submission of documents on that day meets the requirement that documents be submitted "not less than 10 days prior to the hearing."

Regarding the issue of compensability of claimant's peptic ulcer condition, we find that, regardless of whether or not Exhibit 10 is admitted, claimant has failed to prove by a preponderance of the medical evidence that work-related factors were the major contributing cause of the recurrence of his peptic ulcer disease. Therefore, we affirm and adopt the Referee's order on the issue of compensability.

ORDER

The letter to Dr. Patrick Goodall from attorney Jonathon T. Harnish dated February 25, 1983, with a notation by Dr. Goodall at the bottom also dated February 25, 1983 (Exhibit 10), is admitted into the record. The Referee's order dated March 14, 1983 regarding the compensability of claimant's present peptic ulcer disease is affirmed.

RICKIE J. FAWVER, Claimant
Horne & Tenenbaum, Defense Attorneys
Miller, et al., Defense Attorneys

WCB 81-01648
August 16, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Wausau Insurance Companies requests review of Referee Fink's order which found that claimant had sustained an aggravation of an old injury rather than a new injury. The primary issue is responsibility, the insurers having previously conceded compensability and an order having issued pursuant to ORS 656.307 designating Wausau as the paying agent.

There is an evidentiary issue arising from a motion submitted by Wausau requesting remand for consideration of newly discovered information. The evidence in question consists of a photocopy of an 801 claim form, a copy of which already is in the record, but which clarifies some of the entries on the form and contains the date stamp of North Pacific Insurance Company, the insurer on the risk at the time of the subsequent exposure. As we understand the record, North Pacific does not contest that claimant filed a claim or that he experienced back pain at that time. The issue is the medical significance of the back pain: whether it indicates an aggravation or a new injury. We find that the proffered evidence borders on being immaterial and is decidedly lacking in probative value, i.e., irrelevant. Accordingly, we decline to remand this matter for consideration of the proffered evidence.

On the merits, based on our de novo review of the record, we find that claimant sustained a new injury and, therefore, reverse the Referee and assign responsibility to North Pacific Insurance Company.

Claimant sustained a compensable injury to his low back in August 1976 when he fell through a hole on a flatbed truck in the course of his employment with Interstate Manufacturing, insured by Wausau Insurance Companies. This injury caused a herniated disc on the left side of L5-S1 and culminated in a hemilaminectomy and partial discectomy in August 1977. Claimant was released to return to work in February 1978 and a Determination Order issued in June 1978 awarding claimant 5% permanent partial disability.

Claimant began work for North Pacific's insured, Alaska Kodiak West, in September 1979. Between his release to return to work and commencing employment with Alaska Kodiak, claimant avoided heavy lifting and bending and had "back problems" every month and a half or so. In July 1979 he experienced a bout of back pain which caused him to seek medical care. However, that incident of back pain resolved in three or four days, and at the time claimant saw his physician, no further treatment was ordered. Other than the July 1979 incident, claimant did not seek medical care until September 1980, he took no medication for his back, and for a period of about three and a half months prior to commencing his employment with Alaska Kodiak, claimant was totally symptom free.

Claimant was employed by Alaska Kodiak as a welder in the manufacture of wood stoves. Initially he was part of a crew and his specific task was to weld together smaller parts of the shroud.

A shroud weighed approximately 30 pounds when brought to him and 50 to 55 pounds when he finished with it. Subsequently claimant became a leadman and assumed more supervisory responsibilities and fewer actual assembly functions. In February 1980 the employer laid off a relatively large number of employes. After the layoff claimant's responsibilities included cutting steel, burning, and doing more of the welding assembly, along with his leadman duties. The amount of lifting required of claimant increased somewhat and the amount of walking increased substantially.

In April 1980 Alaska Kodiak laid off more employes but demanded increased production. The nature of claimant's job changed again in that with just a "skeleton crew" claimant had to work faster, do more of the actual assembly of stoves and carry certain items farther. After this second round of layoffs claimant noticed that his back began to hurt him more. His back hurt sufficiently that he filed an 801 claim form in August 1980 and in September 1980 he sought medical attention. Claimant continued to work notwithstanding the pain and discomfort he was feeling because he felt that "the company needed him." However, during the last three to four months of employment he greatly restricted his off-work activities and in claimant's words, "It took almost everything I had to stay at work and keep my mind on what I was doing."

Upon seeking treatment, claimant's physician, Dr. John Hazel, who was also his treating physician in 1976, diagnosed a herniated disc at L5-S1, right side, and performed a second partial discectomy in January 1981. The claim was closed in August 1981 with an award of an additional 10% permanent disability. With respect to whether claimant had sustained a new injury or an aggravation of his 1976 injury, Dr. Hazel consistently opined that claimant's condition was an aggravation of his 1976 injury and not a new injury or condition. It was apparently on the strength and consistency of Dr. Hazel's opinion that the Referee concluded that claimant had sustained an aggravation rather than a new injury. Although Dr. Hazel's opinion is the only opinion in the record, and he opined that claimant sustained an aggravation, we feel constrained to find a new injury because Dr. Hazel's view of what constitutes an aggravation, while sound for medical purposes, does not comport with workers' compensation law.

Dr. Hazel believed that claimant had sustained an aggravation because the same disc was involved in 1980 as in 1976, the lack of a specific incident which caused the herniated disc, and his concept that the second herniation on the right in 1980 was just part of the overall degenerative process taking place in the disc. As Dr. Hazel explained his view, claimant's disc was naturally subject to degeneration and the 1976 injury and ensuing surgery further weakened that disc, leading to the second herniation in 1980.

Under Oregon's workers compensation law, the test for determining responsibility is the "last injury rule" espoused by Larson at 4 Larson, Workmen's Compensation Law, §95.12 (1976), adopted by the Court of Appeals in Smith v. Ed's Pancake House, 27 Or App 361 (1976), and recently clarified in Boise Cascade v. Starbuck, 61 Or App 631 (1983). Under the last injury rule, the subsequent employer is responsible if there was a traumatic incident in the course of that employment which contributed independently to the claimant's condition.

In Starbuck, as well as in Valtinson v. SAIF, 56 Or App 184 (1982), cited in Starbuck, there was no specific fall or lifting incident which could be identified easily as a traumatic incident. However, in each case there was a particular work activity during a relatively short and discrete time period accompanied by a significant onset of pain culminating in disability. See also Donald M. Drake Co. v. Lundmark, 63 Or App 261 (1983). Here, there was a layoff in April 1980 at which time claimant's job tasks and the tempo of his work changed, and at which time he noticed an increase in the amount of back pain. Furthermore, by August 1980 he filed his claim form and by September 1980 he sought medical care for back and right leg pain. We believe that this is sufficient under Starbuck to constitute a new and separate injurious exposure or "injury."

Perhaps more significantly, there was an actual and objectively verifiable pathological change in claimant's condition: In 1976 it was low back and left sided symptoms which led to the diagnosis and surgical removal of a herniated disc at the left side of L5-S1. In 1980 it was low back pain and right sided symptoms which led to the diagnosis and surgical removal of a new herniation on the right side of the L5-S1 disc. From a physician's point of view, it is understandable that Dr. Hazel would characterize the two herniations as part and parcel of the overall degeneration of the disc at L5-S1. We also assume that Dr. Hazel is correct that the 1976 injury and resulting surgery left claimant with a weakened disc more susceptible to further degeneration and herniation. Nevertheless, we cannot avoid the conclusion that claimant's work at Alaska Kodiak caused a new injury or condition. Claimant's 1976 claim was closed with a minimum award of permanent disability (5%). The medical reports indicate that claimant enjoyed excellent recovery from the surgery. From at least February 1978 until April 1980 claimant had very infrequent back symptoms. These factors, together with the actual new protrusion of disc material on the right side of the disc at L5-S1, persuade us that claimant's employment with Alaska Kodiak independently contributed to the creation of a new condition. This is true under the last injury rule even though the previous injury and surgery might be considered contributing factors to claimant's disability in September 1980 and surgery in January 1981.

For these reasons, we reverse the Referee with respect to his finding of an aggravation and assign responsibility to North Pacific Insurance Company, Alaska Kodiak's insurer.

ORDER

The Referee's order dated October 26, 1982 is reversed. North Pacific Insurance Company's denial of February 27, 1981 is set aside and the claim is remanded for acceptance and payment of compensation in accordance with law. Wausau Insurance Companies' denial of January 16, 1981 is affirmed. North Pacific Insurance Companies shall reimburse Wausau as provided by law.

HOWARD HUNTER, Claimant
Roll & Westmoreland, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 81-06976
August 16, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Nichols' order which approved EBI Companies' July 17, 1981 denial, found claimant entitled to benefits for interim compensation from June 25, 1981 through July 17, 1981 and assessed a 25% penalty against the insurer on such compensation along with a $200 attorney's fee. The issues for review are compensability, penalties and attorney fees.

The Board affirms and adopts the order of the Referee, subject to one comment. We note that the 25% penalty awarded by the Referee was outside the range we indicated would be appropriate in Zelda M. Bahler, 33 Van Natta 478 (1981), reversed on other grounds 60 Or App 90 (1982), where we stated that unexplained delay in the payment of interim compensation for a period of up to twenty-five days, would justify a penalty of up to fifteen, rather than twenty-five percent.

ORDER

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

MARILYN J. CLEMONS, Claimant
Bischoff & Strooband, Claimant's Attorneys
Horne & Tenenbaum, Defense Attorneys
SAIF Corp Legal, Defense Attorney
Bullivant, et al., Attorneys
Wolf, Griffith, et al., Attorneys

Own Motion 83-0220M
August 17, 1983
Own Motion Order

Claimant, by and through her attorney, has requested that the Board exercise its own motion authority and reopen her February 1, 1971 industrial injury claim for an allegedly worsened condition related to claimant's original injury. Claimant's aggravation rights have expired.

Claimant's attorney initially directed his request for reopening of claimant's 1971 injury claim to the employer (Roseburg Lumber Company) and its insurer (Wausau Insurance Companies). See ORS 656.278(4). By letter of July 15, 1983, Wausau notified claimant that it had elected not to voluntarily reopen the claim for payment of own motion benefits (i.e., temporary and/or permanent disability). It is the insurer's position that claimant's injury-related condition has not worsened since the last award/arrangement in this claim.

The insurer also notified claimant in this same letter that it was denying responsibility for payment of medical bills incurred by claimant as a result of recent treatment. The insurer's position in this regard is that claimant's current medical problems are the result of either an aggravation of a condition for which South Umpqua State Bank, insured by EBI Companies, is responsible, or more recent work activity during

claimant's employment with Monty Kershner, insured by the SAIF Corporation. The only medical report submitted in support of claimant's request for own motion relief might tend to support this proposition.

Wausau's July 15, 1983 letter is in the form of a formal denial with notice of claimant's hearing rights pursuant to ORS 656.283. This is appropriate in view of the fact that claimant's 1971 injury claim carries with it a lifetime right to receive medical services for conditions related to the original injury. Consequently, when a claim for medical services is contested, the employer/insurer is obligated to formally deny the claim in spite of the expiration of claimant's aggravation rights; and claimant is required to request a hearing in order to preserve his rights and remedies under the law. Donald L. Lentz, 35 Van Natta 1084 (July 20, 1983).

Our agency records reflect that EBI Companies issued a denial in behalf of South Umpqua State Bank (DOI July 17, 1980); that claimant requested a hearing on December 17, 1982; and that a hearing was scheduled for May 25, 1983 in Roseburg, Oregon. Our records also reflect that the SAIF Corporation issued a denial in behalf of Monty Kershner on December 7, 1982 (DOI October 7, 1982); that claimant requested a hearing on December 9, 1982; and that this request for hearing also was scheduled for hearing in Roseburg on May 25, 1983. These two requests for hearing were assigned WCB Case Nos. 82-11493 and 82-11229 respectively, and apparently were consolidated for hearing.

It is apparent that there presently is litigation pending concerning employer/insurer responsibility for claimant's present medical condition as between two employers/insurers other than Roseburg Lumber/Wausau, the own motion employer/insurer. It is also clear that claimant has the right to request a hearing contesting Wausau's July 15, 1983 denial of an apparent claim for medical services which are related to the additional disability benefits claimant seeks by her request for own motion relief.

In view of the fact that there presently is litigation pending which apparently involves an issue of employer/insurer responsibility for the same benefits which claimant seeks through an exercise of the Board's own motion authority; and the fact that the own motion employer/insurer may be joined as a party to that litigation if claimant elects to exercise her right to request a hearing contesting Wausau's denial of her apparent claim for medical services; we decline to consider claimant's request for own motion relief at the present time. See OAR 436-83-810(1)(a); Ralph R. Lee, 35 Van Natta 1109 (July 26, 1983). It may be more appropriate to consider claimant's request for own motion relief at a later date, at which time claimant may renew her request to the Board.

ORDER

Claimant's request for own motion relief presently is denied.

ROGER A. DRIGGERS, Claimant
Coons & McKeown, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0298M
August 17, 1983
Order Rescinding Own Motion Determination

The Board issued an Own Motion Order and Determination herein on July 15, 1983. It now has been brought to our attention that the Evaluation Division issued a Determination Order dated February 25, 1983, awarding claimant temporary total disability compensation for a period overlapping the period identified in the above-referenced Own Motion Order and Determination. The question that has arisen, therefore, is whether it was proper for the Board to issue its Own Motion Order in view of the outstanding Determination Order. We have determined that we issued our order based upon incomplete information concerning the status of this claim, and that it is appropriate to withdraw our prior order.

Claimant first made application to the Board requesting own motion relief in October of 1982, after a hearing had been conducted concerning his entitlement to medical services pursuant to ORS 656.245. The Board deferred consideration of claimant's request for own motion relief pending the outcome of the medical services litigation. The Referee issued his order in the medical services litigation (WCB Case No. 82-07883) on November 23, 1982. The SAIF Corporation thereafter requested review of the Referee's order, which had overturned its denial of medical treatment. The last correspondence from counsel for either party with reference to claimant's own motion request was a December 6, 1982 letter from claimant's attorney reiterating claimant's request that the Board reopen the claim pursuant to ORS 656.278.

The Board proceeded to review the Referee's order in the medical services claim, pursuant to ORS 656.295. In conjunction with its review function, the Board also considered claimant's related request for own motion relief under ORS 656.278. As is indicated in the Board's Own Motion Order and Determination, in considering whether to grant claimant's request for own motion relief, the Board reviewed the record developed before the Referee.

Unbeknownst to the Board, the claim had been reopened by SAIF upon receipt of the Referee's order in WCB Case No. 82-07883, which had ordered SAIF to accept "responsibility for treatment of the claimant's ulcer condition commencing in the spring of 1982." The Referee correctly noted that in the event of a request for review by SAIF, its obligation to pay the cost of the medical services in issue would not be stayed pending review or appeal. SAIF v. Mathews, 55 Or App 608 (1982); ORS 656.202(2). The Referee's order did not, however, nor could it, adjudicate claimant's "entitlement" to receive compensation for temporary total disability benefits, in view of the expiration of claimant's aggravation rights. Nevertheless, a 1502 form submitted to the Compliance Division by SAIF, dated December 7, 1982, indicates that pursuant to the terms of the Referee's order, compensation for temporary total disability benefits was commenced as of May 28, 1982.

Accordingly, when the Board considered whether or not to grant claimant's request for own motion reopening prior to

issuance of its July 15, 1983 Own Motion Order, the claim had been in open status and neither party had advised the Board of this fact. Nor was the Board advised that the Evaluation Division recently had closed the claim pursuant to ORS 656.268. A review of the procedural history of the claim discloses that claim closure pursuant to ORS 656.268 was appropriate.

Claimant's aggravation rights expired November 23, 1981. Prior to expiration of claimant's aggravation rights, the claim was reopened in December 1979, and it remained in open status until closure by a fourth Determination Order dated May 6, 1982. The claim remained in closed status for five months until December 7, 1982, at which time it was reopened after issuance of the Referee's order in the medical services litigation. Since the claim was reopened by the SAIF Corporation within one year of the last Determination Order issued pursuant to ORS 656.268, the subsequent closure had to be accomplished pursuant to ORS 656.268. Carter v. SAIF, 52 Or App 1027 (1981); Coombs v. SAIF, 39 Or App 293 (1979). Therefore, the Board's Own Motion Order and Determination is of no legal effect.

We note in passing that as of the date of the Board's Own Motion Order, the claim was in open status as a result of claimant's recent enrollment in an authorized training program. This reopening was effected after the February 25, 1983 Determination Order and within one year thereof; therefore, the order reclosing this claim necessarily will be issued by the Evaluation Division pursuant to ORS 656.268, as opposed to the Board pursuant to ORS 656.278.

ORDER

The Board's Own Motion Order and Determination issued herein on July 15, 1983, hereby is rescinded and held for naught.

BONITA K. MILLER, Claimant
Galton, Popick & Scott, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-08941
August 17, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Mulder's order which concluded that the employer properly reduced claimant's compensation for temporary total disability to compensation for temporary partial disability after claimant refused light-duty employment offered by the employer.

This case arises under ORS 656.325(5) and OAR 436-54-222(5). ORS 656.325(5) provides:

> "Notwithstanding ORS 656.268, an insurer or self-insured employer shall cease making payments pursuant to ORS 656.210 [temporary total disability] and shall commence making payment of such amounts as are due pursuant to ORS 656.212 [temporary partial disability] when an injured worker refuses wage earning employment prior to claim determination and the worker's attending physician,

after being notified by the employer of the specific duties to be performed by the injured worker, agrees that the injured worker is capable of performing the employment offered."

At the time the issue arose in the processing of this claim of whether or not claimant should receive temporary total or temporary partial disability, the pre-1982 version of OAR 436-54-222(5) provided:

> "An insurer or self-insured employer shall cease paying temporary total disability compensation and start making payment of such temporary partial disability compensation as would be due in subsection (1) when an injured worker refuses wage earning employment prior to claim determination under the following conditions:
>
> (a) the attending physician has been provided with a written description of the job duties and the physical requirements thereof;
>
> (b) the attending physician agrees that the injured worker is capable of performing the employment offered as it is described; and
>
> (c) the employer has provided the injured worker with a written offer of reasonable employment which states the beginning time, date and place; the duration of the job; the wage payable; an accurate description of the job duties and that the attending physician has said the worker is capable of performing the employment." (Emphasis added.)

Effective January 1, 1982, OAR 436-54-222(5) was amended and now provides:

> "An insurer or self-insured employer shall cease paying temporary total disability compensation and start making payment of such temporary partial disability compensation as would be due in subsection (1) when an injured worker refuses wage earning employment prior to claim determination under the following conditions:
>
> (a) the attending physician has been notified by the employer or

insurer of the specific duties to be performed by the injured worker and the physical requirements thereof;

(b) the attending physician agrees that the offered employment appears to be within the worker's capabilities; and

(c) the employer has provided the injured worker with a written offer of the employment which states the beginning time, date and place; the duration of the job; the wage rate payable; an accurate description of the job duties and that the attending physician has said the offered employment appears to be within the worker's capabilities."

It is clear that claimant's physician was provided a description of the light-duty job offered by the employer and certified that claimant was capable of performing that job. The issue is joined on whether the offered employment was "reasonable employment" under former OAR 436-54-222(5).

We first note that there is no "reasonableness" limit expressed in the statute, ORS 656.325(5) or in the current version of OAR 436-54-222(5). That limitation was stated only in the pre-1982 verions of OAR 436-54-222(5). We assume for purposes of this case, however, that it does not matter which version of the administrative rule is applicable because some type of reasonableness limitation would probably be found to be implicit in the statute.

We secondly assume, as is true in all other situations in which a claimant requests a hearing seeking increased benefits, that the claimant here bears the burden of proving that the light-duty job that she refused was unreasonable.

Claimant argues that the combination of factors makes the offered light-duty employment unreasonable:

(1) Transportation problems. The offered light-duty employment was at a location about 5 to 10 miles more distant from claimant's home than the location she was working when injured. Claimant's car was apparently operable but apparently undependable. Bus transportation to the location of the light-duty employment would have involved commuting approximately three hours a day.

(2) Child care problems. Claimant had three young children at home, the oldest being 7. In order to accept the offered light-duty position, claimant would have had to arrange for child care.

(3) Income. The offered light-duty position paid only $2 per hour. Although we are not sure we completely understand all the

various benefit computations discussed in the record, it is clear that the SAIF Corporation would have paid claimant an amount of benefits for temporary partial disability that, when added to her wages from the light-duty position, would have been equal to or greater than her compensation benefits for temporary total disability.

(4) Job satisfaction. Claimant was injured while working as a "processor" sorting laundry in a facility operated by a motel. The light-duty position the employer offered involved doing maid-type work in the motel. Claimant testified that she did not regard maid-type work as sufficiently mentally stimulating.

We are not persuaded that these factors establish that the offered employment was unreasonable. It seems to us that claimant's child care problems would have been exactly the same if claimant were working in any job. Likewise, some of claimant's transportation problems (undependable car, inconvenient bus schedules) would have been substantially the same if claimant were working in any job. Admittedly, claimant was commuting about 20 miles a day to work pre-injury and the offered post-injury position would have involved commuting about 30 to 40 miles a day. But we do not think that this additional distance or travel time is so onerous as to make the offered employment unreasonable.

We are frankly unsure that we understand claimant's argument about her income. The whole point of temporary partial disability, as provided for in ORS 656.212 and OAR 436-54-222, is that wages earned while recovering from an industrial injury reduce compensation benefits received during that same period. To the extent that claimant's complaint is that her wages plus temporary partial disability benefits while working would only be the same or a little more than her temporary total disability benefits while not working, that is a complaint about the statutory scheme; it is not evidence that the offered light-duty work was unreasonable.

Finally, as to the relative stimulation level of claimant's pre-injury work and the proposed post-injury work, based on the limited information in this record, we cannot see any significant difference between work in a motel laundry and work in the motel housekeeping department. Moreover, and most importantly, the proposed housekeeping job would not have been permanent; it was intended to be and was offered as only an interim measure until claimant's doctor either gave her a full work release or determined that she was medically stationary. Such an interim measure appears to us to be fully consistent with one of the stated purposes of the Workers' Compensation Law: "To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable." ORS 656.012(2)(c). Given that statutory goal, we generally think it is preferable for an injured worker to return to a modified (even if possibly "less stimulating") job as soon as possible and thus think that any doubt about whether offered, modified employment was reasonable should be resolved in favor of an affirmative finding.

Claimant also argues that she should be awarded penalties and attorney fees because: (1) There was a delay in the payment of some of her time loss when SAIF converted the rate from total disability to partial disability; and (2) SAIF did not give claimant

a written explanation of its setoff of a prior overpayment as required by OAR 436-54-320(2). The relevant facts are a little vague in the record, but it does appear that there probably was a brief delay in the payment of a small amount of time loss and that SAIF's first explanation of its setoff was oral rather than written. We nevertheless conclude that these deviations from legal requirements are too inconsequential to warrant assessment of penalties and attorney fees.

ORDER

The Referee's order dated November 17, 1982 is affirmed.

GARY PARKER, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 81-09988
August 18, 1983
Order on Reconsideration

The employer/insurer has moved for reconsideration of our Order of Remand dated April 27, 1983. We abated that order on May 19, 1983 to consider the motion. On reconsideration, we vacate our April 27, 1983 order.

In our prior order we found that claimant's attorney was "never provided with copies of [certain] reports [from the Northwest Pain Center] until the time of the hearing." On the basis of this finding we ordered this case remanded for admission and consideration of those reports and for assessment of an appropriate penalty for noncompliance with discovery obligations. See Curtis H. Best, 35 Van Natta 298 (1983). On reconsideration, we find the evidence on this point is conflicting. Claimant's attorney states in an affidavit that he never received the reports in question prior to the hearing. However, the record now before us includes a transmittal letter from the insurer's attorney which on its face indicates that the reports were forwarded to claimant's attorney. On the basis of the record before us, we are unable to resolve the conflict on this issue.

Nevertheless, we remand this case to the Referee pursuant to ORS 656.295(5) to admit and consider the complete reports of the Northwest Pain Center because we find that the record is incomplete without those reports. Regardless of whether the insurer was derelict in complying with the discovery obligations, it is apparent that claimant's attorney did not receive the reports in question from the insurer prior to the hearing. We also feel it is appropriate for the Referee to offer the parties an opportunity to develop a record on whether a penalty should be assessed against the insurer.

Accordingly, we remand this case to the Referee for the limited purposes of admitting and considering the complete reports of the Northwest Pain Center and determining whether a penalty should be assessed against the insurer for noncompliance with OAR 436-83-460.

ORDER

The Board Order of Remand dated April 27, 1983 is vacated and in lieu thereof, this case is remanded to the Referee for proceedings consistent with this Order on Reconsideration.

ROLAND R. EDWARDS, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05167
August 19, 1983
Second Order on Reconsideration

Claimant requests further reconsideration of our Order on Review dated July 27, 1983 and our Order on Reconsideration dated August 12, 1983. Claimant contends that because our Order on Reconsideration upheld the Referee's award of a penalty for failure to disclose certain documents, our Order on Reconsideration should have specified what part of the attorney's fee awarded by the Referee was attributable thereto. We agree. We conclude that $200 is a reasonable attorney's fee for the SAIF Corporation's noncompliance with OAR 436-83-460.

ORDER

The Board's Order on Reconsideration dated August 12, 1983 is modified. Claimant's attorney is awarded $200 payable by the SAIF Corporation. The Order on Reconsideration is republished in all other respects.

ROBERT H. O'DELL, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-04914
August 19, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of Referee Howell's order which set aside its denial of claimant's mid back injury claim. The issues on review are whether the claim is barred by untimely filing and, if not, whether the claim is compensable.

Claimant has a compensable ankle injury which is apparently his most significant work-related injury. That claim has been accepted and is not directly here in issue. Claimant also alleges that in July 1981 he was pulling lumber when he heard a loud snap in his back. He felt no pain then, but began to experience pain several days later. Claimant alleges he told some co-workers about the incident but admits he did not report it to any supervisors. He missed no time from work as a result of this incident. Indeed, claimant was working at two jobs during the summer of 1981 and did not miss time from either job due to the alleged back injury.

On July 29, 1981, in the course of a visit to his physician for treatment for his ankle, claimant mentioned that he was having some back problems. Claimant did not file a back injury claim until December 16, 1981, after he had been laid off by this employer. He testified that he was visiting his attorney in connection with his ankle claim when the attorney noticed the physician's reference to the back incident.

Dr. Boughn, claimant's treating physician, refused to state that claimant's back condition was caused by an on-the-job incident. However, he stated that he found claimant believable, and based on claimant's history, the condition was connected with the work.

On January 26, 1982 SAIF issued a denial of the back claim based on late notice and lack of evidence of any compensable back injury. The Referee set aside that denial, finding that SAIF was not prejudiced by the late filing and that there was sufficient evidence to connect the back condition with a compensable injury. We reverse on the timeliness issue.

ORS 656.265 requires that notice of an on-the-job injury be given within 30 days of the injury. Failure to give notice bars a claim unless one of several conditions are met. Claimant alleges that this claim is not barred under ORS 656.265 because SAIF was not prejudiced. The insurer has the burden of proving prejudice. Satterfield v. Compensation Department, 1 Or App 524 (1970).

In Vandre v. Weyerhaeuser, 42 Or App 705 (1979), the court found prejudice where the claimant had delayed filing his claim three months. The claimant did not recall the exact date of his alleged injury. He worked without time loss for three months following his alleged injury. The foreman to whom he allegedly reported the incident did not recall his reporting the incident.

We find this case indistinguishable from Vandre. Here claimant failed to file his claim for approximately five months after the alleged incident. He, too, cannot recall the exact date of the injury. He, too, continued working without time loss; in fact, he worked at two different jobs without time loss. Claimant does not even allege that he reported the incident to any supervisor, and the co-workers to whom he allegedly reported the incident testified in such a vague manner that it is impossible to determine what claimant may have told them about the incident or when he told them.

Accordingly, we find that SAIF has established that it was prejudiced by claimant's late filing. It had no opportunity to conduct a meaningful investigation of the claim because, until five months after the alleged incident, it did not even know of the incident. By that time, memories were dim and the only recorded evidence of the incident was a fleeting reference in one physician's chart notes. The claim is, therefore, barred under ORS 656.265 for late filing.

ORDER

The Referee's order dated December 15, 1981 is reversed. The SAIF Corporation's denial dated January 26, 1982 is reinstated and affirmed.

PAUL SCOTT, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-06735
August 19, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

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

Claimant is a 59 year old jail guard who alleges that he injured his neck while wrestling with a prisoner in a courtroom

incident on September 8, 1981. Claimant testified that his neck had never bothered him prior to this incident, that he felt immediate pain following the incident, but that he did not seek immediate medical attention because he thought he would get better. Some months later the pain continued to worsen and claimant sought medical attention from Dr. Russell, who referred claimant to Dr. Campagna, a neurologist. Dr. Campagna opined that claimant suffered from nerve root irritation at C7 secondary to an aggravation of cervical spondylosis at C6-7 caused by his job. A myelogram in May 1982 confirmed the diagnosis of cervical spondylosis. Dr. Campagna continued to opine that the spondylosis was aggravated by trauma.

In April 1982 Dr. Campagna took claimant off work. Claimant did not return to work until November 1982. SAIF denied the claim in June 1982.

In its reply brief, SAIF argues that claimant's claim, which was made by filing an 801 form about eight months after the prisoner-wrestling incident, was not timely. Assuming for sake of discussion that the issue is properly before us, we disagree. Claimant testified that he informed a supervisor of his injury shortly after that incident and the Referee specifically found claimant's testimony to be credible.

SAIF primarily argues that the claim is not compensable because claimant failed to prove a worsening of his underlying condition. The Referee agreed that claimant had failed to prove a worsening of the underlying condition, but found the claim compensable because such a showing is not required where the underlying condition is asymptomatic prior to an on-the-job incident.

We disagree with the Referee that claimant has failed to prove a worsening of the underlying condition. Dr. Campagna repeatedly stated that the prisoner-wrestling incident had caused nerve root irritation and a traumatic aggravation of the underlying spondylosis. This uncontroverted statement, in these circumstances, establishes to our satisfaction that there was a worsening of claimant's underlying condition.

Moreover, we agree with the Referee that even if there was no worsening of the underlying spondylosis, the claim is compensable. Although, as pointed out in the parties' briefs, the messages from the Court of Appeals have been conflicting on this issue, the court's most recent pronouncements indicate that the requirement of Weller v. Union Carbide, 288 Or 27 (1979), that claimant prove a worsening of the underlying condition, does not apply in industrial injury cases. Boise Cascade v. Wattenbarger, 63 Or App 447 (1983); Jameson v. SAIF, 63 Or App 553 (1983). There is no question that claimant's symptoms, at the very least, were caused by the wrestling incident. As a result of those symptoms, claimant has required medical care and has suffered time loss. SAIF is liable for compensation for the medical care and time loss.

ORDER

The Referee's order dated January 24, 1983 is affirmed. Claimant's attorney is awarded $450 for services on Board review, to be paid by the SAIF Corporation.

DANIEL R. HILL, Claimant
Coons & McKeown, Claimant's Attorneys
Ackerman, et al., Attorneys
Wiswall, et al., Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-09509
August 22, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation and the employer, Mazama Timber Products, request review of Referee Quillinan's order which set aside SAIF's denial of claimant's occupational disease claim. The issue is the compensability of claimant's bilateral metatarsalgia condition.

Claimant, who was 29 years of age at the time of the hearing, began working as a grease monkey for Mazama in November 1980. Claimant's job involved servicing trucks and yard equipment. Claimant worked in a concrete pit and he would occasionally jump a distance of about three feet from the trucks to the floor.

On July 6, 1981 claimant was examined by Dr. Arden with complaints of back and bilateral foot pain. Dr. Arden reported on November 6, 1981 that claimant was somewhat hypertensive on examination and that he possessed some tarsal and navicular bone "misalignments" in both feet. Dr. Arden indicated that he had corrected the "misalignments." Claimant did not return to Dr. Arden thereafter.

On July 9, 1981 claimant was examined by Dr. Roy, a physician specializing in sports medicine and running injuries. Dr. Roy reported that claimant was complaining of foot pain, and that:

> "The problem has been present many months, probably many years. He is on his feet all day and he finds if he stands for long periods of time his feet will get very painful."

Dr. Roy noted no tenderness, swelling, or other changes in claimant's feet and x-rays revealed no definite abnormality other than a long second metatarsal and a slight metatarsus adductus. He diagnosed bilateral metatarsalgia and prescribed orthopedic shoe devices.

Claimant was seen for the second and last time by Dr. Roy on August 31, 1981. Dr. Roy indicated that claimant felt "comfortable" but that he was complaining of back pain, and that:

> "He gives a history of having had lower back pain for quite some time, which he feels affects his psyche as well. He has seen a number of psychologists, psychiatrists, and chiropractors, but still has problems. * * * He says when his back feels bad he has pain going up to his head, feels dizzy, and somewhat claustrophobic. It appears there is a definite interrelationship between his back discomfort, his foot fatigue, and his mood swings."

Dr. Roy futher indicated that he could find no definite foot defects and that claimant "obviously has psychiatric problems. . ."

On September 25, 1981, after his claim had been rejected by his health insurance provider, claimant filed an 801 form alleging that his work on concrete floors at Mazama was the cause of his foot difficulties. SAIF denied the claim on October 9, 1981.

On October 20, 1981 Dr. Roy responded to several interrogatories from counsel for the employer. He stated that:

> "Mr. Hill stated his foot problems were worse when he stood for long periods of time. Therefore, if his work at Mazama entailed a significant period of standing, then his work may well aggravate his problem. As to whether his work caused his foot problem, this cannot be stated."

Dr. Roy further stated that he did not have an opinion regarding whether claimant's foot problem was disabling as, "His pain is purely a subjective phenomenon, there are very few clinical findings associated with his pain," and "My prognosis must take into account that his aforementioned mental condition may influence his foot symptoms." On November 25, 1981 Dr. Roy reported that claimant's work activities would have caused a "worsening of his foot pain."

Dr. Roy's deposition was taken on May 5, 1982. His testimony is somewhat difficult to evaluate. He first indicated that claimant had related to him that he had had the problem for many months and probably many years. Dr. Roy explained that metatarsalgia was a condition involving the alignment of the foot and the manner in which the soft tissues are related to that alignment and that it is basically congenital or developmental in origin. He indicated that the basic etiology of the pain is not really known, and that in claimant's case, there were no objective clinical findings present. He further testified that from a pathological standpoint, the main changes which would signal a worsening of the condition would be inflammation of either the fascia or the bursa of the tendons, which claimant did not exhibit. Dr. Roy stated that such changes would be expected if the condition were long-standing, but that it was also not unknown for the condition to be long-standing with no such changes taking place. Although he testified that if the symptoms of metatarsalgia were worse it must be assumed that the condition is worse, he also testified that by "exacerbated" he meant that the condition was simply more symptomatic and that it was a question "purely about symptoms," rather than a "pathological entity."

Claimant testified that he experienced increased pain whenever he was on his feet for any period of time:

> "Q So if you were on your feet at home, however, the problem would be present, I take it?
>
> "A Yes.

"Q So basically it was being on your feet whether it was at home or at work that would precipitate the pain in your feet?

"A In the long run, yes.

"Q Okay. So if you went out, say for a hike in the woods you would anticipate your feet to start hurting?

"A Yes.

"Q If you mowed your yard, assuming you have one around your house, your feet would start hurting?

"A Yes.

"Q If you walked to the grocery store your feet would start hurting?

"A Yes."

Claimant also testified that he jogged on occasion prior to working for Mazama and that he was jogging regularly at the time of the hearing. He also testified that he never experienced any foot difficulties prior to working for Mazama.

The Referee concluded that claimant had established by a preponderance of the evidence that his work activity was the major factor in either causing or aggravating his foot condition. SAIF v. Gygi, 55 Or App 570 (1982). The Referee also concluded that if claimant's condition preexisted his employment, that he had established a worsening of the underlying condition under Weller v. Union Carbide Corp., 288 Or 27 (1979). Although we agree with the Referee that this case presents occupational disease questions relative to Gygi and Weller, we disagree with the conclusion that the claim is compensable.

As noted above, Dr. Roy explained that metatarsalgia is a congenital or developmental condition of the alignment of the foot and the manner in which the soft tissues are related to that alignment. We, therefore, disagree with the Referee's statement that the symptoms are the condition. Dr. Roy further indicated that claimant had foot problems for several months and possibly several years; he was quite clear in his deposition that claimant had so indicated. We, therefore, also disagree with the Referee's speculation that Dr. Roy must have misinterpreted claimant's statement that his foot problem was long-standing. Another disagreement we have with the Referee involves her statement that if claimant's condition was long-standing, one would have expected evidence of change in the form of inflammation. Dr. Roy indicated that this happened in some cases but not in others. Under Weller, claimant must establish a worsening of the condition rather than merely an increase in his symptoms. This is where the clarity in Dr. Roy's opinion ends and the waters become muddied. We are unable to determine just what position Dr. Roy takes on the critical question of pathological worsening. He seems to vacillate from one position to another,

first saying that it is purely a question of symptoms, later saying that it must be assumed the underlying condition worsened, and once again saying that he was only speaking in terms of symptoms.

A physician's opinion, which would equally support either of two possible conclusions, supports no conclusion. Cf James M. Tornow, 35 Van Natta 71 (1983). And, as we noted in Eugene Voris, 35 Van Natta 598, 606 (1983): "When the evidence is inconclusive, we necessarily have to recall where the burden of proof lies." That is precisely the situation here. We are simply unable to determine on this record whether claimant's underlying condition actually worsened or if he just experienced an increase in symptoms.

Although we have concluded that we are unable to make an accurate determination of what Dr. Roy's position is, if we were forced to hazard a guess we would probably conclude that a preponderance of Dr. Roy's statements are to the effect that claimant only experienced an increase in pain as a result of working on a concrete floor at Mazama. At no time did Dr. Roy find any evidence of inflammation of the fascia or the bursa of the tendons which he indicated would be expected if there was an actual pathological worsening. In fact, Dr. Roy was unable to find any objective evidence of any type that would indicate a worsening.

Furthermore, we believe that there are additional difficulties present when the Gygi test is applied. Claimant testified that he experienced or would anticipate experiencing pain whenever he was standing for a period of time on virtually any surface. Even if a solely symptomatic worsening were compensable, we still think that some stronger link between work activities and increased symptoms would be necessary.

ORDER

The Referee's order dated June 7, 1992 is reversed. The SAIF Corporation's October 9, 1981 denial is reinstated and affirmed.

FRED A. MOORE, Claimant
Paul Wiggins, Claimant's Attorney
Cheney & Kelley, Defense Attorneys

WCB 81-01928
August 22, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Knapp's order which: (1) Found claimant was not permanently and totally disabled as a result of his September 1978 right hand injury; (2) increased claimant's partial disability award from 80% loss of the right forearm (hand), granted by the July 21, 1980 Determination Order, to 90% loss of the right forearm (hand); and (3) allowed the employer to setoff its overpayment of compensation for temporary total disability that was paid between the medically stationary date and the issuance of the Determination Order.

Regarding claimant's challenges to the Referee's first and third conclusions, we affirm and adopt those portions of the

Referee's order finding that claimant is not totally disabled and that the employer is entitled to a setoff.

Extent of partial disability is the closest question. Claimant contends that he should be awarded compensation for 100% loss of use of his right hand. Some isolated comments by various doctors support that contention. Dr. Coletti suggested that claimant may not regain any use of his right hand. Dr. Deal stated that claimant's right hand function was "really no better than an amputation at the wrist." Dr. Nye calculated that claimant suffers 100% loss of use of his right hand.

The Referee concluded, however, that claimant does retain some use of his right hand. The Referee based that conclusion on the work that claimant had been able to do since becoming medically stationary and on his observations of claimant's hand at the hearing. We are not as confident as the Referee apparently was that claimant's limited post-injury experience is inconsistent with an award for 100% loss of claimant's hand. But the Referee's conclusion was also based in part on his observations at hearing, an opportunity we do not have; and we do not find the medical evidence suggesting 100% loss of use sufficiently compelling to overcome the Referee's observation of some, albeit very limited, remaining right hand use.

ORDER

The Referee's order dated October 6, 1982 is affirmed.

JOHN W. SNYDER, Claimant
Michael Dye, Claimant's Attorney
Wolf, Griffith, et al., Defense Attorneys

WCB 82-05361
August 22, 1983
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Quillinan's order which awarded claimant compensation for permanent total disability. The insurer argues that claimant has failed to prove that he is totally disabled. We find that there are critical but unanswered questions in the record and thus remand to the Referee for further proceedings pursuant to ORS 656.295(5).

Claimant suffered a low back injury in December 1978. After a period of conservative treatment produced little relief, a myelogram was performed in October 1981. It resulted in a diagnosis of a herniated disc at L4-5. Subsequent medical reports refer frequently to the possibility of surgery. On October 12, 1981 Dr. Coletti recommended surgery. On December 2, 1981 Dr. Fax called claimant "an excellent surgical candidate," but apparently suggested a CT scan before making a final decision on surgery. On January 14, 1982 Dr. Cottrell referred to conservative treatment in the form of home traction and opined:

"I think this home treatment [traction] program has a very good chance of relieving him

> enough to avoid surgical treatment and keep him reasonably comfortable. However, only time will tell."

On February 3, 1982 Dr. Coletti, who recommended surgery the prior October, recommended against surgery without any explanation of that change in position. On February 4, 1982 Dr. Cottrell described claimant as "much more comfortable" as a result of the home traction program and opined: "I feel about 90 percent sure that we are going to avoid surgical treatment."

In summary: (1) Over about five months following the October 1981 myelogram, doctors often mentioned the possibility of surgery for claimant's herniated disc; (2) it is not clear why surgery was not performed; however (3) it appears that the medical consensus was to try conservative treatment (home traction) first and, if that did not produce meaningful relief, then to offer claimant the alternative of surgery; and (4) the most recent indication in the record, Dr. Cottrell's February 1982 report, suggests that home traction was producing meaningful relief.

That understanding of the medical record is in stark contrast to claimant's hearing testimony. Claimant's hearing testimony painted a bleak picture of total disability; claimant generally testified that he is unable to stand, unable to walk over half a mile, unable to lift anything over 10 pounds, unable to wash dishes, unable to do garden work, etc. In short, if one fully accepts claimant's testimony, it would seem that his home traction treatment has been a dismal failure.

Given this glaring conflict between the medical evidence and the lay testimony, the questions that we want answered on remand are: What is the current status of medical consideration of the alternative of surgery? Has claimant given the history to his doctors that seemingly suggests the failure of conservative treatment? If so, have the doctors offered surgery to claimant? And if surgery has been offered, why has claimant not submitted to it? In short, has claimant received all medical treatment that is likely to achieve the maximum possible recovery.

We conclude it would be inappropriate to attempt to rate the extent of claimant's permanent disability without answers to these questions and thus remand to the Referee for the taking of additional evidence.

ORDER

The Referee's order dated September 14, 1982 is vacated. This case is remanded for further proceedings consistent with this order.

HILARIA O. SILVA, Claimant
Callahan, Hittle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-06191
August 22, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Wilson's order which affirmed the August 5, 1980 Determination Order awarding claimant no compensation for permanent partial disability. The sole issue is the extent of claimant's permanent disability.

As a result of injury or work activity, claimant now suffers from a condition of her right shoulder diagnosed by her treating physician as bicipital tendinitis. Claimant testified that her right shoulder problem developed gradually while she was employed in carrying and lifting wood components in the employer's furniture plant. She attempted a return to work but experienced continuing pain. She was laid-off due to a reduction in the work force, and she has not returned to work. Claimant testified that she is required to use her left hand almost exclusively because she constantly experiences pain in her right shoulder. She, therefore, attempts to use her left arm in performing most activities. She does little or no housework and depends upon her family to perform household chores. She testified that none of the medical treatments she received have been beneficial in alleviating her symptoms of pain, and that ever since she filed her claim, the condition of her right shoulder has become progressively worse. Claimant's son testified, corroborating claimant's testimony that she was unable to perform any household chores due to the condition of her right shoulder and arm. The lay evidence thus paints a bleak picture in terms of the residual impairment of function in claimant's right shoulder.

The medical evidence is directly to the contrary. Dr. Boyd, claimant's treating orthopedic physician for over one and a half years prior to the hearing, reported on July 7, 1980 that objectively claimant would be able to resume normal work activity with no restrictions. In reviewing Dr. Boyd's other reports, as well as his depositional testimony, the medical picture that emerges is a worker who, although not a malingerer in any sense of the word, has a marked tendency to magnify minor discomfort out of all proportion to its actual magnitude. Dr. Boyd testified that claimant's subjective complaints of pain and inability to use her arm were not verified by his objective findings:

> "I am unable to show the atrophy and [crepitus] and consistent reproduction of symptoms in one area and not over the whole shoulder and arm and neck. That means we are dealing with a functional subjective emotional response."

Dr. Boyd's reports and testimony indicate that during the time claimant had been in his care, in his examination of claimant's shoulder he was able to achieve a greater passive range of motion than claimant was able to achieve actively. In other words, claimant's complaints of limitations in function and use were

contradicted by Dr. Boyd's objective findings on examination of claimant's shoulder.

Our general approach to resolution of such a conflict between medical evidence and lay evidence is as stated in James G. Thomas, 35 Van Natta 714, 715 (1983):

> "When there is direct medical evidence from a physician who has rendered significant treatment to an injured worker which clearly indicates the extent of the worker's impairment and which we have no reason to question, that expert opinion will generally be accepted and take precedence over any contrary opinion of a layman, unless there is compelling reason to do otherwise."

Dr. Boyd rendered significant treatment to claimant and rather strongly opines that claimant has no permanent impairment. Pursuant to Thomas, there is no compelling reason to find the lay evidence more persuasive in the face of this contrary medical evidence. Accordingly, we affirm the Referee's order which granted claimant no compensation for permanent disability.

ORDER

The Referee's order dated March 10, 1982 is affirmed.

JILL M. GABRIEL, Claimant
Burt, Swanson, et al., Claimant's Attorneys
Leonard W. Pearlman, Ass't. A.G.

WCB CV-83010
August 23, 1983
Crime Victim Order

Reviewed by Board Members Lewis and Ferris.

Applicant, Jill Gabriel, requests Board review pursuant to ORS 147.155. She appeals from a Department of Justice (Department) decision on review which affirmed the Department's original order denying applicant compensation under the Crime Victim's Compensation Act (the Act), ORS 147.005, et seq. The Department has filed a counter motion to dismiss the appeal. The parties have waived a hearing and submitted the matter on written argument.

The Department's original order held that applicant was not entitled to compensation under the Act because she did not file her claim for compensation until some fourteen months after she was injured in a crime. The Department alleges she failed to satisfy the statutory requirements for obtaining compensation under the Act. These requirments are stated in ORS 147.015. which provides:

> "A person is entitled to an award of compensation under ORS 147.005 to 147.365 if:
>
> "(1) He is a victim, or is a dependent of a victim of a compensable crime that resulted in a compensable loss of more than $250;

"(2) The appropriate law enforcement officials were notified of the perpetration of the crime allegedly causing the death or injury to the victim within 72 hours after its perpetration, unless the Department finds good cause exists for the failure of notification;

"(3)The applicant has cooperated fully with law enforcement officials in the apprehension and prosecution of the assailant or the Department has found that the applicant's failure to cooperate was for good cause;

"(4) The victim and his assailant were not related or sharing the same household;

"(5) The death or injury to the victim was not substantially attributable to his wrongful act;

"(6)His application for an award of compensation under ORS 147.005 to 147.365 is filed with the Department:

" (a) Within six months of the date of the injury to the victim; or

"(b) Within such further extension of time as the Department for good cause shown, allows.

The Department's original order did not contest whether applicant had satisfied the first five requirments. It refused the claim on the basis of the fact that applicant did not file her claim for benefits until fourteen months after her criminally-caused injury.

In its decision on review, the Department said that the only issue was whether the Department abused its discretion in declining to extend the time in which claimant could timely file for benefits.

FINDINGS OF FACT

Late on the evening of March 29, 1980 a car driven by a man attempting to elude the police crashed into two cars including the one applicant was riding in. One person was killed, and applicant was seriously injured. Although police were immediately on the scene, they did not give applicant a card informing her of her rights under the Act.

There is no indication that applicant did not fully cooperate with the police. There is also no indication that applicant was in any way related to the assailant. Finally, there is no indication that applicant in any way contributed to the wrongful act of the assailant. In other words, we find applicant has satisfied all requirements of ORS 147.015 for eligibility for compensation with

the possible exception of the timeliness of the application. We also find that applicant has satisfied that requirment for the reasons stated below.

OPINION

I. Standard of Review

We must first determine under what standard of review we operate before deciding whether the Department erred in concluding that applicant had failed to meet the timeliness requirment of the Act. While the Act specifies that Department decisions are appealable, it only hints at the proper scope of Board review.

> "The Board is not bound by rules of evidence or by technical or formal rules of procedure, and may conduct the hearing in any manner that will achieve substantial justice. However, no evidence is admissible at a hearing that has not previously been considered by the Department. The decision by the Board shall be final and shall not be subject to further administrative or judicial review." ORS 147.155(5).

While the statute does not specify what standard of review the Board is to use, it does give the Board broad discretion to determine in what manner it can "achieve substantial justice." The only limitation on the Board's review power is that the Board may not admit evidence not already considered by the Department.

As a general rule the Board exercises de novo review of a record developed at a lower level. ORS 656.295(5). Thus, the Board has experience in conducting de novo review. Considering the broad grant of authority and the Board's own experience, we conclude that we should exercise de novo review in Crime Victims' Compensation cases also. We find that we can best achieve "substantial justice" through de novo review.

II. Construction of the Timeliness Statute

The crux of this case is whether the Department correctly applied ORS 147.015(6)(b). Unfortunately, that portion of the statute is not a model of clarity. It states that in order to obtain compensation on a claim filed outside a six months limitation, the claim must be filed "within such further extension of time as the Department for good cause shown, allows." Upon examination of that subsection, we conclude that it requires a two step analysis. In order to obtain an extension beyond the six months limitation, an applicant is required to show good cause for failure to file within six months. However, even upon that showing, it is within the discretion of the Department whether to grant an extension or not. See Ivan Ouchinnokov, 34 Van Natta 579 (1982).

The concept of good cause is applied in other subsections of the statute. Failure to notify the police is excused for good cause, as is failure to cooperate with the police. ORS 147.015(2) and (3). However, there is no indication in the statute that the

Department has any discretion whether to grant those two exceptions. If there is good cause, then the applicant has satisfied the requirement.

On the other hand, the exception to the timeliness requirment speaks of allowing an extension. The word "allows" connotes discretion. It does not speak in absolutes. Hence, we review to determine both whether applicant had good cause for filing her claim fourteen months after her injury and whether the Department abused its discretion in refusing to allow an extension.

III. Good Cause

Applicant's injury occurred on March 29, 1980. She did not file a claim until June 8, 1981. However, in her request for reconsideration of the Department's original order, the applicant specifically stated that she was not informed of the Crime Victim's Compensation program by the officers at the scene. She stated that the only way she found out about the program was through a newspaper article concerning a highly publicized crime.

ORS 147.365 states:

> "(1) All law enforcement agencies in this state shall deliver cards to victims of crime stating the procedure to be followed in applying for compensation under ORS 147.005 to 147.365.
>
> "(2) No law enforcement agency shall be civilly liable for a failure to comply with subsection (1) of this section."

This statute imposes an affirmative duty on law enforcement agencies to inform victims of crime of their rights under the Act. The fact that the legislature relieved these agencies of civil liability for failure to comply with their duty does not diminish the fact that the statute imposes an affirmative duty. The obvious intent of the legislature was to make sure that victims of crime were informed by the police of their rights. In view of this intent we have held that failure of the police to provide a victim with a card informing her/him of rights under the Act constitutes a prima facie showing of good cause for a late filing. Ivan Ouchinnikov, supra. We, therefore, find that applicant had good cause for the late filing of her claim.

IV. Abuse of Discretion

After concluding that claimant had good cause for filing her claim late, we must then resolve the question of whether the Department abused its discretion in refusing to allow an extension.

The Department has never adopted administrative rules to guide it in exercising its discretion in this area. Rather, it relies on "administrative practice."

> "[I]t has been the administrative practice of the Crime Victims' Compensation Program, since its beginning, not to allow claims

filed beyond one year from the date of the injury on the grounds that such late filing impaired the ability of the Program to properly process those claims."

By failing to adopt administrative rules, the Department has failed to provide notice that there is an absolute deadline of one year for filing claims.

The Department argues that such late filings prejudice it in its ability to process claims . However, there is no indication that the Department was prejudiced in its ability to process this claim. It was able to provide extensive police reports which included the names of all witnesses to the incident and the name and address of both the alleged assailant and his father.

The Department denied applicant's claim simply because she did not file it within the one year "policy" deadline despite the fact that claimant was able to demonstrate good cause for her late filing. The department made no effort to prove that it was in any way prejudiced by the late filing. We believe that the denial of a claim because of late filing (where good cause has been shown) without first making a showing that it was prejudiced by the late filing is an abuse of discretion. We hold, therefore, that the Department abused its discretion in denying this claim.

ORDER

The Department of Justice's decision on review of September 18, 1981 is reversed. The claim is remanded to the Department for processing in accordance with this order. The Department's motion to dismiss is denied.

CHARLES W. GODDARD, Claimant
Pozzi, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-02872
August 23, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Gemmell's order which awarded claimant 65% unscheduled disability, that being an increase of 45% over the amount awarded by Determination Orders. The sole issue is extent of disability.

Claimant, 53 years old at the time of hearing, compensably injured his low back on March 1, 1977 when he attempted to catch a solid core door. He was working at that time repairing doors, work that is classified as heavy. He developed low back pain with no radiculopathy. Claimant never returned to his door repair job. After he became medically stationary, he went to work for a home improvement company. A Determination Order dated May 18, 1978 awarded claimant 5% unscheduled disability. He subsequently began his own home remodeling business.

In July 1981 claimant aggravated his low back when he was opening a car door. He was evaluated by Orthopaedic Consultants in August 1981. They diagnosed chronic low back strain with marked postural deformity. The Consultants noted no functional interfer-

ence. They felt claimant was not then medically stationary, but opined that at most he could return to light work when he became stationary. They felt sure he could not return to either of his previous occupations. His treating physician, Dr. Kirchim, agreed with Orthopaedic Consultants' report. Claimant continues to manage his home remodeling business without doing any of the actual physical labor.

Claimant was evaluated at the Callahan Center in November 1981. Dr. Storino opined that claimant is only able to sit for one hour at a time, to stand for one half hour at a time and to walk for one hour at a time. He felt that claimant is limited to light work. He said claimant probably could not return to his previous jobs.

In January 1982 Dr. Newfeld examined claimant. He reported that claimant experiences a sharp pain in his lower back and buttocks with numbness on the left side of his leg. He said claimant has trouble standing after being seated for a time. Dr. Neufeld observed a significant list to the left with poor bending of the lumbar spine to the right. Claimant could only bend so that his fingertips reached his knees. His extension was 50% of normal.

A Determination Order dated January 21, 1982 awarded claimant an additional 15% unscheduled disability. Claimant appealed that Determination Order. At hearing claimant testified concerning the amount of pain he experiences. He said he constantly has sharp pains in his back, which at times are excruciating. He said he sometimes has sharp pains in his legs and muscle spasms in his feet. When he twists his pain gets worse.

The Referee found claimant's loss of wage earning capacity justified an award for 65% unscheduled permanent partial disability.

Considering the guidelines in OAR 436-65-600 et seq., and comparing this case to other similar cases, we conclude that claimant would be more appropriately compensated by a total award of 45%. We base this conclusion on the following analysis. No physician specifically rates claimant's impairment due to his compensable injury. The medical evidence reflects impairment in the form of limitation of motion and restrictions on lifting. Claimant's testimony establishes impairment in the form of disabling pain. It would appear that claimant suffers from about 25%-30% whole person impairment. Claimant's age of 53 yields a +8 value. His education (high school graduate), intelligence and the relevant labor market findings have no impact. Claimant's previous work was heavy and he is now limited to light work; we assign an adaptability value of +10. His work experience at his previous job required significant training, which here leads to a +5 value. Combining all these values yields a disability rating of 45%, which we think is appropriate in this case, which involves a no-surgery injury to a high school graduate who has been able to continue working in a marginal/supervisory position despite his limitations.

ORDER

The Referee's order dated November 18, 1982 is modified. Claimant is awarded 144° for 45% unscheduled permanent disability; this award is in lieu of all prior awards. Claimant's attorney's fee shall be adjusted accordingly.

JOSEPH E. GUILLORY, Claimant
Michael Dye, Claimant's Attorney
Schwabe, Williamson, et al., Defense Attorneys

WCB 82-09332
August 23, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Nichol's order which upheld the self-insured employer's denial of claimant's aggravation claim.

Claimant sustained compensable low back injuries in 1976, 1977 and 1981. The resulting claims were all closed with no awards for permanent disability. In June 1982 claimant was laid off due to the employer's closure of a mill and claimant then began working in a family-run cleaning business. Claimant alleges he suffered a sudden onset of back pain in July 1982 while getting into the van used in that cleaning business. Claimant's resulting aggravation claim presents the issue of whether his prior (1977-81) industrial injuries materially contributed to his low back disability after the July 1982 incident.

The Referee found that claimant had failed to so establish based on her conclusion that claimant tended to embellish his problems, what she viewed as the conclusory nature of Dr. Poulson's opinion and her interpretation that Orthopaedic Consultants' report did not address the issue of causation.

Since there is no issue of compensability of claimant's earlier injuries, nor does the employer raise any question as to whether the July 1982 incident occurred in any way other than claimant related, claimant's credibility or lack thereof is not critical with respect to these issues. On the other hand, there is a suggestion that the medical opinions in the record may have been based on different histories from claimant. To this extent, claimant's credibility is important in assessing the medical opinions.

We agree with the Referee that Dr. Poulson's emphatic statement of his opinion ("There is no doubt in my mind that this is only an aggravation of the pre-existing condition, which makes the previous injuries . . . the material cause of his present complaints.") does not carry the day without explanation or analysis, which Dr. Poulson does not offer. First, Dr. Poulson admits that claimant "did not give me a very good history," but then does not indicate what history he is relying on in the formulation of his opinion. Second, Dr. Poulson insists that claimant's problems after July 1982 include a protrusion of the L4-5 disc. However, that diagnosis is not shared by Dr. Kelly, a radiologist who interpreted the August 1982 myelogram results. Assuming claimant does have a protruded disc and that the disc injury occurred before claimant was laid off in June 1982, the question arises of how claimant was able to continue performing his regular job, which he did until laid off, without apparent disability. Assuming claimant does have a disc which did not protrude until after the lay-off, the question arises: what is the causal link with the prior industrial injuries which were diagnosed as soft tissue injuries. Dr. Poulson does not answer any of these questions.

Finally, although we agree with the Referee that Orthopaedic Consultants' report does not hit any bullseyes, we think that report offers some possibly helpful insight. Dr. Stainsby, writing for the Consultants, opines:

> "The diagnosis of lumbar sprain, historically, is not specifically related to his off the [job] injury of July 7, 1982, but in my opinion is related to the three prior on-the-job injuries which have been documented as well as the off-the-job injury of July 7, 1982.
>
> "In my opinion, the July 7, 1982 'injury' did not significantly increase any impairment present in this individual's lumbar back."

There is no requirement that an aggravation claim be based upon "significant" increase in impairment. But in context with the rest of this report, it appears that Dr. Stainsby may be saying that claimant had or possibly had permanent impairment as a result of his 1976, 1977 and 1981 industrial injuries (even though he did not receive any awards for permanent disability) and that claimant's condition was basically unchanged in 1982. If this is Dr. Stainsby's opinion, claimant cannot use this "aggravation claim" as a means of collaterally attacking the fact that he was not previously awarded any compensation for permanent disability. Deaton v. SAIF, 33 Or App 261 (1978).

ORDER

The Referee's order dated December 17, 1982 is affirmed.

PEARL M. LUKENS, Claimant
Bischoff et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-05197
August 23, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order affirming a Determination Order which awarded claimant 25% scheduled permanent partial disability for injury to her right forearm (wrist). The only issue on review is extent of disability to her right forearm.

Claimant is a 60 year old dishwasher who has right carpal tunnel syndrome. The condition has been accepted as a compensable occupational disease. She has had three surgeries involving her right carpal tunnel.

Dr. Schwan of the Callahan Center provides objective medical evidence of claimant's loss of right wrist function. He reports loss of right wrist dorsiflexion, right wrist palmar flexion, radial and ulnar deviation, and loss of grip strength. He also stated that claimant is unable to return to her occupation of nine

years as a dishwasher, or to any other occupation requiring prolonged standing or use of the hands or wrists.

Claimant testified that she experienced no limitation in her right arm/wrist/hand before the onset of her occupational disease. She now experiences almost constant pain and numbness in all five fingers of her right hand, particularly into the index, middle finger and thumb. She cannot use small hand tools such as crocheting needles. She experiences pain when doing housework, tying her shoes or driving a car. She has such a degree of numbness that she has cut her fingers and scalded herself several times. She also drops things because of the loss of grip strength.

We look at claimant's permanent loss of use or function in evaluating her scheduled injury. ORS 656.214. Using the guidelines in OAR 436-65-520 et seq., we add the ranges of motion involving the same body part and combine that total with the other impairment findings.

Dr. Schwan reported the following ranges of motion: right wrist dorsiflexion 50°; right wrist volar [palmar] flexion 60°; radial deviation right wrist 10°; ulnar deviation right wrist 20°. We convert these findings into percentages by using the AMA "Guides to the Evaluation of Permanent Impairment," and then add them. This yields 8%.

The 8% figure is then combined with the documented loss of grip strength caused by impairment of the median nerve. Claimant's grip strength in the right (dominant) hand was 15 pounds. The impairment factor for loss of grip strength is thus 30%.

Finally, we conclude from the evidence that claimant's pain contributes to her impairment. Accordingly, we combine an additional 5% figure with the other impairment ratings.

Combining the 8% total derived from adding the ranges of motion, the 30% total from loss of grip strength and the 5% total for disabling pain yields 40% when properly rounded to the nearest 5%. We have also compared this case with similar cases and find that 40% scheduled disability is consistent with them. We, therefore, reverse the Referee's order and grant claimant a 40% scheduled disability award for her right forearm (wrist) condition.

ORDER

The Referee's order dated November 18, 1982 is reversed. Claimant is awarded 40% scheduled permanent partial disability for injury to her right forearm (wrist). This is in lieu of any prior awards for such injury. Claimant's attorney is allowed 25% of the increased compensation not to exceed $3,000, payable out of and not in addition to claimant's compensation.

WALTER D. ROELLE, Claimant
Cash Perrine, Claimant's Attorney
Minturn, et al., Defense Attorneys

WCB 82-11738
August 23, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Seymour's order overturning its denial of claimant's left hernia problems. Claimant cross-requests review on the issue of whether SAIF should have been penalized for an unreasonable denial.

On November 14, 1975 claimant sustained a compensable groin injury while lifting heavy boxes. He initially complained of a bulging on his right side and pain in his right side and leg. However, on November 17, 1975 Dr. Rohberg submitted a form 827 to SAIF in which he diagnosed claimant as having "bilateral inguinal hernia." On November 19, 1975 the right hernia was operated on. On December 17, 1975 the left hernia was operated on. The original Determination Order from 1977 is not in this record, and neither is there any other direct evidence that the left hernia was accepted. However, there is also no indication in the file that the left hernia condition was ever denied until November 10, 1982. Because the doctor's report of bilateral inguinal hernia clearly constitutes a claim for both the right and left hernias and because there is no indication SAIF ever denied that claim until 1982, we conclude that it was in accepted status until at least November 10, 1982.

Claimant continued to have problems with the right hernia which necessitated numerous surgeries. He had no problems with the left side until late 1981. There was some question whether claimant actually had a left hernia at that time, but by late 1982 his physician had concluded that indeed he had a recurrent left hernia for which surgery should be authorized.

Dr. Norton reviewed claimant's file and opined:

> "Those [hernias] that recur at a more remote period in time, which may be many years later, are the result of intra-abdominal pressure acting upon inadequate tissue, i.e., the scar tissue of the repair.
>
> ****
>
> "If the left inguinal hernia was accepted as a compensable 'injury' (which it was not)...then the current problem of a recurrent hernia would have to be considered <u>medically</u> as a continuation of the same problem that was treated in 1975."

The Referee said that he viewed the critical issue as being whether SAIF's denial of November 1982 was a denial of the left hernia from the outset or merely a denial of the left hernia condition as it existed in 1982. He concluded that it was merely a denial of the condition as it existed in 1982 and found, based on Dr. Norton's report, that the condition in 1982 was related to the condition treated in 1975.

It is unclear whether SAIF intended to deny the entire left hernia condition from the outset or merely the condition as it existed in 1982. The Court of Appeals has recently held that an insurer cannot unilaterally deny a claim after an award or arrangement of compensation has become final. Bauman v. SAIF, 62 Or App 323 (1983). We have found that the left hernia condition was accepted in 1975 and continued to be accepted until the denial of November 1982. During the interval at least two Determination Orders issued. The Determination Orders were never challenged and thus became final by operation of law. Consequently, under Bauman, SAIF could not deny the left inguinal hernia from the outset. At most it could deny compensability of it as it existed in 1982. We, therefore, agree with the Referee.

The evidence from Dr. Norton is clear that not only did claimant's left hernia worsen, but it was directly related to the accepted surgery in 1975. Accordingly, claimant's current left hernia condition is compensable.

We agree with the Referee that claimant is not entitled to a penalty for an unreasonable denial.

ORDER

The Referee's order dated February 16, 1983 is affirmed. Claimant's attorney is awarded $400 for services on Board review, to be paid by the SAIF Corporation.

RAYMOND THORNSBERRY, Claimant — WCB 80-09765
Pozzi, Wilson, et al., Claimant's Attorneys — August 23, 1983
Foss, Whitty, & Roess, Defense Attorneys — Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Seymour's order which affirmed that portion of the October 3, 1980 Determination Order which found that claimant was no longer permanently and totally disabled. The Referee modified that Determination Order, in part, by awarding claimant compensation for 256° for 80% unscheduled low back disability and 112.5° for 75% loss of the left leg. The Determination Order had awarded compensation for 40% unscheduled low back disability and 65% loss of the left leg.

The Board affirms and adopts the Referee's order with one additional comment. In dicta, the Referee commented in his order that future questions involving entitlement to medical services should be addressed to the Board under its ORS 656.278 own motion jurisdiction. Because claimant was injured before 1965 and because we have determined that claimant is no longer totally disabled, the Referee's dicta would appear to have been correct under our subsequent decision in William A. Newell, 35 Van Natta 629 (1983). However, we do not understand this case to involve any issue of denied medical services or the remedy available to claimant in the event of a denial of medical services; and we thus do not understand the Referee's order or this order to preclude claimant, in the event of a denial of medical services, from asserting that he has a right to a hearing on that issue notwithstanding Newell.

ORDER

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

JOSEPH BEEBE, Claimant
Coons & McKeown, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-00260
August 25, 1983
Interim Order of Remand

The Referee issued his order herein on August 12, 1983, increasing claimant's award of unscheduled permanent partial disability. In his order the Referee noted that claimant's attorney had failed to submit a copy of his client's retainer agreement and, therefore, did not allow claimant's attorney a reasonable attorney's fee payable out of claimant's increased award.

On or about August 15, 1983, the SAIF Corporation requested review of the Referee's order. On or about that same date, claimant submitted a copy of his client's retainer agreement to the Referee, who forwarded it to the Board in view of the insurer's request for review divesting the Referee of jurisdiction.

Considering the circumstances presented herein, we deem it appropriate to remand this matter to the Referee for the limited purpose of issuing a supplemental order allowing claimant's attorney a reasonable attorney's fee payable out of claimant's increased award of compensation, in accordance with OAR 438-47-025 and the claimant's retainer agreement.

ORDER

This case is remanded to the Referee for issuance of a supplemental order allowing claimant's attorney a reasonable attorney's fee. The Board retains jurisdiction over this proceeding, and upon issuance of the Referee's supplemental order, this proceeding on Board review shall be resumed.

RICHARD A. FILONCZUK, Claimant
Lynch & Siel, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-10911
August 25, 1983
Order of Abatement

The Board has received a motion to reconsider its Order on Review dated July 29, 1983 and its amended Order on Review dated August 5, 1983.

In order to allow sufficient time to consider the motion, the above noted Board orders are abated and claimant is requested to file a response to the motion for reconsideration within ten days.

IT IS SO ORDERED.

BERT G. HARR, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Lindsay, Hart, et al., Defense Attorneys

WCB 82-03306
August 25, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Foster's order sustaining the insurer's denial of claimant's bilateral carpal tunnel syndrome. The insurer cross-requests review of the Referee's award of an attorney's fee for late denial. The compensability of claimant's bilateral carpal tunnel syndrome and the propriety of the attorney's fee award are the only issues on review.

We affirm and adopt that portion of the Referee's order awarding an attorney's fee for late denial.

On the compensability question, we find that claimant's bilateral carpal tunnel syndrome is compensable.

Claimant is a 32 year old carpenter. According to the history which he gave to his treating physician and his testimony at hearing, he had experienced numbness in the fingers of both hands prior to the occupational exposure at issue in this case. He had never lost time from work or sought medical attention for these symptoms prior to the exposure at issue here.

In August 1981 claimant began working for the employer building forms for the construction of a dam. He testified that this work consisted of holding pieces of wood with his left hand while he hammered nails with his right hand. Within about three weeks after beginning this work he began to experience increased numbness in the first three fingers of each hand. He also began to notice pain in his hands for the first time.

Dr. Altrocchi, claimant's treating physician and the only physician who voices a medical opinion in this case, opines that claimant has carpal tunnel syndrome. He also states unequivocally that based on the claimant's history, the carpal tunnel syndrome preexisted his occupational exposure with this employer.

Dr. Altrocchi is equivocal about whether claimant's work exposure worsened his preexisting carpal tunnel syndrome. In a report to the insurer's attorney he states that while this work exposure caused claimant's carpal tunnel syndrome to become symptomatic, it did not materially worsen the syndrome. In a report written to claimant's attorney, Dr. Altrocchi states that this work exposure did aggravate the preexisting problem. "Certainly, his work activities were the major contributing cause for the relapse of his bilateral carpal tunnel syndrome." His latter report can arguably be read to mean that the work exposure did cause a worsening of the underlying carpal tunnel syndrome.

The Referee held that claimant had satisfied SAIF v. Gygi, 55 Or App 570 (1982), by proving that his work exposure was the major contributing cause for his carpal tunnel syndrome as it manifested itself in 1981. However, the Referee held that because claimant had a preexisting condition he was required to prove a worsening of

that condition under Weller v. Union Carbide, 288 Or 27 (1979), in order to establish compensability.

We disagree because we find that Weller does not apply in this case. In Lorena Iles, 30 Van Natta 666 (1981), we declined to apply Weller because we found that claimant's preexisting back condition was not symptomatic enough to apply Weller. In Patricia Lewis, 34 Van Natta 202 (1982), we explained the rationale for declining to apply Weller.

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

In this case claimant was not totally asymptomatic prior to his occupational exposure. However, it is apparent from reading Iles that the claimant there was not totally asymptomatic either. In any event, the rationale for declining to apply Weller which we voiced in Patricia Lewis is equally applicable whether the claimant is previously totally asymptomatic or whether the claimant's symptoms are merely such that he notices them but does not seek medical treatment for them. In both cases there is no baseline information upon which to base a decision whether the occupational exposure has worsened the underlying condition because there is necessarily no medical information about the underlying condition. It would create an insurmountable burden in a case in which there is no medical evidence about the underlying condition to require claimant to prove both what his condition was before his occupational exposure and that the occupational exposure had worsened it. Accordingly, we find that Weller is inapplicable.

Because we find that Weller is inapplicable, claimant's burden is to prove that his occupational exposure was the major contributing cause of the condition for which he sought medical treatment. The Referee found that claimant had satisfied that burden and we agree. Dr. Altrocchi said in both his reports that claimant's work activities were the cause of the problems which claimant reported. In his second report he specifically said the work activities were the major contributing cause for the relapse of the carpal tunnel syndrome.

ORDER

The Referee's order dated October 5, 1982 is reversed in part.

That portion of the order sustaining the insurer's denial is reversed. The claim is remanded to the insurer to accept claimant's bilateral carpal tunnel syndrome. Claimant's attorney is awarded $1,500 for services before the Referee and on Board review, for prevailing on a denied claim. The remainder of the Referee's order is affirmed.

ERWIN MUSTOE, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Lindsay, Hart, et al., Defense Attorneys

WCB 76-00610 & 78-04474
August 25, 1983
Interim Order of Remand

The Referee issued his order herein on July 25, 1983. On or about July 29, 1983, claimant requested review. The employer thereafter requested that the Referee modify that portion of his order which allowed claimant's attorney a reasonable attorney's fee payable out of claimant's increased award of compensation, not to exceed $2,300, in view of OAR 438-47-025, which limits such an attorney's fee to $2,000. But see OAR 438-47-010(2). The Referee thereafter corresponded with counsel for the employer, acknowledging that he mistakenly had allowed claimant's attorney a fee in excess of that provided by OAR 438-47-025, and correctly stating that, in view of claimant's request for Board review, he no longer had jurisdiction to correct this error.

The employer now has moved the Board for remand to the Referee pursuant to ORS 656.295(5) for correction of the error. Under the circumstances presented herein, we deem it appropriate to remand this matter to the Referee for the limited purpose of correcting what apparently was an oversight.

ORDER

This case is remanded to the Referee with instructions to amend that portion of his order allowing claimant's attorney a reasonable attorney's fee payable out of claimant's award of compensation, in order to allow an attorney's fee which comports with existing law. The Board retains jurisdiction of this case, and upon issuance of the Referee's amended order, this proceeding on Board review shall be resumed.

RICK E. O'DELL, Claimant
Evohl Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 82-06105 & 82-06104
August 26, 1983
Order on Reconsideration

Reviewed by Board Members Lewis and Ferris.

Claimant has requested reconsideration of the Board's Order on Review of July 29, 1983 asking, specifically, that the Board reconsider its award of a $200 attorney's fee. Claimant's attorney contends that the sum of $1,000 would be a reasonable attorney's fee. The Board grants claimant's request for reconsideration and republishes its order with the following comments.

In support of his request for reconsideration, claimant's attorney states:

"You are reminded that in a recent Circuit Court review of attorney's fee awards, the Circuit Court Judge remarked, in the words of the Bible, that a laborer is worthy of his hire."

The Board is cognizant of the words of the esteemed Judge and respects them. This case went to hearing and was appealed to the Board on the sole issue of a late payment of the balance of a stipulated settlement. As the Board said in Zelda M. Bahler, 33 Van Natta 478 (1981), rev'd on other grounds; Bahler v. Mail-Well Envelope Co., 60 Or App 90 (1982):

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

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

In granting a fee of $200, the Board believes that it conformed to the policy stated in Bahler, and, as claimant points out, we are reminded of the Biblical injunction that a laborer is worthy of his hire. However, we are also reminded that, "Better is a little with righteousness than great revenues without right." Proverbs 16:8.

We, therefore, adhere to our previous order.

IT IS SO ORDERED.

OUIDA E. BASSINGER, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-02320
August 30, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Quillinan's order which modified the July 14, 1982 Determination Order by increasing claimant's right leg (knee) award from 15% to 90% scheduled disability and increasing claimant's left hand award from

35% to 75% scheduled disability. SAIF contends that the awards are excessive. Claimant cross-requests review of the Referee's order, contending that she is permanently and totally disabled when considering her right knee and left hand injuries in conjunction with her preexisting physical impairments and social/vocational factors.

We affirm that portion of the Referee's order which found that claimant is not permanently and totally disabled. However, we modify those portions of the order which increased the right leg and left hand awards.

Claimant was injured on April 26, 1980 when she tripped while going down some stairs at her place of employment while she was carrying a case of pop bottles. Claimant fractured her left thumb at the carpal metacarpal joint as she attempted to brace herself while twisting and falling on her right knee.

Dr. Stanley, claimant's treating physician for her right knee, has rated claimant's knee impairment as mild to moderate resulting from related degenerative arthritis of the knee. Claimant is precluded from prolonged standing, walking or climbing stairs. Dr. Stanley also noted the occasional feeling of instability claimant experienced in her knee. Claimant testified that her knee is swollen nearly all the time and becomes progressively worse as the day goes on. The swelling is worse with prolonged sitting or standing. She is able to sit approximately one-half hour and stand approximately one hour. She then finds it necessary to elevate her leg for approximately another hour. She can walk about eight blocks and tends to limp. She uses a cane on occasion. Claimant experiences constant aching pain in her knee which can increase significantly with use. The pain in her knee frequently prevents her from sleeping at night. She testified that from time to time her knee is weak and gives out on her, causing her to fall.

We find that although claimant has suffered considerable loss of use of her leg due to her right knee injury in the form of decreased range of motion, instability, and pain and swelling, an award of compensation equal to 67.5° for 45% scheduled right leg disability adequately compensates claimant.

Dr. Ellison was her treating physician and surgeon for her left thumb fracture. As a result of the fracture Dr. Ellison performed a resection at the distal end of the thumb metacarpal and inserted a silastic spacer disc. Claimant has lost approximately two-thirds of her left hand pinch and grip as compared with her right hand as a result. She has considerable swelling in the hand with pain that contributes to her inability to sleep regularly.

We find that claimant's left hand surgery, loss of grip strength and pain and swelling would be adequately compensated with an award of 75° for 50% loss of function of the left hand.

ORDER

The Referee's order dated January 26, 1983 is modified. Claimant is awarded 67.5° of scheduled permanent partial disability for a 45% loss of function of the right leg (knee) and 75° for 50% loss of function of the left hand. These awards are in lieu of prior awards. Claimant's attorney's fee should be adjusted accordingly. The remainder of the Referee's order is affirmed.

JOHN P. BROWN, Claimant
John Parkhurst, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 82-06394
August 30, 1983
Order on Review (Remanding)

Reviewed by Board Members Lewis and Barnes.

The insurer requests review of that portion of Referee Gemmell's order which set aside the Determination Orders dated May 13, 1982 and June 13, 1982 as premature. The Referee did not reach the issue of extent of permanent disability because of her finding of premature closure. The insurer contends that the Determination Orders properly terminated temporary disability payments as of April 14, 1982. We agree with the insurer and reverse the Referee's order.

In reaching her decision that claimant's low back condition was not medically stationary as of April 14, 1982, the Referee relied on the opinion of claimant's treating physician, Dr. Heatherington, who reported that, as of May 13, 1982, claimant's chronic low back sprain was not medically stationary. The Referee also relied on reports from the Callahan Center where claimant was evaluated from December 8, 1981 to January 6, 1982. Those reports recommended that claimant return to treatment with Dr. Heatherington before continuing with the evaluation because claimant was having difficulty participating in physical evaluations.

On the other hand, claimant was examined by the Orthopaedic Consultants on April 9, 1982 and by Dr. Snodgrass on August 11, 1982. Those examiners determined that claimant was medically stationary, although they disagreed as to whether or not he sustained permanent disability. The insurer points out, we think persuasively, that Dr. Snodgrass was in a good position, as of August 1982, to look back on the care claimant had been receiving over the past months and determine if there was any improvement occurring in claimant's condition. The treatment that claimant had been receiving at the time of the claim closure and at the time of the hearing consisted of weekly spinal manipulations by Dr. Heatherington and physical therapy treatments three times a week consisting of ultrasound and hotpack applications. This is the same treatment claimant has been receiving over the past year. Dr. Heatherington's May 1982 report (which is his last report in the record), does not indicate how the manipulations and physical therapy treatments were expected to improve an unstable condition as opposed to providing only palliative treatment for a stable condition. In August of 1982 Dr. Snodgrass had the benefit of reading the prior medical reports, getting a history from claimant, examining claimant and, upon that evidence, determining whether or not he felt there had been an improvement in claimant's condition. Dr. Snodgrass determined that claimant's condition was stationary as of April 14, 1982. Moreover, claimant testified at hearing that he had been really no better or no worse over the months after the April 1982 claim closure.

In our opinion, the Callahan Center reports about claimant's condition more than three months before claim closure prove nothing about whether claimant was medically stationary at the

time of claim closure. In view of the detailed findings by Orthopaedic Consultants and Dr. Snodgrass that claimant was medically stationary in April 1982, and claimant's testimony that his condition did not change after that date, we are not persuaded by Dr. Heatherington's unexplained opinion that claimant was other than stationary in April 1982.

Our finding that claimant has not proven premature closure requires a further determination of the extent of permanent disability due to claimant's low back injury. The Referee did not reach that issue. We remand to the Referee for further hearing on the extent of claimant's permanent disability and for resolution of that issue.

ORDER

The Referee's order dated November 15, 1982 is reversed. The Determination Orders dated May 13, 1982 and June 13, 1982 are reinstated as proper closures of claimant's claim. This case is remanded for further proceedings consistent with this order.

WOLFGANG HOFFMAN, Claimant
Willner, et al., Claimant's Attorneys
Breathouwer, et al., Defense Attorneys

WCB 81-10284
August 30, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Pferdner's order sustaining the insurer's denial of claimant's current low back complaints and its back-up denial which denied ab initio claimant's low back and bilateral knee conditions.

The Board affirms the Referee's order with the following comment: This case involves a back-up denial of a previously accepted injury. We held in Patricia Davis, 35 Van Natta 635 (1983), that in such situations the insurer has the burden of proving the propriety of the denial. The Referee's order in this case issued prior to our order in Davis. Consequently, we assume that he placed the burden on the claimant consistent with the law at the time of his order. However, on de novo review of the record, we conclude that the insurer has met its burden of proving the propriety of the back-up denial.

ORDER

The Referee's order dated December 10, 1982 is affirmed.

FLOYD S. IVERS, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03307
August 30, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests and claimant cross-requests review of Referee Brown's order which: (1) Upheld SAIF's denial of claimant's back injury claim; and (2) assessed a penalty and attorney fee against SAIF for unreasonably delayed compliance with

the discovery obligations stated in OAR 436-83-460. SAIF only requests review of the penalty issue. Claimant only requests review of the compensability issue.

We affirm and adopt those portions of the Referee's order that found the claim was not compensable and that thus upheld SAIF's denial.

OAR 436-83-460 provides that an insurer must furnish a claimant with copies of all written claims information in its possession within 15 days of demand, except that evidence used solely for impeachment need not be thus disclosed pre-hearing. The Referee's order states that SAIF failed to provide claimant with copies of statements of two witnesses, which were admitted as Exhibits 9A and 9B, until the day of hearing, and failed to provide a copy of a transcript of claimant's taped statement to a SAIF investigator, which appears in the record as Exhibit 16 but was not admitted, until about five months after claimant first demanded it.

As for the transcription of claimant's tape recorded statement to an investigator, we note: (1) OAR 436-83-460 only applies to disclosure of documentary evidence; (2) a tape recording is obviously not a document; (3) the record suggests that there was some delay in getting the tape transcribed; (4) the record does not document a delay of greater than 15 days in furnishing a copy of the transcript once it was prepared; (5) claimant's statement in question appears to have been intended to be used and, in fact, was used primarily as a form of impeachment evidence (indeed, when offered, the Referee declined to admit it as substantive evidence); and (6) despite, thus at least arguably, not having to furnish claimant's statement at all pre-hearing, SAIF sent a copy of a transcription of it to claimant's attorney about six weeks before the hearing. Under all of these circumstances, we do not think that any violation of OAR 436-83-460 was established as to Exhibit 16.

Exhibits 9A and 9B are another matter. On the 801 claim form that claimant submitted, in the portion that is filled in by the employer, there appears the statement "see attached memos." Noting this, claimant's attorney repeatedly requested copies of those memos before the hearing. Despite the representation in SAIF's brief that it furnished copies of these memos to claimant's attorney before the hearing, as we read the hearing transcript, the fact of the matter is that claimant's attorney first received copies late in the hearing when the authors of those memos were testifying. The memos were then introduced as Exhibits 9A and 9B. While portions of the contents of those memos could be viewed as being in the nature of impeaching evidence, we do not think they are "solely" impeachment within the meaning of the exception in OAR 436-83-460. Under these circumstances, we think that the established violation of OAR 436-83-460 just as to Exhibits 9A and 9B justifies the penalty imposed by the Referee.

ORDER

The Referee's order dated December 27, 1982 is affirmed.

CHARLES R. JACKSON, Claimant
Doblie, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-04320
August 30, 1983
Order of Abatement

The Board has received a request for reconsideration of its Order on Review dated August 12, 1983 from the employer/insurer.

In order to allow sufficient time to consider the request, the above-noted Board order is abated, and claimant is requested to file a response to the request for reconsideration within ten days of the date of this order.

IT IS SO ORDERED.

ROBERT F. MAXWELL, Claimant
Samuel Hall, Jr., Claimant's Attorney
Starr & Vinson, Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-11288
August 30, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Seifert's order which set aside its denial of claimant's left knee injury claim. The issue is compensability.

Claimant had been employed as a shovel operator for Ronald Lentz Logging Company for approximately one month when, on October 5, 1981, he allegedly sustained an injury to his left knee. Claimant contends that he was operating a log loading machine when the foot brake on the loader kicked back and jammed his left knee underneath the dashboard. Claimant testified that his injury, "took a little skin off, but it didn't really do anything to me." Claimant testified that he informed his employer, Ronald Lentz, of the injury, showed him his injured knee and requested him to finish loading logs for him. Ronald Lentz testified that claimant did not show him his knee and that the first time he was aware of the alleged injury was when he received a telephone call from a SAIF representative three to four weeks later.

Claimant testified that he also showed his injured knee to Bert Lentz, the employer's son, and two other employees, Robert Webb and Victor Case. Bert Lentz testified that claimant did not show him an injured knee, that he remembered claimant mentioning that he had bumped it, but that he could not remember when this occurred. Victor Case testified that he was unaware of the alleged injury and that claimant had not showen him his knee or mentioned any injury. Robert Webb testified that he did remember claimant showing him his knee, but that he could not remember when this occurred. Although claimant testified that he was limping following the alleged October 5 incident, none of these other witnesses remembered him doing so.

Claimant completed his shift on October 5, 1982. Claimant reported for work the following morning, but apparently adverse weather conditions prevented work that day. That being the case, claimant, Bert Lentz and Victor Case went steelhead fishing on the Salmon River. While fishing, claimant fell down and struck his

left knee. Contrary to claimant's testimony, Bert Lentz and Victor Case testified that claimant was not limping before the fishing trip, and Bert Lentz testified that claimant was limping following his fall on the river bank.

Claimant initially was examined by Dr. Brown on October 11, 1982. An 827 form signed by Dr. Brown gives an injury date of October 8, 1982 (a date claimant did not work) and indicates a diagnosis of left knee contusion. The emergency room report recites a history that claimant was operating a log loader on October 8, 1982 when the brake kicked back and injured his knee. Claimant also was seen by Dr. Stephens on October 12, 1982. Dr. Stephens diagnosed a possible medial collateral ligament injury, with possible internal derangement. Claimant was next examined on November 5, 1982 by Dr. Blake, an orthopedist. Dr. Blake suspected a medial meniscus tear and ordered an arthrogram. Dr. Endelman interpreted the arthrogram as normal except for some minor osteoarthritic changes.

On November 17, 1982 claimant was interviewed by a SAIF investigator. The investigator testified that claimant had been drinking and had difficulty walking and talking but that he was in better control after about an hour. Claimant told the investigator that, after the October 5, 1982 at-work incident, he spent the rest of the day in a pickup truck. Claimant also stated that he needed help getting down the river bank when he went fishing on October 6, 1982. Testimony at the hearing indicated that claimant did not need help getting down the river bank when he went fishing, and claimant himself testified that he did not sit in a pickup truck following the alleged incident on October 5, 1982.

On November 21, 1982 Dr. Blake reported that:

> "It is unlikely that a direct blow to the superior aspect of the knee would result in a tear of knee cartilage. Arthrogram did not show any cartilage damage. Mr. Maxwell changed the story of this injury every time that I saw him and, therefore, I am unable to ascertain exactly what was the cause of his knee injury."

Claimant also was treated by Dr. Buck. Dr. Buck reported on January 6, 1983 that he had examined claimant on three occasions, and that:

> "On none of the three visits have I been able to find objective signs of his knee injury. Based on the patient's history I would have to conclude that the knee injury occurred while he was working." (Emphasis added.)

Without making any credibility finding, the Referee stated that the type of injury claimant suffered was consistent with his report of the injury and consistent with the emergency room report. The Referee concluded that:

> "On the basis of claimant's testimony, the testimony of Robert Webb, and the type of injury claimant exhibited on reporting to the emergency room . . . I find the evidence sufficient to establish that claimant suffered an industrial injury as alleged."

We disagree and reverse.

SAIF's argument focuses mainly on the credibility aspect of this case. SAIF argues that claimant's testimony was so inconsistent with that of the other witnesses that it is entitled to no weight. SAIF additionally argues that even if an incident did take place at work on October 5, 1982, it was such a minor event that it required no treatment and was not disabling. SAIF contends that claimant's need for treatment is more likely related to his fall suffered the next day while fishing.

We find SAIF's contentions relating to credibility to be well-taken. There are so many inconsistencies and variations with regard to the circumstances surrounding the relevant events that we feel safe in concluding that either there are many inaccurate memories involved or one or more of the witnesses were simply not candid. On this record, it would be difficult to conclude that claimant was the only candid or the most candid witness.

Furthermore, even if claimant did suffer an injury at work on October 5, 1982, we conclude that there is insufficient medical evidence from which to conclude that claimant's knee difficulties are the result of any such injury. Although the emergency room reports recite a history of injury consistent with claimant's testimony, it is noteworthy that claimant failed to mention to the emergency room physicians (or any other physician who examined him) that he struck his knee while fishing on October 6, 1982. Dr. Blake refused to comment on the cause of claimant's knee problems because claimant had given him so many different versions of the injury (not including mention of the fishing incident). Dr. Buck could not even find any indications that claimant sustained an injury, and could do no better than to theorize that, if claimant had an injury, it was work-related only by history. However, we note that a physician's conclusions regarding causation are only valid to the extent that a patient's history is complete, accurate and truthful. Miller v. Granite Construction Co., 28 Or App 473 (1977); Melodie A. Gage, 34 Van Natta 1245 (1982). The emergency room report and Dr. Buck's comment must, therefore, be discounted because claimant never reported a complete history.

Assuming that claimant did strike his knee at work on October 5, 1982, the more convincing evidence indicates that it caused him little or no difficulty. He finished his work shift, showed up for work the next day without having seen a physician and was then in good enough spirits to go steelhead fishing. Subsequent to his fall down the river bank, claimant began limping and felt it necessary to see a doctor. None of the medical evidence addresses the question of whether the alleged work injury or the fishing trip injury was the cause of claimant's subsequent difficulties.

On this record, we think it would be more reasonable to infer the latter. However, we need not and do not so infer. Claimant has the burden of proving industrial causation; the insurer does not have to prove non-industrial causation. We thus need only find, and we do find, that the evidence of possible non-industrial causation raises sufficient doubts in our minds that we are not persuaded that claimant has established industrial causation.

ORDER

The Referee's order dated February 8, 1983 is reversed. The SAIF Corporation's denial dated November 30, 1982 is reinstated and affirmed.

DONALD MILBRADT, Claimant
Allen & Vick, Claimant's Attorneys
Darrell Bewley, Defense Attorney

WCB 81-05138
August 30, 1983
Order on Remand

On review of the Board's Order dated June 17, 1982, 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 insurer for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

NORMAN MUNGER, Claimant
Alan Scott, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 81-05855
August 30, 1983
Order on Remand

On review of the Board's Order dated September 30, 1982, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated February 26, 1982.

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

IT IS SO ORDERED.

JIMMIE PARKERSON, Claimant
Gatti & Gatti, Claimant's Attorneys
Donald Howe, Ass't A.G.
Lindsay, Hart, et al., Defense Attorneys

WCB 82-07754, 82-07755, 82-07756 & 82-11210
August 30, 1983
Interim Order of Dismissal

This proceeding arises under the provisions of ORS Chapter 655, involving benefits for injured inmates. Claimant has moved the Board for dismissal of a request for review filed by the Inmate Injury Fund for failure to file a request for review within 30 days of the date of the Referee's order. We agree with the claimant's position and dismiss the Fund's request for review.

A hearing was held on April 1, 1983, and the Referee issued an order dated April 29, 1983. Prior to expiration of the 30-day period for requesting Board review and prior to a request for review being

filed, the Referee issued a supplemental order on May 9, 1983. Both orders contain the requisite Notice to Parties setting forth the right to request Board review within 30 days. See ORS 656.289(3).

On May 25, 1983 Salem Tent and Awning and its insurer, EBI, requested Board review of those portions of the Referee's order which set aside EBI's denial of responsibility and ordered it to pay claimant's attorney an attorney's fee of $950. The Board acknowledged this request for review on May 31, 1983.

On June 10, 1983 the Board received a second request for review filed by the Department of Justice, as attorneys for the Inmate Injury Fund, contesting the Referee's award of 10% permanent partial disability and imposition of a penalty and associated attorney's fee for failure to pay interim compensation and to accept or deny claimant's aggravation claim. The Board acknowledged the Fund's request for review as a cross-request for Board review on June 13, 1983. On June 15, 1983 claimant moved to dismiss the Fund's request for review.

ORS 656.289(3) provides:

> "When one party requests a review by the board, the other party or parties shall have the remainder of the 30-day period and in no case less than 10 days in which to request board review in the same manner. The 10-day requirement may carry the period of time allowed for requests for board reviews [sic] beyond the 30th day."

Under this statute a party cross-requesting review has the remainder of the 30-day period in which to file its cross-request, "and in no case less than 10 days." That 10-day period may thus extend the usual 30-day period for requesting Board review, i.e., if a party requesting review files the request more than 20 days into the 30-day period, the time limit within which opposing parties may file a cross-request for review will be extended beyond the 30-day period.

The question remains, however, whether, in extending the 30-day period for requesting review, the legislature intended to create an automatic 40-day period within which any party may cross-request Board review after another party has initiated the review process. That question is presented in this case because: (1) The time within which to request review began to run when the Referee issued a supplemental order on May 9, 1983; (2) the Inmate Injury Fund did not request review within 30 days of that order; (3) nor did the Fund request review within 10 days of EBI's May 25, 1983 request for review; and, thus, (4) we have jurisdiction over the Fund's request only if ORS 656.289(3) creates an automatic 40-day period within which a party may cross-request Board review.

The statute states that the party cross-requesting review has the remainder of the 30-day period and in no case less than 10 days in which to file a cross-request for review. If the legislature had intended to extend the 30-day period to an automatic 40-day period, we believe that clearer language could have been and would have been used to accomplish such a purpose. Rather, from the language that was used, it appears that the legislature intended to provide an

adequate period of notification to a respondent that another party had requested review of a Referee's order, thereby affording the respondent an opportunity to decide whether to file a cross-request for review. Allowing a minimum of 10 days comports with this apparent purpose; granting an automatic extension of the period for requesting review to a full 40 days, regardless of the date on which the initial request for review is filed, would serve no apparent purpose.

We interpret ORS 656.289(3) as providing that a cross-request for Board review is timely if it is filed with the Board within 10 days of the filing of the initial request for Board review, where the 10-day provision extends the time allowed for requesting review beyond the 30-day period. This could result in extending the 30-day period to a full 40 days, but only if the initial request for Board review was filed with the Board on the 30th day. Compare Ray A. Williams, 20 Van Natta 195 (1977), with Ahmad Noor Kojah, 28 Van Natta 262 (1979). Both a request for Board review and a cross-request for review are considered to be filed with the Board on the date that the request is mailed. OAR 436-83-700(2).

Turning to the facts of this case, the period for requesting Board review expired 30 days after May 9, 1983, the date of the Referee's supplemental order. EBI's request for review is postmarked May 25, 1983. Accordingly, the Fund had 10 days from May 25, 1983 within which to cross-request review, or until Monday, June 6, 1983 (the tenth day falls on a weekend, so the following business day is considered the last day for filing). The envelope within which the Fund's cross-request for review was mailed is not postmarked because it apparently was forwarded to the Board through inter-agency channels. However, the certificate of service attached to the cross-request indicates that copies of the document were mailed to the other parties on June 9, 1983, the day before the Board received the cross-request. In the absence of any indication to the contrary, we presume that the certificate of service accurately represents the date on which the Fund's request for review was mailed to the Board. Considering June 9, 1983 as the date on which the Fund's cross-request for review was filed with the Board, it is untimely.

On the facts of this case, the alternative limitation period in ORS 656.289(3), i.e., "the remainder of the 30-day period," actually results in a longer limitation period. The 30-day period ran from the Referee's May 9, 1983 supplemental order to June 8, 1983. However, the Inmate Injury Fund's request for review was not filed (mailed) until the following day. It was thus untimely under this alternative, too.

Although we find that the Fund's cross-request for review is untimely, the consequence of dismissal of the Fund's cross-request is of limited significance. There is no requirement that a party cross-request Board review in order to have particular issues considered on de novo review. Neely v. SAIF, 43 Or App 319, 323 (1979); Francoeur v. SAIF, 20 Or App 604, 606-607 (1975). There are no specific pleading requirements in proceedings before the Board. A party may file a request for review of a Referee's order simply by a statement that review is requested. ORS 656.295(1). Most often the issues to be reviewed are not defined until the appellant has filed

its brief with the Board. Where a respondent files a brief making an argument or raising an issue which diverges from those raised or argued in the appellant's brief, we consider the additional argument or issue even in the absence of a cross-request for review.

Accordingly, dismissal of a cross-request for review does not deprive a respondent of the opportunity to raise an issue which otherwise would be considered by the Board pursuant to the cross-request for review. The respondent is free to raise the issue in its brief. The primary purpose for filing a cross-request for review is to maintain control over the Board's jurisdiction. A respondent who has failed to cross-request Board review and who raises an issue in its respondent's brief is at the mercy of an appellant who, upon recognizing the fact that a potentially meritorious argument has been raised in respondent's brief, or for any other reason, withdraws the request for Board review. If the respondent had cross-requested review, the Board would retain jurisdiction over the cross-request. If the respondent had not cross-requested review, there would be nothing to retain jurisdiction over and the respondent would lose the opportunity to have the issue raised in its brief reviewed.

ORDER

The cross-request for Board review filed by the Department of Justice as attorneys for the Inmate Injury Fund is dismissed as untimely.

SHERRY L. SCHMIEDEL, Claimant
I. Lucretia Hollingsworth, Claimant's Attorney
John E. Snarskis, Defense Attorney

WCB 81-10856
August 30, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer, Industrial Indemnity, requests review of Referee Fink's order overturning its denial of claimant's aggravation claim.

Claimant developed hand and forearm problems in October 1978 while working as a power sewing machine operator for Portland Glove Company which is insured by Industrial Indemnity. Diagnosis was equivocal, but the physicians described her condition as repetitive overuse syndrome. The claim was accepted and then closed on February 8, 1979 by a Determination Order granting no permanent disability award.

Claimant returned to work for Portland Glove until November 1980 when she went to work for another employer, Jantzen, Inc., operating a power sewing machine. In her later employment the work was somewhat lighter because she worked with fabric rather than leather. The later employer is not a party.

While she was somewhat symptomatic, claimant sought no medical treatment between February 1979 and May 1981. However, in May 1981 she again sought treatment for pain in her wrists. She was diagnosed again as having repetitive overuse syndrome. At her

physician's suggestion she stopped working in August 1981. Industrial Indemnity denied her claim for aggravation on the basis that her problems were caused by her work at the later employer rather than at Portland Glove.

The Referee found that under Bracke v. Baza'r, 293 Or 239 (1982), there had to have been a worsening of claimant's underlying condition in order to excuse Industrial Indemnity under the last injurious exposure rule. He found that there had been no worsening of the underlying condition. We disagree with his conclusion.

The circumstantial evidence tends to indicate there was a worsening of the underlying condition. Claimant was able to work steadily from the time of the 1979 Determination Order until May 1981 without seeking medical attention.

Furthermore, the only physician who addresses the question of whether there was a worsening of the underlying condition, seems to indicate that there was a worsening. Dr. Button evaluated the claimant at the insurer's request and opined:

> "I. I would consider her condition to be a mild chronic recurrent type of musculo-tendonitis, which apparently has not completely resolved; however, her most recent employment with Jantzen was the major precipitating factor in the deterioration of her condition and most recent time loss . . .
>
> * * *
>
> "III. The repetitive nature of her work as a sewer at Jantzen, is the major contributing cause to her medical condition, necessity for treatment and time loss."

We find that Industrial Indemnity is not responsible for claimant's condition because her most recent employment worsened her underlying condition. Cf SAIF v. Luhrs, 63 Or App 78 (1983).

ORDER

The Referee's order dated December 16, 1982 is reversed. Industrial Indemnity's denial is reinstated.

MARGARET J. SUGDEN, Claimant
Mercer, et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 80-04292
August 30, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Shebley's order which set aside its denial of claimant's occupational disease claim for two conditons: A respiratory condition variously described as asthma or reversible bronchospasm; and a skin condition variously described as urticaria (hives) or vasculitis erythema meltiforme.

The insurer argues that claimant failed to file a timely request for hearing on its denial and that the disease claim is not compensable on the merits. We agree with the insurer's positions on both points and reverse.

We find the facts relevant to the timeliness issue to be as follows:

July 22, 1979: The insurer sent a denial to claimant, correctly addressed, via certified mail. That denial contained the proper notice to the effect that claimant could request a hearing to protest the denial. Approximately three weeks later this denial letter was returned to the insurer as "unclaimed." Claimant testified that she was on vacation and out of the state for about the middle two weeks in July 1979. Claimant was not asked whether, upon returning, her mail included notices of attempts to deliver certified mail.

July 26, 1979: The insurer remailed its July 2, 1979 denial to claimant, again correctly addressed, this time by ordinary mail. Claimant testified that she did not receive it. An employee of the insurer testified that it was not returned to the insurer. The Referee found claimant's testimony credible, but made no finding on the credibility of the insurer's employee.

December 12, 1979: The insurer again remailed its July 2, 1979 denial to claimant. Claimant had telephoned the insurer a few days earlier and asked about the status of her claim. The insurer's employee with whom claimant spoke testified that she (the employee) advised claimant that the claim had been denied. Claimant testified that she was told in that telephone conversation that the claim had been denied.

May 12, 1980: Claimant's request for hearing on the insurer's denial was filed.

ORS 656.319(1) provides that a request for hearing on a denial must be filed within 60 days of the denial, or within 180 days if the claimant can establish good cause for failure to request a hearing within 60 days. As applied to these facts, that statute produces two possibilities: Either (1) the time limit started to run in July 1979 and claimant's May 1980 hearing request was filed beyond the outer time limit provided by statute; or (2) the time started to run in December 1979, which would mean that claimant filed a hearing request more than 60 but less than 180 days after the denial, which would lead to the question of whether there was good cause for the delayed filing.

Although we are aware of no appellate court decisions that have specifically held that the time limit stated in ORS 656.319(1) starts to run from the date that a denial is mailed even in the face of evidence of nonreceipt, we think that the thrust of Norton v. Compensation Department, 252 Or 75 (1968), and Madwell v. Salvation Army, 49 Or App 713 (1980), is to that effect. Language from Stroh v. SAIF, 261 Or 117 (1972), although arising in a different context, is even more explicit:

> "In the absence of statute the deposit of a notification in the mail is not effective as

> notice unless the notification is received. However, statutes commonly provide for notification by mail and where this is the case the deposit of the notification in the mails satisfies the requirement of notice, even though the notification is not received." 261 Or at 119 (footnotes omitted).

As discussed in Norton, the relevant statutes on employer/insurer denial of compensation claims do provide for notification by mail. The relevant administrative rule, OAR 436-83-130, even more explicitly so provides. We conclude that the time limit stated in ORS 656.319(1) started to run in July 1979 and thus had expired by the time claimant requested a hearing in May 1980.

Alternatively, if the statutory time limit started to run when claimant became actually aware of the denial in December 1979, we conclude that claimant has not established good cause for requesting a hearing beyond 60 days from that date.

Claimant testified that, in the same phone conversation in early December 1979 during which claimant actually learned that her claim had been denied the prior July, the insurer requested that claimant submit to additional medical examinations; that claimant agreed to do so; and that claimant then assumed that the insurer had not yet taken final action on her claim and would not do so until it received the results of the additional medical examinations it requested. Specifically, claimant testified that after that December conversation she understood her claim was in "deferred" status.

The insurer's employee with whom claimant spoke testified that it was later in December, after receiving some additional medical reports, that the insurer requested claimant to participate in further medical examinations. We do not deem this minor conflict in the evidence to be critical, but we note that the employee's version is considerably more plausible. It is not plausible that a claims adjuster who gets a phone call from a claimant asking about the status of a claim would, then and there, say something like, "Your claim is denied and, by the way, we would like you to attend an independent medical examination." It is plausible that an insurer's receipt of additional medical reports would generate a request for an independent medical examination.

In any event, the question of what is "good cause" under ORS 656.319(1)(b) is primarily a question for this Board under the McPherson v. Employment Division, 285 Or 541 (1979), line of cases. Brown v. EBI Companies, 289 Or 455, 460 footnote 3 (1980) ("'good cause' under ORS 656.319(1)(b) is . . . a matter of . . . agency judgment in the sense stated in McPherson"); see also Curtis A. Lowden, 30 Van Natta 642 (1981). Claimant's good cause argument in this case boils down to a contention that, notwithstanding written notice that her claim was denied, including bold-face written notice that, if she did not request a hearing within a limited period of time, her right to do so would be lost, and notwithstanding oral elaboration by phone that her claim was denied, claimant's subjective understanding was that her claim had not been denied. It is our agency judgment, Brown, supra, that recognizing such an excuse as "good cause" under ORS 656.319(1)(b) would virtually repeal the 60-day limitation period

stated in ORS 656.319(1)(a). Conceivably every claimant who requested a hearing more than 60 days beyond a denial would be testifying about his or her subjective understanding and assumptions about why the denial meant something other than what it objectively said. For both practical and policy reasons, the law of contracts has long been to the effect that objective manifestations of a party's position prevail over that party's subjective, uncommunicated understanding and assumptions. For substantially the same reasons, we think it would be ill-advised to find good cause for a delayed hearing request on facts like those presented in the current case.

Finally, if we were to reach the merits, we would conclude that claimant has not established the compensability of her claim for the reasons stated in the insurer's brief.

ORDER

The Referee's order dated December 3, 1982 is reversed. The insurer's denial dated July 2, 1979 is reinstated and affirmed.

RAYMOND K. ALLEN, Claimant
DeForest & Hansen, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 81-07672
August 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Brown's order which set aside its denials of claimant's alleged pulmonary and psychiatric conditions. The insurer contends that claimant has failed to show that either of the alleged conditions are compensable consequences of claimant's prior compensable injury.

Claimant was injured on December 26, 1978 when a log hit him in the chest and rolled over him. Claimant was treated conservatively without success. He underwent decompression surgery on his lower neck at the C5-6 and C6-7 levels in April of 1979. Claimant eventually underwent two more surgical procedures, resections of the first rib on the left and right sides, in 1980. Claimant continued to have chest pain and headaches following the surgery. He was awarded compensation for a 20% unscheduled permanent partial disability for his neck injury.

Claimant was admitted to the hospital in early July 1981 for evaluation of his complaints of chest pain, shortness of breath and hyperventilation. Dr. Berryman concluded after extensive testing that claimant's pain was musculoskeletal in origin and that claimant was suffering from "hyperventilation syndrome." He was unable to identify any specific relationship between claimant's chest pain and the prior surgeries or injury.

On August 31, 1981 the employer denied compensability for claimant's "pulmonary condition." Claimant continued to have chest pain and breathing problems. He underwent further testing and was examined by several doctors over the course of the next year. Only Dr. Cade, a family practitioner, related claimant's continued problems to the compensable injury and subsequent surgeries. The clear consensus of the specialists who examined him is that claimant's pain complaints are not related to the industrial injury.

Claimant was examined by Dr. Eastman, a psychiatrist. Claimant gave a history to Dr. Eastman in which he indicated that his activities were severely limited by pain and that he could only work for 15 minutes at a time. Dr. Eastman diagnosed a psychogenic pain disorder, i.e., that claimant was expressing his psychological stress "somatically, mainly by way of muscle tension and pain."

A second psychological exam was done at the employer's request by Dr. Stolzberg. She diagnosed three conditions: (1) Psychological factors affecting physical condition; (2) psychogenic pain disorder; and (3) malingering. Dr. Stolzberg believes claimant has a preexisting personality trait disturbance and that disturbance was not worsened by the industrial accident.

On March 26, 1982 the employer secretly filmed claimant digging post holes, carrying fence posts and climbing over fences. It is obvious from the films that claimant has been less than candid in describing the extent of his limitations.

Dr. Luther, psychiatrist, examined claimant at claimant's attorney's request. He opined that claimant's psychological problems were contributing to his continued pain and that his symptomatology was related to the 1978 injury. In arriving at this conclusion, Dr. Luther stated on April 16, 1982:

> "In my opinion, the patient is not malingering. The diagnosis of malingering is made when the patient is, in the terminology of the DMS III, '...voluntary production and presentation of faults or grossly exaggerated physical or psychological symptoms.' Although this patient is very interested in people understanding his symptomatology, I feel he does not exaggerate or make up symptomatology."

Claimant's account of his symptoms and limitations was central to Dr. Luther's opinion concerning the legitimacy of claimant's problems. The activities filmed by the employer show that the assumptions on which Dr. Luther's opinion was apparently based are inaccurate. Thus, his report carries little weight.

The Referee concluded that both claimant's psychological and pulmonary conditions were compensable. Although the Referee found the complaints of chest pain to be psychological in origin, he also found the psychological condition itself to be compensable and, therefore, set aside both of the insurer's denials. While we agree that the evidence indicates that there is no physiological cause for claimant's chest pain, we do not believe claimant has met his burden of proving that he suffers from a compensable psychological condition. Therefore, both of the insurer's denials should be reinstated.

The Referee correctly pointed out that claimant did suffer a serious compensable chest injury and the insurer is responsible for the costs of the extensive testing that claimant underwent in order

to determine the cause of his continuing complaints. Myrtle L. Thomas, 35 Van Natta 1093 (July 22, 1983); Jimmy K. Layton, 35 Van Natta 253 (1983).

ORDER

The Referee's order dated August 26, 1982 is reversed. The insurer's denials of August 31, 1981 and June 7, 1982 are reinstated and affirmed. Insurer shall pay for all medical treatment and diagnostic testing related to claimant's pulmonary complaints and psychological condition performed prior to June 7, 1982.

CLAUDE W. CHASE, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08268
August 31, 1983
Order of Dismissal

The Referee issued his order herein on October 29, 1982, ordering the SAIF Corporation to accept claimant's aggravation claim. On November 29, 1982, the Board received a letter from S.R. Danish, representing the insured employer, alleging: "We were never notified of the time or place of such hearing or requested to testify, and at this time we are offering the following information relative to this case which we believe negates our responsibility concerning this claim."

The Board elected to treat this letter as a request for Board review, which was acknowledged by the Board on December 1, 1982.

Claimant, by and through his attorney, thereafter moved to dismiss the putative request for review, alleging the employer's failure to serve a copy of its request upon claimant or his attorney as grounds for dismissal. Claimant also requested that penalties and attorney fees be imposed under authority of ORS 656.382(3), which provides that a hearing initiated by an employer for the purpose of delay or other vexatious reason, or without reasonable ground, may warrant imposition of a penalty. Claimant contends that this provision applies equally to a request for Board review initiated under the same or similar circumstances.

We find that the employer failed to provide claimant or his attorney with a copy of the putative request for review; that the first notice to claimant or his attorney concerning the employer's request for review was by the Board's computer-generated acknowledgment of the employer's request for review, received by claimant's attorney on December 3, 1982; that neither claimant nor his attorney, therefore, received actual notice of the request for review within the 30 day period provided by ORS 656.289 and 656.295; and that the Board, therefore, lacks jurisdiction to consider the merits of the employer's putative request for Board review. Argonaut Insurance Company v. King, 63 Or App 847 (1983); see also Edward Hanson, 35 Van Natta 1107 (1983).

We find that imposition of a penalty pursuant to ORS 656.382(3) is not appropriate under the facts and circumstances presented herein. Accordingly, we need not decide whether this provision applies to a request for Board review.

A March 31, 1983 letter from SAIF's Legal Services Division appears, by its terms, to concede that claimant's attorney is entitled to a reasonable attorney's fee for services performed post-hearing, albeit "nothing more than a minimal fee . . . ." Therefore, without considering whether statutory authority exists for an award of a reasonable attorney's fee under the circumstances of this case, we award claimant's attorney a fee for services rendered in connection with this "Board review."

ORDER

The employer's request for review of the Referee's October 29, 1982 order hereby is dismissed, and the Referee's order is final by operation of law. Claimant's attorney is awarded $100 as a reasonable attorney's fee, to be paid by the SAIF Corporation.

BETTY L. FRYER, Claimant
Moomau, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-03033
August 31, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Neal's order which approved the employer's March 24, 1982 denial by which the employer denied that claimant's January 1982 right knee surgery was related to her October 8, 1981 compensable hip injury. The issue for review is compensability.

We adopt the Referee's findings of fact as our own and affirm her order.

The employer argues that the rule of Weller v. Union Carbide, 288 Or 27 (1979), is applicable to this case and that under that rule, this claim must fail. Although it is true that claimant suffers from a degenerative arthritic knee condition which preexisted her October 1981 industrial injury, the applicability of Weller is another matter, as this is a case involving an industrial injury rather than an occupational disease. See Paul Scott, WCB Case No. 82-06735, 35 Van Natta 1215 (August 19, 1983). Even assuming that Weller were applicable, however, claimant must still establish that her compensable injury was a material contributing cause which produced symptoms which led to the need for knee surgery. We agree completely with the Referee that the most the medical evidence demonstrates in this case is that the injury was, at best, only a very minor factor in claimant's need for right knee surgery and that the evidence does not rise to the level of establishing that the injury was a material contributing cause of that surgical procedure.

ORDER

The Referee's order dated February 28, 1983 is affirmed.

MICHAEL J. JOHANNESEN, Claimant
Royce, Swanson, et al., Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03482 & 82-08599
August 31, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The employer/insurer requests review of Referee Neal's order which set aside its March 12, 1982 denial of claimant's bilateral degenerative knee arthritis condition. Although claimant has cross-requested review of the Referee's order, in his brief claimant argues only that the Referee's order "should be affirmed in its entirety." We, therefore, proceed on the assumption that claimant has no disagreement with any portion of the Referee's order and that the only issue is compensability.

Claimant, who was 43 years of age at the time of the hearing, has been employed by Northwest Natural Gas Company for twenty years. Claimant has worked as a serviceman repairing gas equipment for approximately 90% of that time. Claimant first suffered left knee difficulties as a result of a high school football injury in approximately 1953 or 1954. This injury resulted in a left knee meniscectomy.

Claimant began working for Northwest Natural Gas in 1962. While on a service call in 1964 he twisted his right knee. This injury was diagnosed as a partial tear of the medial collateral ligament and was accepted as a nondisabling injury by the employer's insurer at that time. The injury was apparently treated conservatively. Approximately one year later claimant was engaged in a game of touch-football with some friends, when his right knee "gave out." A meniscectomy was subsequently performed on claimant's right knee. (We question the Referee's finding that this right knee meniscectomy was the result of the 1964 industrial injury; there is nothing in the record so indicating and it appears that no claim was ever filed by claimant in relation to this right knee meniscectomy.)

Claimant thereafter experienced no difficulties with his knees until 1978. He testified that he lifted weights on a regular basis until approximately 1970 or 1972, played basketball on occasion including playing in a city basketball league one year. He testified that he played basketball one to two times per week until 1978.

On October 2, 1978 claimant was examined by Dr. Zimmerman with complaints of knee pain. Dr. Zimmerman noted that claimant had a history of bilateral meniscectomies but that he had not had any difficulty until the summer of 1978. Dr. Zimmerman's chart note indicates that claimant had been jogging to work every day for the past year, a distance of about four miles. By October 13, 1978 Dr. Zimmerman apparently had concluded that claimant was suffering from early degenerative arthritis in the knees. On January 16, 1979 Dr. Zimmerman reported that claimant had been doing well until he suffered a recent fall and had to take five days off work. (There is no indication whether this fall occurred at work or not.) Dr. Zimmerman stated claimant was developing degenerative changes in the lateral cartilage.

Claimant did not return to Dr. Zimmerman again until January 15, 1980. The chart note indicates that claimant twisted his left knee about a week previous while walking downstairs at home carrying some wood, and that the knee had been painful since then. On February 21, 1980 Dr. Welch reported that Dr. Zimmerman had diagnosed claimant's condition as postoperative degenerative arthritis with reinjuries and restrains.

On June 22, 1980 claimant strained his left knee at work while carrying a gas heater up some stairs. A claim was filed and it was accepted as a nondisabling injury because claimant lost no time from work, although he did see Dr. Zimmerman.

Claimant did not return to Dr. Zimmerman again until March 27, 1981. The chart note indicates that claimant had quit jogging, and that he had been getting along fairly well working on a less strenuous job, but that after returning to serviceman work his knees once again began bothering him. Claimant was seen again by Dr. Zimmerman in November 1981 and January 1982. Claimant reported that climbing ladders and stairs bothered him. Dr. Zimmerman reported:

> "I believe this gentleman who has previously had injuries to his knee with meniscectomies is having degenerative changes on the medial side, primarily with irritability when he over uses the knees. I have told him that this is related to activity, that he should live within the limits of tolerance of his discomfort, that if he forces the knees, such as with lots of stair climbing and kneeling, that the degenerative process will probably be accelerated as compared to a sedentary type of occupation."

On January 21, 1982 claimant filed an 801 form with his employer claiming that constant bending, stooping, squatting and lifting activities at work caused or aggravated his arthritis condition. The claim was denied on March 12, 1982.

On May 6, 1982 Dr. Duncan reported that he had examined claimant on September 12, 1978 for a knee problem. Dr. Duncan stated that: "A diagnosis of sprain was made. He [claimant] stated he had been running, playing ball and etc. prior to this and had not been having problems with his knees." Dr. Duncan made no comment regarding the cause of claimant's condition.

On May 26, 1982 Dr. Zimmerman, in a narrative report to claimant's attorney, basically summarized all of his prior chart notes we have related above, but offered nothing new on the question of causation.

On June 10, 1982, claimant was examined by Dr. Rusch. Dr. Rusch reported that it was "apparent" that claimant had recognizable signs and symptoms of degenerative osteoarthritis of both knees when he had been examined by Dr. Zimmerman in 1978, and that:

> "It appears apparent that <u>any</u> use of the lower extremities in walking, kneeling,

> squatting, or other active physical activities of the lower extremites would lead to progressive deterioration of the underlying degenerative osteoarthritis." (Emphasis added.)

Dr. Rusch concluded:

> "It is my opinion that it is within the realm of reasonable medical probability that the work activity associated with [claimant's] work . . . over the period of the last twenty years has materially contributed to a worsening of the underlying condition of both his knees."

However, Dr. Rusch went on to qualify that opinion:

> "It must also be recognized, however, that other strenuous activities which Mr. Johannesen may have engaged in which may not have been associated with his work, such as walking, jogging, kneeling, or squatting would also contribute to this worsening of that underlying condition. The extent to which this physical activity leads to the worsening of that condition as opposed to the natural progression or worsening of the underlying condition is unknown."

The Referee found that claimant suffered from a preexisting degenerative knee condition related to his previous meniscectomies, and that he, therefore, had to establish a worsening of that condition, Weller v. Union Carbide, 288 Or 27 (1979), and also had to establish that his work activities were the major cause of that worsening. SAIF v. Gygi, 55 Or App 570 (1982). The Referee concluded that claimant had so established. We disagree and reverse.

We agree with the Referee that claimant must establish that his work activities when compared to his non-work activities are the major contributing cause or aggravating factor of his degenerative arthritis condition. Dethlefs v. Hyster Co., 295 Or 298 (1983); Beaudry v. Winchester Plywood Co., 255 Or 503 (1970); SAIF v. Gygi, supra. We also believe that questions concerning a condition such as degenerative arthritis are sufficiently complex to require expert medical evidence. See Jacobson v. SAIF, 36 Or App 789 (1978). We, therefore, do not believe that lay testimony is sufficient to "bridge the gap" of causation in this case.

The only medical opinion in this entire record which attempts to address the question of causation is that of Dr. Rusch. The most that Dr. Rusch is able to state is that claimant's work activities were a material contributing cause of claimant's worsened arthritis condition, rather than the major cause. Although it is certainly not required that a physician use the exact legal phraseology, we think it is clear from the qualifying language of Dr. Rusch's opinion that he cannot state that claimant's work activities were the major cause of the condition or the worsening thereof. He particularly made a point in noting that any use of

the lower extremities in walking, kneeling, squatting, etc., would serve to contribute to a worsening of the condition and that the condition was naturally progressive on its own. He stated that he could not determine the extent to which physical activity contributed to a worsening of the condition as opposed to the natural progression of the condition itself. Claimant regularly played basketball up to two times per week and was jogging, apparently daily, until he began suffering knee pain in 1978. Although claimant testified that he stopped lifting weights and playing league basketball several years prior to the time he began experiencing knee pain, the medical evidence indicates that such activities would nevertheless have taken their toll on claimant's knees. In view of the fact that the evidence establishes that claimant used his lower extremities for fairly vigorous off-the-job activities as well as on-the-job activities, Dr. Rusch's opinion does not establish major work causation.

ORDER

The Referee's order dated December 10, 1982 is reversed. The insurer's denial dated March 12, 1982 is reinstated and affirmed.

DAN LINGO, Claimant
Michael B. Dye, Claimant's Attorney
Wolf, Griffith, et al., Defense Attorneys

WCB 82-08179
August 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

EBI Companies requests review of Referee Baker's order which apparently set aside its September 1, 1982 denial which denied both that claimant suffered an aggravation of his January 24, 1979 back injury and also the compensability of claimant's alleged right knee injury of April 22, 1982. Although the Referee set forth the issues as being, "compensability of a denied low back aggravation claim and compensability of denied knee problems," the remainder of his order referred only to claimant's alleged right knee injury. Nevertheless, both parties appear to agree that the Referee's order also set aside EBI's denial of claimant's back aggravation claim. Therefore, we proceed on the understanding that the issues for review are the compensability of claimant's back agravation claim and the compensability of claimant's alleged right knee injury of April 22, 1982.

I

Since the Referee failed to do so, we make the following findings of fact.

Claimant has a long history of back difficulties beginning in 1967 when he sustained his first industrial back injury. Claimant sustained additional injuries in 1971, 1972, and 1974. In 1975 claimant experienced further difficulties with his back. A myelogram and discogram were performed by Dr. Poulson, and evidence of a ruptured disc led to a recommendation that claimant consider surgery. Claimant declined the surgery. He was eventually awarded 25% or 30% unscheduled permanent partial disability.

On January 24, 1979 claimant was employed as a driver/ dispatcher for Viesko Redi-Mix, Inc., when he sustained another compensable back injury, diagnosed by Dr. Wilson as a lumbar strain. Dr. Wilson advised the claimant to return to Dr. Poulson. On March 21, 1979 Dr. Poulson reported that a myelogram performed on March 7, 1979 revealed a protruding disc at L4-L5. Dr. Poulson performed a laminectomy on April 3, 1979. On December 6, 1979 Dr. Poulson noted that claimant's surgical recovery progress was extremely slow and that he believed there was "a large functional overlay here." Claimant's weight at that time was 255 pounds.

On June 26, 1980, Dr. Poulson released claimant to return to light duty work. However, on July 8, 1980, Dr. Poulson reported that:

> "It is my opinion that [claimant] can do light work but he told me when he was in on the last visit, he would refuse any type of work at present, particularly with that company. I do think he can do light work as of June 26, 1980. What the problem he has with the company he works with, I do not know."

On July 22, 1980 a Determination Order issued awarding claimant 20% unscheduled permanent partial low back disability.

On October 13, 1980 Dr. Poulson again reported that he felt claimant was capable of returning to work as a truck dispatcher but felt that a referral to the Northwest Pain Center was appropriate. Psychological evaluation at the Pain Center found claimant to have a passive-dependent personality with secondary gain elements present in the form of relief from work pressures and potential for future financial compensation. His motivation for Pain Center therapy was felt to be questionable and motivation for return to work to be poor. On November 21, 1980 Dr. Newman reported:

> "It is our feeling that no further treatment or evaluations are likely to change the situation much and that a substantial part of his refractoriness to rehabilitation at this point is attitudinal."

On January 27, 1981 Dr. Poulson reported his agreement with Dr. Newman. Dr. Poulson stated, "It remains my opinion that he is probably capable of doing light work, such as dispatching." Rather than returning to work, however, claimant began receiving chiropractic treatments from Dr. Buttler. Dr. Buttler felt that claimant was unable to work. Dr. Poulson reported on March 18, 1981 that perhaps Dr. Buttler's enthusiasm would rub off on the claimant and he would be able to motivate him sufficiently to return to work.

Claimant thereafter moved to Ontario, Oregon and began treating with another chiropractor, Dr. Van Patten. On May 7, 1981 Dr. Van Patten reported that claimant was complaining of low back, neck and leg pain and had difficulty sleeping. Claimant was referred for examination to Dr. Karmy, an orthopedic surgeon. On June 2, 1981 Dr. Karmy reported that claimant had numerous

complaints of pain and that claimant felt he was too disabled to do any type of work. Dr. Karmy felt that claimant was medically stationary and should return to light work such as truck dispatching. On July 1, 1981 Dr. Van Patten indicated he disagreed with Dr. Karmy and felt that claimant was unable to return to work. Dr. Van Patten continued treating claimant at a frequency of about twelve treatments per month.

In September 1981 the Orthopaedic Consultants concluded that claimant had degenerative atrophy of the L4-5 disc, chronic low back strain and bilateral leg radiation, exogenous obesity and functional overlay. The Consultants felt that claimant was medically stationary, that some additional chiropractic treatments would be beneficial and that his previous award of 20% unscheduled disability was not adequate.

A second Determination Order issued on November 12, 1981 awarding claimant no additional permanent partial disability benefits. By stipulation of December 4, 1981, claimant was awarded an additional 28% unscheduled disability, for a total of 48% disability as a result of his 1979 injury.

Following the issuance of the November 1981 Determination Order, claimant did not return to work. Nothing further from a medical standpoint was heard of the claimant until April 28, 1982 when Dr. Buttler reported that claimant had returned to him with complaints of:

> ". . . constant aching in his lower back with sharp pains upon specific motion and swelling and severe pain in his right knee. The knee pain was due to Mr. Lingo's back giving out on him on 4-22-82 and causing his knee to twist and buckle. This happened while he was walking."

On May 17, 1982, Dr. Buttler requested the insurer to authorize a weight loss program (the Cambridge Diet) for claimant as claimant's inactivity had resulted in an excessive weight gain. On August 3, 1982 Dr. Buttler indicated that claimant's knee injury was a result of his back giving out on him while walking and that "his back had an immediate sharp pain in it causing his right knee not to hold his weight and thus buckle and twist causing knee pain and swelling." Dr. Buttler again recommended authorization for a weight loss program.

Claimant was referred by the insurer to Dr. Bolin for an independent chiropractic examination on July 28, 1982. It was Dr. Bolin's opinion that claimant suffered from pre-existing degenerative disc disease coupled with severe obesity of nearly 300 pounds which caused stress at the lumbosacral facets, which in turn resulted in low back pain. He opined that claimant's current back problem was related to his obesity rather than the 1979 industrial injury. He felt that claimant was medically stationary with a mild functional overlay.

On September 1, 1982 EBI denied that claimant suffered an aggravation of his 1979 back injury and also denied the compensability of the April 1982 right knee injury. On July 17, 1982 Dr. Buttler reported his disagreement with much of Dr. Bolin's findings

and analysis. Specifically, Dr. Buttler stated that claimant's inactivity as a result of the 1979 injury was the cause of claimant's excessive weight gain, and that Dr. Bolin failed to mention claimant's knee injury. Dr. Buttler did not indicate any disagreement with Dr. Bolin's conclusion that claimant was medically stationary.

II

The insurer's argument against the compensability of claimant's knee injury and back aggravation claim is based primarily on the contention that it was claimant's obesity rather than the 1979 compensable injury which was the cause of both his ongoing back difficulties and the minor right knee injury sustained in April 1982. The insurer argues that, contrary to Dr. Buttler's opinon, claimant's obesity is not due to his industrial injury. The insurer relies on the opinion of Dr. Bolin and our decision in Patricia Nelson, 34 Van Natta 1078 (1982), where we concluded that it was appropriate to consider a worker's obesity in certain circumstances when rating extent of disability. Claimant responds that this case presents no issue relating to extent of disability and that Nelson, therefore, is inapplicable.

The first question is whether the concepts expressed in Nelson are relevant in cases involving compensability as well as extent of disability. We conclude that they are. The issue in Nelson was framed as follows:

> "To what extent should an insurer/employer be responsible for the disabling effects of the non-compensable condition of obesity when it interferes with the recovery from a compensable injury." 34 Van Natta at 1078.

We answered that question as follows:

> ". . . a worker is not entitled to compensation for disability attributable to obesity to the extent that (a) the evidence establishes that weight loss would reduce or eliminate the degree of disability, and (b) it is within the voluntary control of the worker to follow such medical advice and lose weight, and (c) the worker has not made a reasonable effort to follow such medical advice." 34 Van Natta at 1080.

The Court of Appeals has indicated its agreement with that analysis. Nelson v. EBI Companies, 64 Or App 16 (1983).

In David Cheney, 35 Van Natta 21 (1983), without specifically so indicating, we implicitly recognized that Nelson could be applicable in situations where the evidence indicates that a worker's condition worsened as a result of the worker's obesity. The insurer in Cheney had denied the claimant's aggravation claim on the basis that it was claimant's obesity that was causing continuing symptoms in his compensably injured leg. We found the evidence insufficient to support the insurer's contentions in Cheney, but

did not indicate any disagreement with the underlying premise of the insurer's position.

We now make explicit that which was implicit in Cheney. We conclude that the Nelson rationale applies, not only to the rating of permanent disability, but also to acceptance or denial of the disabling effects of a non-compensable obesity condition.

There is nothing unique in this conclusion. It has long been the law that a claimant must establish by a preponderence of the evidence that his disability was caused by a compensable injury. Riutta v. Mayflower Farms, 19 Or App 278 (1974). It is similarly well established that, when seeking compensation for an aggravation, a claimant must establish that the worsened condition since the previous award or arrangement of compensation is causally related to the industrial injury. Anderson v. West Union Village Square, 43 Or App 295 (1979). If the evidence establishes that a claimant's worsened condition is not due to the compensable injury because it is due to some other cause, the aggravation claim necessarily must fail. Christensen v. SAIF, 27 Or App 595 (1976). We perceive little difference in arguing that a claimant's current condition is due to non-compensable obesity, or in arguing that a worker's current condition is due not to a prior compensable back injury, but to a non-compensable degenerative condition as in George Brasky, 34 Van Natta 453 (1982), aff'd without opinion, 61 Or App 226 (1982). The mere fact that this case involves obesity rather than a degenerative condition neither calls new rules into play nor requires any. In such situations, if a claimant establishes that his compensable injury remains a material cause of his worsened condition, he is entitled to additional compensation. If, in the face of evidence suggesting non-compensable obesity is causative, a claimant cannot establish that his compensable injury remains a material cause of his worsened condition, he is not entitled to additional compensation.

Having determined that the Nelson rationale is applicable to cases involving compensability, the next question is whether claimant's obesity is a result of his 1979 industrial injury. In other words, is the obesity compensable or non-compensable?

At the time of his industrial injury in 1979, claimant was already overweight at 240 pounds. By the time of Dr. Bolin's 1982 examination, claimant weighed 292 pounds. The only physician who relates claimant's weight gain to the 1979 injury is Dr. Buttler. We are unconvinced by Dr. Buttler's opinion on this matter. The record is replete with references to claimant's weight problem from the very beginning of his treatment for the 1979 injury. The record is also replete with references to claimant's refusal to take any positive action to control his weight problem, such as exercising and/or dieting. Admittedly the 1979 injury caused a limited period of inactivity, but the record is persuasive that claimant has been able to participate in moderate physical activity ever since Dr. Poulson released him to return to light work in October 1980. Rather than returning to work, claimant refused to do so and remained physically inactive. Dr. Buttler, in his report of April 27, 1981, indicates that he prescribed a home exercise program for the claimant. This seems inconsistent with his opinion that claimant was incapable of any kind of productive physical

activity. It certainly cannot be argued that claimant's chronic overeating habits were caused by the industrial injury. Contrary to Dr. Buttler's opinion, we believe it is claimant who must take responsibility for his weight difficulties, rather than attempting to lay the blame on some external factor, such as his industrial injury.

Having determined that Nelson is applicable to cases involving compensability, and having determined that claimant's obesity is not the result of his industrial injury, the remaining question is whether these two conclusions are of any benefit to the insurer under the facts of the present case. In other words, although we have determined that claimant's obesity is not related to his industrial injury, we must determine whether it was claimant's obesity or prior industrial injury which caused his back difficulties and leg injury in April 1982.

Excluding the question of claimant's obesity for a moment, if claimant's off-the-job knee injury was caused in material part by his compensable back injury, the knee injury is compensable. Wood v. SAIF, 30 Or App 1103 (1977). It would then follow that, if the evidence preponderates in favor of the conclusion that it was this fall which served to aggravate claimant's back condition, the worsened back condition is also compensable. Grable v. Weyerhaeuser, 291 Or 387 (1981).

The question of whether or not claimant actually sustained a fall in April 1982 is to a large extent a question of credibility. There are reasons in the record to question claimant's credibility. In fact, the Referee was somewhat less than enthusiastic on this subject. He noted that claimant had a tendency to overstate his difficulties; that he had an "imperfect memory"; but the Referee found claimant "essentially" credible. The Referee did specifically accept claimant's testimony concerning the circumstances of the April 1982 fall, and there are medical reports prepared reasonably contemporaneously with the fall, that are consistent with claimant's testimony to the effect that he suffered a severe pain in his low back which caused his leg to buckle and twist. We find no comfortable basis in the record for a contrary credibility finding.

Of course, the fact that the Referee found the claimant credible with regard to the circumstances of his fall does not necessarily establish the causal link between his work injury and that fall. This is where the opinons of Drs. Bolin and Butler conflict. It seems clear that Dr. Bolin is of the opinion that claimant's back difficulties in April 1982 were the result of his obesity coupled with degenerative disc disease which caused stress at the lumbosacral facets. Dr. Bolin did not believe claimant's obesity was a result of the 1979 injury. He was of the opinion that the pain which claimant experienced in his back on the day of the fall and which caused the fall was the result of his unrelated obesity.

Dr. Buttler's opinion is somewhat difficult to pin down. In his April 28, 1982 report he does not relate the cause of claimant's back difficulties to anything in particular. In his May 17, 1982 report Dr. Buttler seems to indicate that it was claimant's

excess weight which was the real culprit . However, in his report of August 3, 1982, Dr. Buttler seems to implicate the 1979 injury as the cause of the 1982 fall. At the hearing, Dr. Buttler explained that the 1982 fall was due to a combination of claimant's weight and the instability caused by the 1979 injury. He additionally stated:

> "I don't think that he would have fallen in 1982 had he not had severe, sharp pain in the low back emanating into his legs, which was a direct responsibility of the 1979 injury."

In summary, the factors which weigh against compensability are: (1) The fact that claimant's weight problem is not due to his 1979 injury; (2) Dr. Bolin's opinion that it was claimant's weight problem which led to the 1982 fall and subsequent back aggravation; (3) the fact that claimant's overall credibility is somewhat marginal; and (4) the fact that Dr. Buttler's opinions are somewhat tainted by inconsistencies and the fact that he appears to have lost some of his objectivity. The factors which support a finding of compensability are: (1) The fact that the question regarding the 1982 fall is largely a matter of credibility and the Referee found the claimant's testimony credible with regard to the circumstances surrounding the 1982 fall; (2) the supportive medical reports prepared contemporaneously with that fall; (3) the fact that Dr. Buttler has generally been claimant's treating physician; and (4) Dr. Buttler's apparent final opinion that, although claimant's obesity was a factor in the 1982 fall, the fall would not have occurred had it not been for the instability caused by the 1979 injury.

The question is extremely close because the evidence is almost evenly balanced. However, we conclude that the factors in favor of compensability slightly outweigh the factors against compensability.

ORDER

The Referee's order dated December 8, 1982 is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney's fee for services in on Board review, to be paid by the insurer.

CONNIE PALMER, Claimant
Doblie, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-01666
August 31, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The self-insured employer requests review of Referee McCullough's order which set aside its denial of claimant's aggravation claim and awarded claimant's attorney a fee of $1,100. The employer contends that:

> "The Referee erroneously found that the evidence proved that claimant's bilateral upper extremity and shoulder symptoms 'were brought about as the result of her work at Willamette Industries in 1979 and 1980 and

were worsened by her activities in her vocational program during the spring and summer of 1981.'"

Claimant began working for Willamette Industries in early 1979 in the labor pool. She performed a variety of job activities, such as fishtail saw operator, grader, clean-up and pulling on the dry and green veneer chains. In September 1979 claimant began experiencing bilateral upper extremity discomfort. This was initially diagnosed by Dr. Cronk as possible early bilateral carpal tunnel syndrome. Except for a two and one-half week period in November 1979, claimant continued working. On November 12, 1979 claimant completed an 801 form alleging that she suffered from bilateral carpal tunnel syndrome as a result of her work activities. Willamette Industries accepted the claim.

Claimant continued to treat with Dr. Cronk throughout the remainder of 1979 for upper extremity discomfort, although Dr. Cronk was unable to find any objective evidence to verify her complaints. On December 4, 1979 Dr. Cronk reported that:

> "Based on the history given to me by the patient, it appears that [claimant's] complaints are related to her employment. This is based on the necessity to use her upper extremities during the employment, and as you no doubt recognize, is not an uncommon manifestation in this type of work, particularly in ladies.
>
> "The wrist and shoulder pain may well be related, but at this time that relationship has been unclear."

In February 1980 Dr. Cronk performed a left carpal tunnel decompression. Dr. Cronk eventually released claimant to return to her regular work on an "as tolerated" basis in April 1980. As related by the Referee, claimant's subsequent work history was as follows:

> "She worked for just one day and then was temporarily laid off. She returned to work at Willamette Industries in late May 1980 and worked for a couple of weeks before being laid off again. She then returned to work in late June 1980 and worked for another month or so . . . . Claimant has not worked at Willamette Industries since then."

A June 13, 1980 Determination Order awarded claimant benefits for temporary total disability and 5% scheduled disability for loss of the left forearm.

Claimant thereafter continued to experience difficulties and treated with several physicians. On August 15, 1980 Dr. Throop reported that claimant was complaining of diffuse pain in both shoulders, both elbows and swelling and numbness in both hands. The claim was reopened and subsequently reclosed by Determination

Order of October 29, 1980 which awarded claimant only additional temporary total disability benefits.

On January 12, 1981 a stipulation was entered into between claimant and the employer. The stipulation indicates that claimant had previously requested a hearing on the issues of temporary total disability benefits, penalties and attorney fees and that the request for hearing had been amended to include an appeal of the October 29, 1980 Determination Order. The stipulation provided that claimant would receive an additional 14% scheduled left arm disability and that:

> "Claimant agrees that she is medically stationary and that this settlement represents all of her physical and psychological disability following from the subject accident . . . ."

The stipulation provided that claimant's aggravation rights under ORS 656.273 were not affected.

In March 1981 claimant entered a program of vocational rehabilitation to receive training as a beautician. Although claimant continued to experience some discomfort, she was able to attend the vocational classes in a consistent manner, except she missed some classes due to car troubles and other illnesses.

Dr. Ellison examined claimant on May 7, 1981. Dr. Ellison suspected that claimant had bilateral thoracic outlet syndrome. He prescribed a trial of various medications. Claimant was referred to Dr. Gerstner who also reported that he suspected thoracic outlet syndrome. Claimant was thereafter examined by Dr. Rosenbaum, a neurosurgeon, who reported on August 3, 1981 that claimant's condition was stationary, that she did not have thoracic outlet syndrome and that the best thing she could do to improve her condition was to avoid further medical treatment. Claimant terminated her vocational program July 10, 1981, even though she was still progressing satisfactorily as of June 25, 1981.

On September 23, 1981 Dr. Throop reported that he could not verify the diagnosis of thoracic outlet syndrome and that claimant's condition was more likely a diffuse musculoligamentous problem. Also in September, claimant began participating in a new vocational program to receive training as a computer operator. Claimant missed many classes and furnished a variety of excuses for her poor attendance. An alternative program was offered, but as the Referee correctly noted, claimant chose to close her vocational file.

Claimant continued to receive medical evaluations. Dr. Ellison reported on October 29, 1980 that claimant's condition was not serious enough to justify surgery and stated that he would prefer to defer to Dr. Gerstner with regard to a diagnosis of her condition. On November 6, 1981 claimant was examined by Dr. Nathan, who diagnosed claimant's condition as tightness of the pectoralis minor muscles which could appear as a functional thoracic outlet syndrome. He felt that claimant's previous carpal tunnel surgery was unnecessary. Dr. Nathan indicated that claimant's prior Willamette Industries employment could be considered as a possibly

precipitating cause, although not a direct cause, of her symptoms. He nevertheless felt she could be employed with no restrictions. Dr. Gerstner reported on November 16, 1981 that it was still his opinion that claimant suffered from thoracic outlet syndrome and that her symptoms were compatible with her employment.

On March 23, 1982 another Determination Order issued awarding claimant additional temporary total disability benefits for the period she participated in vocational rehabilitation.

The Referee stated that, in view of the apparent inability of the various physicians who examined claimant to come to a firm agreement on a diagnosis of her condition, it was not within his expertise to do so. He further stated that the real questions were whether claimant's upper arm/shoulder condition was real and causally related to her employment at Willamette Industries. He answered both questions in the affirmative. We agree.

The employer argues that a definite medical diagnosis must be made before a condition can be ascribed to a claimant's employment. We only partially agree. We noted in Lorrie A. Minton, 34 Van Natta 162 (1982):

> "Determination of the work-relatedness of a disease requires identifying possible causes and weighing the relative contribution of possible causes. Practically, it is usually impossible to identify possible etiology and weigh relative contribution unless we know what disease we are talking about."

However, we also noted in John R. Hart, 35 Van Natta 665, 666 (1983), that:

> "Minton discussed practicalities, not absolutes. * * * If doctors suspect different diseases with different known causes, not all of which would be equally work related, the absence of a specific diagnosis may make it impossible to prove disease is compensable. But if different possible diseases have the same or similar causes and/or all possible causes were equally present in the work environment, the absence of a specific diagnosis is not necessarily fatal to an occupational disease claim."

Despite the disputed diagnosis of claimant's upper arm/shoulder condition, we find the medical evidence to be generally more supportive of compensability than not. Claimant had no difficulties with her shoulders prior to her employment at Willamette Industries. Dr. Cronk indicated in his December 4, 1979 report that, although the relationship was unclear, it appeared that claimant's condition was related to her employment. Dr. Hartmann reported on August 15, 1980 that claimant's shoulder symptoms were most likely due to the way she was working and trying to protect her hands and wrists from pain. Dr. Nathan indicated in his November 9, 1981 report that claimant's employment could be a precipitating cause of her symptoms, although he did not feel that it

adequately explained the persistence of the symptoms. Dr. Gerstner reported on November 16, 1981 that claimant's symptoms were compatible with her employment.

In sum, nearly all of the physicians who ventured an opinion on causation seemed to be of the opinion that, whatever the proper diagnosis of claimant's shoulder condition was, it appeared to be related to her employment. Admittedly, many of these opinions skate close to the fine line between medical possibility and medical probability. Nevertheless, we find them sufficient by the barest of margins to support the compensability of claimant's shoulder condition.

The second question presented is whether or not claimant has established that her shoulder condition worsened since her last award or arrangement of compensation, which in this case would be the January 21, 1981 stipulation. The Referee concluded that claimant had so established. Our conclusion is to the contrary.

We find that the evidence does not establish that claimant's bilateral upper arm/shoulder condition is any worse than it was at the time she entered into the January 21, 1981 stipulation. Comparing the pre-stipulation medical reports to the post-stipulation medical reports, it is apparent that there has been little change in the degree or continuity of claimant's complaints or the treatment she has received for those complaints.

Following claimant's carpal tunnel wrist surgery in February 1980, Dr. Cronk reported on May 21, 1980 that claimant continued to experience symptomatology. Despite this, Dr. Cronk was of the opinion that claimant was medically stationary as of April 14, 1980. Dr. Cronk reported on August 11, 1980 that claimant continued to complain of shoulder and wrist discomfort, but he repeated his opinion that she remained capable of employment. Similarly, Dr. Hartmann reported on August 15, 1980 that claimant was complaining of pain and disability in both hands, wrists and shoulders. Dr. Throop authored a report on that same day to the effect that claimant "continues to complain of diffuse pains about both shoulders, both elbows and with episodic swelling and numbness of the hands." Dr. Hartmann reported on October 2, 1980 that claimant was medically stationary <u>with symptomatology</u> referrable to the hands, wrists and shoulders.

There are no medical reports which indicate that any of the above changed in any way after the January 1981 stipulation. Claimant participated in a vocational program from March to July of 1981 with few problems. There is no medical report indicating that she was unable to continue doing so for reasons related to her compensable condition. The most contemporaneous medical report is Dr. Rosenbaum's August 3, 1981 report in which he states that claimant is medically stationary. Additionally, Dr. Nathan reported on November 9, 1980 that claimant was medically stationary and could be employed without restriction. The only post-stipulation medical report which even comes close to suggesting a worsening of claimant's condition is Dr. Gerstner's November 16, 1981 report. Dr. Gerstner indicates that claimant "is physically impaired as to performing her previous job description on the green chain." That, however, is hardly a new finding;

nearly every physician who examined claimant pre-stipulation indicated the same thing. Dr. Gerstner also thought it "unwise" for claimant to use her arms in an elevated position as would be required by a beautician. That is hardly a statement that claimant's condition has worsened.

We do not deem it at all significant that the January 1981 stipulation resolved "all of [claimant's] physical . . . disability" with only a scheduled award, while our summary of the evidence suggests the possibility that claimant then had permanent unscheduled (shoulder) disability. It is a fact of life -- some might say an unfortunate fact of life -- that stipulated orders, i.e. private settlements of workers compensation litigation, often state disability awards in terms that are not completely consistent with what otherwise might appear to be the injured body area or areas.

For all of these reasons, we conclude that claimant has not established a worsening of her condition such as to justify reopening of her claim pursuant to ORS 656.273.

This conclusion requires us to address the issue of attorney's fees. If this case simply presented a question relative to the employer's November 11, 1981 denial, the Referee's award of attorney fees would have to be reversed, since we have upheld the employer's denial. However, the matter was more complex. When discussing what issues were being litigated, the following exchange took place at the hearing:

> Referee: " * * * The basic issue for resolution here today is the propriety of that denial in which claimant has timely appealed. Putting the issue more specifically though, the question as I understand it, one, what is the exact nature of claimant's bilateral shoulder-arm condition? And, whether that condition is compensable as an occupational disease based upon the work activities claimant engaged in at Willamette Industries from the time of her employment in February of '79 until her termination in August of 1980?" (Emphasis added.)

Both attorneys agreed with the Referee's statement of the issues.

Under these circumstances, we conclude that claimant's attorney is still entitled to an employer-paid fee for prevailing on the compensability issue before the Referee, as well as before the Board. The Referee only awarded a total attorney's fee without designating specific amounts for the two aspects of this case. We believe that $700 would be an appropriate fee in this case for prevailing on the compensability issue.

ORDER

The Referee's order dated July 12, 1982 is affirmed in part and reversed in part. Those portions of the Referee's order which set aside the November 11, 1981 denial and awarded claimant's attorney a fee of $1,100 are reversed. The employer's denial is

reinstated and affirmed. The remainder of the Referee's order is affirmed, and it is specifically recognized that claimant is entitled to continuing medical care for her upper arm/shoulder symptoms as compensable consequences of her accepted claim.

Claimant's attorney is awarded a reasonable attorney's fee of $700 for prevailing on the issue of compensability before the Referee and $400 for prevailing on that issue before the Board, to be paid by the employer. This fee is in lieu of and not in addition to that awarded by the Referee.

ETHEL PERRY, Claimant
Bottini & Bottini, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-05649
August 31, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review and the insurer cross-requests review of Referee Pferdner's order which: (1) Upheld the insurer's partial denial of claimant's psychiatric condition following a compensable injury; (2) assessed a penalty for failure to comply with a prior Referee's order; (3) awarded claimant additional temporary total disability; and (4) assessed a penalty and attorney's fee for unreasonable resistance to and unreasonable delay in the payment of compensation.

Claimant sustained compensable injuries to her back and knee on April 5, 1979 and June 29, 1979. She ultimately received an award of 45% unscheduled disability and 25% scheduled left leg disability by a Referee's order dated June 22, 1982. The order was not appealed. The insurer did not receive that order immediately because it was sent to the wrong address. Just before that earlier hearing, a question arose of whether claimant's injury claim should be reopened because of claimant's psychological problems allegedly related to her industrial injury. The insurer denied the compensability of claimant's psychological condition.

I.

The first issue involves the compensability of claimant's psychiatric condition. The Orthopaedic Consultants examined claimant in June 1981. They found severe functional overlay and suggested that claimant be psychiatrically evaluated. Dr. Voiss performed a psychiatric evaluation of claimant in February 1982. He noted that, by her own admission, claimant had always been a nervous person. However, according to the history he obtained, claimant had become angry, irritable, emotional and at times profoundly depressed since her industrial injury. Dr. Voiss diagnosed claimant as having post-traumatic stress syndrome. He opined that her industrial injuries were material contributing causes of her psychiatric difficulties.

Dr. Parvaresh also examined claimant in February 1982. He diagnosed claimant as having an anxiety neurosis which he did not believe to be disabling. He opined:

> ". . . none of the accidental injuries she has had have been either traumatic or

> disabling to that extent to have possibly caused the type of psychological problems she has. It is my clinical opinion that this young lady must have had longstanding anxiety tension."

In May 1982 Dr. Bloom evaluated claimant and diagnosed her condition as psychogenic pain disorder. He did not consider her disabled from a psychiatric standpoint. He noted from her history that a number of changes had occurred in her life after the industrial injuries. He said he was not able to untangle the web of possible causes and effects enough to voice an opinion whether these changes contributed to or were caused by her industrial injuries.

Dr. Stolzberg reviewed the psychiatric reports on file at the request of the insurer. Dr. Stolzberg opined that there was a great deal of evidence to support the conclusion that the claimant's "preexisting and unrelated personality is contributing to a prolongation of her pain and disability symptoms"; she vehemently disagreed with the diagnosis of post-traumatic stress syndrome; and she said that there is no evidence that claimant's psychological condition was caused by her industrial injuries.

Dr. Hayes examined claimant at the request of her attorney. He said he felt that claimant suffered from a life-long pattern of subnormal assertiveness. He said that she suffers from a general state of anxiety about life and its conflicts. He felt that claimant's industrial injuries had materially aggravated her preexisting psychological condition.

In order to establish the compensability of her psychological condition, claimant need only prove by a preponderance of the evidence that her industrial injury was a material cause of her psychological condition. Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972); Clara M. Peoples 31 Van Natta 192 (1981). We find neither the psychiatrists who find a causal connection between the injury and the psychological condition nor the psychiatrists who fail to find such a connection completely persuasive. Because the burden of proof is on claimant and because the evidence is in equipoise, we agree with the Referee's conclusion on the compensability issue.

II.

After a prior hearing, on June 22, 1982 a Referee ordered the insurer to pay claimant permanent disability. That order was inadvertently sent to the wrong address. No permanent disability payments were made until July 28, 1982. The Referee assessed a 5% penalty for unreasonable delay. We disagree.

OAR 436-54-310(5)(b) requires commencement of permanent disability payments within 30 days of a litigation order awarding permanent partial disability. Thus the payments to claimant were initiated six days late. We do not believe that such a de minimus delay in payment of compensation is unreasonable when the order requiring payment is sent to the wrong address.

III.

The Referee ordered the insurer to pay interim compensation for the period from March 24, 1982, when claimant made an aggravation claim, to May 28, 1982, when the insurer denied that claim. The Referee also assessed a 25% penalty and attorney fees for failure to pay this interim compensation.

We think the insurer's arguments that the Referee erred on this point miss the relative simplicity of this issue. All parties have consistently treated Dr. Voiss' March 24, 1982 report as an aggravation claim. In that report, Dr. Voiss stated that claimant "should be on time loss until treatment can bring her to a pre-injury status." Although conclusory, we think this is adequate medical verification of inability to work. The insurer's clear and simple statutory duty was to pay interim compensation until acceptance or denial.

The insurer's argument to the contrary relies upon the fact that the insurer originally listed claimant's aggravation claim for her psychological condition as nondisabling on an 801 form. The insurer argues that claimant's remedy in the event she disagreed with this classification was to request Evaluation Division review pursuant to ORS 656.268(8).

Aside from the fact that there is no indication that the insurer ever advised claimant before its May 28, 1982 denial that it regarded her aggravation claim/psychological condition to be nondisabling, we disagree with the insurer's statutory analysis. We do not think that Evaluation Division authority to review the disabling/nondisabling classification of a claim can be invoked until after either acceptance of a claim or after employer/insurer closure of a claim under ORS 656.268(3). (It may also be possible to invoke Evaluation Division review authority after denial of a claim, but it would not make much sense to do so.) Before acceptance or denial of an aggravation claim, the statutory obligation of an employer/insurer is very specific -- to pay interim compensation pending acceptance or denial after medical verification of inability to work.

Anthony A. Bono, 35 Van Natta 1 (1983), is not to the contrary. In Bono, a notice of claim acceptance advised the claimant that his claim was being classified as nondisabling. In these circumstances, we concluded that the claimant's proper remedy to contest the nondisabling classification was to request Evaluation Division review under ORS 656.268(8) rather than to request a hearing. In this case, by contrast, there was no notice that claimant's aggravation claim was accepted as nondisabling; indeed there was no notice of anything until the insurer's May 28, 1982 denial.

The Referee properly ordered interim compensation paid for the period between the aggravation claim (that included verification of inability to work) and the denial. The Referee properly ordered a penalty and attorney fee for nonpayment of interim compensation.

ORDER

The Referee's order dated September 16, 1982 is affirmed in part and reversed in part. Those portions that upheld the

insurer's denial of claimant's aggravation claim, that ordered payment of interim compensation and that assessed a penalty and attorney fee for nonpayment of interim compensation are affirmed. That portion that assessed a penalty for delay in payment of compensation following a prior litigation order is reversed.

STELLA PHILLIPS, Claimant
Blair, et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 80-10531
Order on Review
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Johnson's order which upheld the insurer's denial of claimant's back injury claim and declined to assess a penalty/attorney fee for the insurer's failure to timely supply claim information pursuant to OAR 436-83-460.

There is no question that claimant struck her back at work on July 31, 1980. If disability resulted or medical services were required, the claim is compensable. As we understand the record and the arguments of the parties, however, claimant does not contend that the July 31, 1980 injury caused disability or required medical services until late September and early October of 1980 when claimant was discovered to have a herniated disc at the L5-S1 level which led to surgery. The issue, then, is whether the July 31, 1980 incident, that apparently did not otherwise produce compensable consequences, caused claimant's herniated disc.

To establish causation, claimant relies upon the temporal relationship of the at-work incident and the discovery of the herniated disc; claimant also relies upon lay testimony about her symptoms during that approximately two month interval; claimant does not rely on any expert medical opinion. The insurer relies upon the opinion of Dr. White to the effect that claimant's herniated disc was most likely caused by a coughing incident the evening of September 28, 1980 and that there is no clear association between the July at-work incident and the herniated disc. We agree with the insurer and the Referee to the effect that lay and circumstantial evidence is insufficient to overcome the only expert opinion in the record.

We turn to the issue of the insurer's noncompliance with OAR 436-83-460. On December 11, 1980 claimant's attorney requested the insurer to provide copies of all documents in its possession. When that request did not produce any response, claimant's attorney repeated the same request on January 14, 1981. When there was still no response, on March 2, 1981 claimant's attorney filed an amended hearing request on the issue of penalties and attorney fees because of the insurer's failure to supply claims information as required by OAR 436-83-460. The insurer finally provided claimant's attorney with copies of all documents at about the time a hearing convened on July 21, 1981; that hearing, however, had to be postponed because of the insurer's belated disclosure of claims information.

Subject to an exception not here relevant, OAR 436-83-460 requires that all copies of all documents in the possession of an employer/insurer be provided to a claimant "within 15 days of . . . demand." In this case, the first demand was made in December of 1980 and the insurer finally complied in July of 1981 -- hardly timely compliance with the requirement of OAR 436-83-460.

The Referee concluded that the insurer's very belated compliance with OAR 436-83-460 was unreasonable, but declined to assess a penalty: "I conclude there is a failure of proof about whether there was compensation due and owed claimant to which a penalty may attach."

Abstractly, the Referee's analysis is consistent with a literal reading of the "then due" language in ORS 656.262(9). In other similar contexts, however, we have concluded that advancement of the overall statutory purposes requires some departure from literalism. E.g. Norman J. Gibson, 34 Van Natta 1583 (1982). We think the same kind of departure is required to effectuate the discovery obligations stated in OAR 436-83-460. Thus, we have often assessed penalties for noncompliance with OAR 436-83-460 that were not expressed as a percentage of compensation "then due." E.g., Rose E. Pederson, 34 Van Natta 1658 (1982); Ronald D. Blackwell, 29 Van Natta 629 (1980). The Supreme Court has concluded that this Board had the authority to create the discovery rights stated in OAR 436-83-460. Morgan v. Stimson Lumber Company, 288 Or 595, 599 (1980): "The discovery provision embodied in the first sentence of OAR 436-83-460 is plainly a rule of practice and procedure to expedite the effective disposition of claims for which the Board is responsible." In our opinion, authority to create a right necessarily includes authority to create a remedy for breach of that right. As this case illustrates, the alternative of linking the only possible remedy for breach of OAR 436-83-460 to compensation "then due" would create a class of cases in which there would be no possible remedy and would "invite the parties to speculate on such after-the-event litigation about the actual consequences of noncompliance [with OAR 436-83-460] in the particular case." Morgan, 288 Or at 604. We conclude that we have authority to assess a penalty and attorney fee in this case and that it is appropriate to do so.

ORDER

The Referee's order dated May 31, 1982 is affirmed in part and reversed in part. That portion that declined to assess a penalty or attorney fee for the insurer's unreasonably delayed compliance with OAR 436-83-460 is reversed and, in lieu thereof, Liberty Mutual Insurance Company is ordered to pay claimant a penalty of $300 and is ordered to pay claimant's attorney a fee of $300. The remainder of the Referee's order is affirmed.

C of A # A29585 - not scheduled for argument as of 2-16-84

MAXINE P. ROBINSON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-10158 & 82-05121
August 31, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of those portions of Referee Brown's order which overturned its denial of claimant's occupational disease claim against Struther's Furniture for sensitivity to phenol hydrocarbons and formaldehyde. The issues on review are whether the claim is barred for untimely filing and, if not, whether claimant has met her burden of proving that her work was the major contributing cause of her increased sensitivity. We hold that the claim is barred for untimely filing and, therefore, do not reach the merits of the claim.

The record indicates that claimant began working for Struther's Furniture in about 1974. Sometime during the period she worked for Struther's she began to develop symptoms which included dizziness, fatigue and nausea. She stopped working for Struther's in December 1978.

Later she worked for a short time for another furniture store, Adamsons. SAIF has denied responsibility for claimant's occupational disease on behalf of Adamsons also. The Referee in this consolidated hearing upheld that denial and his ruling on that denial has not been appealed.

Dr. Gambee, who treated claimant for her sensitivity, has said he told claimant of a possible connection between her work in the furniture store business and her symptoms on June 30, 1980.

> "On June 30, 1980, after we did some testing on Mrs. Robinson, I discussed with her the fact that she had a higher than normal degree of sensitivity to certain chemicals in our environment. I also explained to her that her working environment contained an even higher than normal concentration of these substances. Because of these conditions, both in her environment and in her body, I felt that she might have difficulty overcoming some of her health complaints if she continued to work in that environment."

The Referee held that the June 30, 1980 conversation reported by Dr. Gambee "did not meet the requisite level of concreteness required by Davidson Baking v. Industrial Indemnity, 20 Or App 508 (1975)." The Referee apparently refers to the fact that in Davidson, the court found a physician's opinion that claimant's hearing loss was probably rather than possibly related to his work exposure to be the first "concrete medical evidence to claimant that this is an occupational disease." Id at 511.

We disagree with the Referee that the June 30, 1980 conversation with Dr. Gambee was insufficient to put claimant on notice that she may have an occupational disease. Not only did Dr. Gambee

inform her that she had a sensitivity to certain chemicals, he informed her that the furniture store contained a high concentration of those chemicals and that she would continue to have those symptoms if she worked in furniture stores. The Court of Appeals has said that the limitation period of occupational disease claims runs from the time claimant is told by a doctor not to return to the employment. Frey v. Willamette Industries, 13 Or App 449 (1973). Claimant was told by her doctor that her problems were related to her work exposure and that if she wanted the problems to abate she should not work in that environment. We consider that sufficient notice to begin the running of the limitation period on this occupational disease claim.

Despite this notice, claimant did not file a claim against Struther's until September 24, 1981. ORS 656.807(1) requires that an occupational disease claim be filed within 180 days of either disability or notice by a physician that claimant has an occupational disease, whichever is later. Claimant became disabled prior to notice by Dr. Gambee, so under the statute she was required to file a claim within 180 days of the conversation with Dr. Gambee on June 30, 1980.

The Supreme Court has said, however, that the procedural defenses available to excuse late filing under the accidental injury law are also available in occupational disease cases. Inkley v. Forest Fiber Products Co., 288 Or 337, 347 (1980). Claimant contends that her claim should not be barred for lack of timeliness because SAIF has not proven that it was prejudiced by the late filing. See, Satterfield v. Compensation Department, 1 Or App 524 (1970). However, SAIF's burden of proving prejudice can be satisfied if evidence of prejudice appears in the record. Vandre v. Weyerhaeuser, 42 Or App 705 (1979).

In this case, claimant delayed some fourteen months from the time she had notice until she finally filed a claim. In addition, there is evidence in the record that the employer was bankrupt and no longer in business at the time the claim was filed. The record is silent concerning when the bankruptcy took place. However, it is clear that SAIF could not fully investigate this claim at the time it was filed because it could not compare the levels of the suspect chemicals with the levels in claimant's home to counter claimant's argument that the job was the major contributing cause of her sensitivity. We find that the record is sufficient to prove that SAIF was prejudiced by the late filing.

Accordingly, we hold that claimant's occupational disease claim against Struther's Furniture is barred. SAIF's denial hereby is reinstated.

ORDER

The Referee's order dated December 15, 1983 is reversed in part. That portion of the order which overturned SAIF's denial of October 28, 1981 is reversed, and SAIF denial is reinstated and affirmed. The remainder of the Referee's order is affirmed.

CHARLES W. SIEG, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-09488
August 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Howell's order which upheld the SAIF Corporation's denial of claimant's occupational disease claim.

We find the record quite confusing. The only case now before us is WCB Case No. 82-09488 which involves a denial of some form of alleged disease in claimant's back. The proceedings before the Referee also involved three other cases, WCB Case Nos. 81-10089, 82-03246 and 82-08141. These other cases apparently involved claims for distinct injuries to claimant's back in December 1980, April 1981 and February 1982. These other cases were settled at the time of hearing. In other words, claimant has received an agreed-upon amount of compensation for his various back injury claims.

In March of 1982 Orthopaedic Consultants examined claimant, apparently in connection with claimant's April 1981 back injury claim. In the course of their report, the Consultants referred to "significant back degeneration." In October 1982, apparently in reliance on that fleeting comment in the Consultants' report, claimant filed a claim for "occupational disease due to excessive wear and tear over a period of 32 years falling and cutting timber in the woods." SAIF then issued a denial stating it was "unable to accept responsibility for [claimant's] degenerative disc disease." Despite the wording of that denial, SAIF called Dr. Norton as a witness at the hearing to testify that claimant does not have degenerative disc disease.

About all that is clear to us on this record is: (1) Claimant has had a series of separate back injuries for which he has been compensated; (2) no doctor has treated claimant for any back disease; and (3) Orthopaedic Consultants' reference to back disease was an aside when reporting on an examination of claimant in connection with one of his back injuries.

And even that aside is far from clear. The Consultants stated, in their "recommendations" section, not in their "diagnosis" section:

> "We feel that if [claimant] returns to his same occupation he can expect repeated episodes of pain following the use of the chainsaw falling trees due to his significant back degeneration. We do not feel that this should be classified as truly an occupational disease since it is the result of hard physical labor of 32 years and not directly due to any specific problem within the logging industry."

One of the several ambiguities in this statement is that claimant's "hard physical labor of 32 years" has not been limited to his work in the logging industry. Claimant's non-work activities during

this same period include feeding bales of hay to cattle, welding, operating a tractor, carpentry work, and building and maintaining several houses and a barn.

In summary, it does not appear to us that any doctor has been asked or has answered the following question: Given claimant's history of work and non-work activities, does claimant have a back disease, the major cause of which is work activity? Without a medical-opinion answer to that question, we agree with the Referee's conclusion that claimant has not proven a compensable occupational disease.

ORDER

The Referee's order dated February 4, 1983 is affirmed.

SUSAN LOUISE WARREN, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-05209
August 31, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee Mannix's order which set aside those portions of its denials of May 3 and May 22, 1980 by which SAIF denied the compensability of claimant's porphyria variegata condition, hysterical conversion condition, low back pain, acid peptic disease and depression. The issue is the compensability of these various problems which claimant alleges are a consequence of her 1978 industrial back injury.

Claimant, who was 39 years of age at the time of the hearing, has a long history of recurrent and severe abdominal distress characterized by nausea, vomiting and panabdominal pain with no known specific initiating factors. Claimant has suffered from this condition, which at various times has been diagnosed as porphyria variegata since her teen-age years. Dr. Wichser explains in his report of September 21, 1979 that porphyria variegata is a somewhat rare abdominal condition characterized by acute abdominal distress associated with neuromuscular aches and pain, nausea and gastrointestinal symptoms. Dr. Wichser further states that:

> "The condition is generated by a genetically inherited chemical of the blood metabolism which becomes symptomatic when abnormal metabolic products accumulate in the blood and liver. The production of these abnormal products is dependent upon multiple biochemical influences. Some of these influences may be pharmacologic, in terms of the administered medications. Some of these influences may be hormonal, affected by emotional states . . ."

In addition to this abdominal problem, claimant also has a long history of psychological difficulties. She received psychoanalysis from 1970 through 1975 which included electroconvulsive

Valley Hospital for psychiatric treatment following the dissolution of her first marriage. She continued to take medication for her psychological condition and was taking such medication at the time of her 1978 industrial injury.

In addition, claimant sustained a whiplash-type injury to her neck and back in 1970 and has suffered from recurrent neck and back aches ever since. In March 1978 claimant was involved in another motor vehicle accident and suffered further injury to her back and neck, for which she was treated by Dr. Hendrickson.

In approximately June 1978 claimant remarried. This marriage included the addition of two children. Although it is not exactly clear when, claimant began working in her husband's appliance business as a clerk. On November 25, 1978 claimant fell backwards when the left rear leg on the chair in which she was sitting broke. Claimant never returned to work following this injury.

Claimant was initially examined by Drs. Hendrickson and Luethe. Dr. Hendrickson indicated on an 827 form that the injury did not prevent claimant from returning to work. Dr. Luethe felt that claimant would be unable to work for one week.

Rather than returning to work, however, claimant began experiencing a constellation of symptoms in addition to her back pain. In April 1979 claimant began treating with Dr. Wichser after being hospitalized for abdominal symptoms. Claimant was referred to Dr. Donald T. Smith for evaluation of her back complaints. Dr. Smith could find no neurological basis for claimant's complaints and opined on August 20, 1979 that, at the time he treated claimant in April, claimant experienced "at the worse" a lumbosacral strain that would have required only four to eight weeks of treatment with no resultant permanent disability. By letter of October 11, 1979 Dr. Hendrickson indicated that claimant's industrial back sprain was medically stationary at the time of Dr. Smith's April 1979 evaluation.

Claimant continued to experience abdominal distress. On September 21, 1979 Dr. Wichser reported that claimant's November 1978 back injury resulted in a "severe" back strain, which had precipitated recurrent emotional distress, which was an adequate cause to result in recurrent abdominal difficulties with her porphyria variegata.

In September 1979 claimant was involved in another motor vehicle accident. A chart note dated September 25, 1979 indicates that claimant "was bounced around the car, sustaining trauma to low back & neck." In October 1979 claimant was readmitted to Sacred Heart Hospital for management of her difficulties. The diagnoses at that time consisted of porphyria variegata, systemic lupus erythematosus, personality disorder, acid peptic disease and recurrent urinary tract infections.

In December 1979 claimant was examined by Dr. Radmore, a psychiatrist. Dr. Radmore concluded that claimant was not suffering from a "significant psychiatric disorder which could be attributable to her injury." Dr. Radmore stated that, even assuming that stress could activate claimant's abdominal condition, there were numerous factors present, such as claimant's remarriage and the acquisition of the two additional children,

which had not been adequately considered in an attempt to assess the role of the injury as the cause of claimant's difficulties.

Claimant was again admitted to the hospital in January 1980. The diagnoses were recurrent abdominal and back pain, esophagitis and porphyria variegata. Dr. Carter evaluated claimant's back complaints and was of the opinion that they were not organically based. Diagnostic testing was carried out at the hospital. The examining and consulting physicians at the hospital concluded that clamiant did not have porphyria variegata, but rather that claimant's recurrent abdominal distress and back pain were purely psychogenic in origin. Dr. Wichser reported on February 8, 1980 that this "state-of-the-art" evaluation at the hospital revealed that claimant was indeed not suffering from porphyria. Dr. Wichser thus revised his opinion "to the conclusion that her complaints of back and abdominal distress are psychogenic in origin." With no explanation, Dr. Wichser then stated that claimant's disability was due to the 1978 industrial injury.

In April 1980 Dr. Holland performed an extensive psychiatric examination of claimant. Dr. Holland noted that the diagnosis of porphyria had been rebutted in favor of a psychological explanation. He observed that claimant had been hospitalized on a number of occasions for abdominal distress prior to her industrial injury; Dr. Holland reasoned that this would be evidence that she was experiencing something which was significantly productive of psychogenic disturbances prior to the time of the injury. Dr. Holland reported that there were a number of significant non-accident related stress factors present, such as her husband's business failure and their attendant financial difficulties. Dr. Holland concluded:

> ". . . it is my belief that [claimant] had significant psychological problems which preceded her injury. I believe that there was little about the injury itself which caused a significant worsening of a pre-existing condition. I feel that the major focus of this worker's psychiatric treatment . . . would have to address itself to this worker's basic personality functioning, which was present before her injury."

On April 3, 1980 claimant was examined by Dr. Carter, a neurosurgeon. Dr. Carter reported that it was "extremely unlikely" that claimant's 1978 back injury was the cause of her current back pain, which he felt was out of proportion to objective evidence of disease or injury. He indicated that her current pain was not more than 10% symptomatic from the 1978 industrial injury.

Claimant was again hospitalized on November 3, 1980. The diagnoses at the time of that admission included porphyria variegata, hysterical conversion, urinary tract infection, low back pain, acid peptic disease, depression, systemic lupus erythematosus and Raynauds phenomenon. In connection with her hospitalization, claimant was examined by Dr. Riner, a psychiatrist. Dr. Riner reported on February 16, 1981 that claimant was under multiple stresses, including back pain from her injury and financial difficulties from not being able to work, and that: "In that sense, her

industrial back injury was a factor which contributed to her psychological problems."

In his final report dated February 17, 1981, Dr. Wichser reported that claimant's hysterical conversion, low back ache and depression were all related to her industrial injury. The basis for this conclusion was that these conditions, although present prior to the injury, were not disabling prior to the injury. Dr. Wichser went on to indicate that claimant experienced numerous stresses as a result of her industrial injury which exacerbated her pre-existing disorders. Dr. Wichser also expressed his disagreement with Dr. Holland's conclusions that claimant's psychological condition and her related difficulties were not the result of her industrial injury.

The Referee stated that the basic issue of the case was whether claimant suffered any continuing problems which could be attributed to her 1978 industrial injury. He further stated that:

> "My evaluation of the evidence is most in accord with the opinion of Dr. Wichser. The focus must be upon whether the industrial injury is a material contributing factor to claimant's continuing problems, not whether the industrial injury is the factor, or a major factor, contributing to those continuing problems."

The Referee concluded that claimant's porphyria variegata (not the underlying condition itself, but exacerbations to the date of his order), hysterical conversion, low back pain, acid peptic disease and depression were all compensably related to claimant's industrial injury. We disagree and reverse.

With regard to the question of what is the claimant's appropriate burden of proof in this case, both parties set forth arguments based on different legal theories. SAIF argues that claimant suffers from a pre-existing mental condition which is the source of all of her symptomatology, and that under Weller v. Union Carbide, 288 Or 27 (1979), she must establish that her industrial injury worsened that pre-existing condition. Claimant argues that the Weller rule applies only to occupational disease claims and that we need only ask if claimant has established her industrial injury was a material contributing factor necessitating medical care and/or producing disability under Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972).

Whatever the correct answer may be, we are satisfied that this claim must fail utilizing even the most minimal burden of proof. Whether her difficulties are purely psychological in origin or not, we find it simply implausible that claimant's minor industrial back injury could have made anything more than a molecular contribution to her incredible subsequent cornucopia of difficulties.

As our summary of claimant's medical history makes evident, the problems which claimant now contends are related to her compensable 1978 industrial injury were chronic problems long before that injury. The causes of these difficulties are both substantial and multiple. For example, one representative medical report relates the following history:

> "Both the patient's parents were alcoholics and two of her brothers are alcoholic. Several members of her family have porphyria. A sister has had psychiatric hospitalization. When the patient was 14, her father . . . killed himself and she witnessed it. Subsequently she had to go through two years of insulin shock therapy to get rid of a vision of her father with his head blown off. * * * She suppressed what she had witnessed for a while and then started having the vision after she went through sodium amytal therapy. At various times in her life she has seen several psychiatrists. For five years she saw a psychiatrist in Long Beach who started her on Mellaril and took her off Sodium Amytal, Meprobamate and Valium. * * * Apparently she has been taking 100 mg of Mellaril q.i.d. and 200 mg of Elavil daily. In spite of almost constant illness and pain over the past two years, with 7 hospitalizations for the same, the patient's outlook has been increasingly positive. * * *
>
> "Fifteen years ago the patient had a head injury and was paralyzed on her right side for 10 days. Ten years ago she had encephalitis . . . . Six years ago she had a nervous 'breakdown' at a time when she was bed-ridden with pain and paralysis, given two months to live, and her husband had walked out on her and her children. She could not talk, eat, think, feel, or relate. After a month on a medical ward, she went through a drug addiction program and then spent 6 weeks in the Psychiatric Unit of Rogue Valley Hospital."

This is by no means a complete enumeration of claimant's pre-injury medical difficulties or the pre-injury psychological stress factors she experienced.

Against this background, what is particularly striking about claimant's industrial accident is the minimal nature of that injury. Dr. Hendrickson treated claimant shortly after the accident, and reported that claimant was medically stationary and able to return to work. When claimant was first examined by Dr. Luethe about a month post-injury, he reported that she would be able to return to work in one week. Dr. Smith reported in August 1979 that claimant would have been medically stationary four to eight weeks after his examination in April 1979. Dr. Hendrickson again reported in October 1979, stating that claimant was medically stationary at the time of Dr. Smith's examination in April 1979. The medical reports generated thereafter only peripherally refer to claimant's back injury. The back injury and her related complaints rapidly began to fade into the background of claimant's medical

treatment as new and old symptoms began to blossom. It is quite clear from the medical reports that claimant sustained, at most, a very minor lumbosacral sprain in November 1978, and was medically stationary with no permanent residuals by April 1979, at the very latest.

The only physician who attempts to relate the majority of claimant's subsequent difficulties directly to this minor industrial back injury is Dr. Wichser. We find that we simply cannot accept Dr. Wichser's opinions in this regard. When setting forth his opinions, Dr. Wichser consistently fails to explain or or take into account claimant's long and extremely complex medical history or the multiple psychological stressors that she has long contended with and which are totally unrelated to her work injury. In addition, Dr. Wichser also fails to take into account the various non-work sources of stress and medical difficulties claimant was experiencing concurrent with and subsequent to her injury. For example, in his final report of February 17, 1981, where he attempts to implicate the industrial injury as the significant source of stress which exacerbated many of claimant's difficulties, Dr. Wichser fails to mention claimant's 1978 remarriage and the two step-children she acquired as a result of that marriage (a fact which Dr. Radmore considered significant enough by itself to produce decompensation). Dr. Wichser also fails to take into account the failure of claimant's husband's appliance business subsequent to her injury and the resulting financial hardships. He additionally fails to consider the effect of claimant's husband's alcoholism. Dr. Wichser also fails to mention claimant's March 1978 motor vehicle accident or her 1979 motor vehicle accident, both of which caused injury to claimant's back. It would be interesting to know why Dr. Wichser felt the minor industrial back injury was a significant source of stress, while the two motor vehicle accidents were not; but our point is that Dr. Wichser's expressed opinions fail to take things like this into account.

Without Dr. Wichser's opinions, there is no evidence supporting the compensability of the conditions in issue. The very most that any other physician is able to say is that claimant's industrial injury may have been a factor in her ongoing difficulties, but no physician can say that it was even a material factor, much less a major factor. The opinions of Drs. Radmore, Holland and Riner are particularly convincing in this regard. Summarized, we read those opinions as basically saying that there are a great many factors involved in claimant's continuing difficulties, and that the relatively minor industrial back strain (which took place nearly four years prior to the hearing), if a factor at all, could only be a microscopic factor in claimant's ongoing difficulties, from which she has been chronically suffering for many years prior to her injury.

For all these reasons, we conclude that SAIF is not responsible for claimant's conditions variously diagnosed as acid peptic disease, hysterical conversion syndrome, depression and porphyria variegata. We additionally conclude that SAIF is not responsible for claimant's continued low back pain. The evidence is uncontradicted that by April 1979 claimant was medically stationary with no permanent residuals as a result of her industrial injury, and that

any ongoing back difficulties are either the result of claimant's September 1979 motor vehicle accident or are psychological in origin and not related to her industrial injury.

ORDER

The Referee's order dated April 22, 1982 is affirmed in part and reversed in part. Those portions of the Referee's order which set aside portions of SAIF's May 3, 1980 and May 22, 1980 denials are reversed, and those denials are reinstated and affirmed. The remainder of the Referee's order is affirmed.

MARTHA A. BAUSTIAN, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-09243
September 1, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The insurer requests review of those portions of Referee Galton's order which: (1) Ordered the insurer to pay claimant interim compensation from October 14, 1982 (the date of Dr. Ramsthel's letter verifying inability to work due to a worsening of claimant's compensable condition) to March 7, 1983 (the date of hearing); and (2) awarded claimant a penalty equal to 25% of that interim compensation. Claimant cross-requests review of that portion of the Referee's order which upheld the insurer's denial of claimant's aggravation claim.

We affirm and adopt those portions of the Referee's order which upheld the denial of claimant's aggravation claim and that assessed a 25% penalty based on the interim compensation that should have been paid, but we modify the Referee's order regarding the time period for which interim compensation should have been paid.

On October 14, 1982 claimant's treating physician, Dr. Ramsthel, wrote to the insurer stating that claimant's low back condition had worsened, that she was unable to work and that her industrial injury claim should be reopened. Claimant had previously, on October 8, 1982, filed a hearing request on a vocational rehabilitation issue. On November 26, 1982 claimant filed an amended hearing request, including as an additional issue the allegation that the insurer "has failed to pay interim compensation as required by law since their receipt of Dr. Ramsthel's 10/14/82 report." On December 10, 1982 the insurer filed and served on claimant's counsel a response to the pending hearing request. That response alleges: "That claimant has not suffered a compensable aggravation since her last award of compensation."

We do not think there can be any serious doubt that Dr. Ramsthel's October 14 report was sufficient to trigger the duty to pay interim compensation pending acceptance or denial of claimant's aggravation claim. There is no question that the insurer failed to pay interim compensation. The only question is the duration of the period for which interim compensation should have been paid, that is, more specifically, whether the insurer's

December 10 response to claimant's hearing request was sufficient to terminate the insurer's duty to pay interim compensation as of that date.

The Referee reasoned that only a "formal" denial, with notice of hearing rights, can terminate the duty to pay interim compensation. That is, of course, generally true. But we have previously concluded in several analogous situations that it is not universally true. Rather, we have found that, when hearing proceedings are already pending, an "informal" denial, i.e., without notice of hearing rights, transmitted to the claimant and/or to the claimant's attorney is sufficient as a denial. Patricia Dees, 35 Van Natta 120 (1983); Angela V. Clow, 34 Van Natta 1632 (1982); Delbert Greening, 34 Van Natta 145 (1982); Terry Dorsey, 31 Van Natta 144 (1981). Without repeating everything we have said about this issue before, we continue to think that deviation from the statutory requirement of notification of hearing rights is harmless error when a hearing is, in fact, requested and held on the validity of a denial.

We thus conclude that the insurer's December 10, 1982 response to claimant's hearing request, which was served on claimant's attorney, was adequate notice to claimant that her aggravation claim was being denied. It follows that interim compensation was only due and payable until December 10, 1982.

ORDER

The Referee's order dated March 7, 1983 is modified in part. The insurer is ordered to pay claimant interim compensation from October 14, 1982 to December 10, 1982; this award of interim compensation is in lieu of that ordered by the Referee. The remainder of the Referee's order is affirmed with the understanding that the penalty ordered will apply to the reduced amount of interim compensation ordered herein.

EUGENE M. CREAMER, Claimant
Evohl F. Malagon, Claimant's Attorney
Cosgrave, Kester, et al., Defense Attorneys

Own Motion 83-0213M
September 1, 1983
Own Motion Determination

By Own Motion Order dated June 8, 1982, the Board ordered reopening of claimant's June 17, 1966 industrial injury claim for a worsened condition related to his original injury, as of the date of claimant's hospitalization for recommended surgical treatment. By an Own Motion Order on Reconsideration dated July 20, 1982, the Board adhered to the conclusion stated in its original order, that the claim should be reopened upon hospitalization, as opposed to an earlier date in October of 1978. The claim now has been submitted for closure pursuant to ORS 656.278.

Claimant was hospitalized on July 19, 1982 for a lumbar laminectomy. He was discharged and re-hospitalized two days later, apparently for treatment of a staph infection in the surgical incision. His condition was found medically stationary by the Medford Orthopedic Group on June 1, 1983, and claimant's

treating physician's office record dated June 3, 1983 indicates that claimant had returned to his pre-surgery status and, "as he states, he is better inasmuch as he doesn't have pain all the time. I do not feel that there has been any change in his disability."

Claimant previously has received an award for unscheduled permanent partial disability equivalent to 50% loss of an arm as a result of this 1966 injury. Claimant sustained an industrial injury in 1961 to the same area of his back, for which he received an award of unscheduled permanent partial disability equivalent to 75% loss of function of an arm. In view of claimant's apparently improved physical condition post-surgery, and his prior awards of permanent disability for injury to his low back, we find that no additional award for permanent disability is warranted.

Claimant's attorney was instrumental in effecting claim reopening in claimant's behalf. The Referee that heard this case on referral by the Board recommended that claimant's attorney be awarded $1,400, payable by the employer, for services rendered in connection with claim reopening. Any attorney's fee allowed would be payable out of claimant's award of compensation, as opposed to being paid in addition to claimant's award, in accordance with applicable administrative rules governing attorney fees in own motion proceedings. OAR 438-47-070(2). The Board failed to allow claimant's attorney a fee payable out of claimant's compensation on claim reopening in either its Own Motion Order or Own Motion Order on Reconsideration. This was an oversight, in view of the Board's policy at that time to allow claimant's attorney a fee payable out of claimant's compensation when a referred hearing had been conducted and the claim reopened as a result of that hearing. Virginia M. Schmidt, WCB Case No. 80-07561 (December 17, 1981). In own motion cases other than referred hearing situations, the Board's policy was to allow claimant's attorney a fee at the time of claim closure, but not at the time of claim reopening. Hazel Stanton Lovell, 31 Van Natta 69 (1981). Lovell was overruled by Fred Gascon, 34 Van Natta 1551A (1982), wherein the Board held that an attorney's fee would be allowed at the time of claim reopening in all cases in which counsel had been instrumental in effecting claim reopening pursuant to ORS 656.278.

Having recognized and now acknowledged the oversight at this late date, all that we presently can do is allow claimant's attorney a reasonable attorney's fee payable out of claimant's compensation which, under the terms of this order, amounts to temporary total disability benefits which claimant has been receiving since his claim was reopened pursuant to the Board's Own Motion Order.

ORDER

Claimant is awarded compensation for temporary total disability from July 19, 1982, through and including June 1, 1983. Claimant's attorney is allowed $750 as a reasonable attorney's fee, payable out of the compensation awarded herein, and not in addition thereto.

CRAIG A. WALKER, Claimant
DAVE WOODRUFF ROOFING COMPANY, Employer
Noreen Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Carl Davis, Ass't A.G.

WCB 82-07113 & 82-03742
September 1, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

The non-complying employer, Dave Woodruff, dba Dave Woodruff Roofing Company, apparently requests review of Referee Knapp's order which found that claimant was a subject employe on December 2, 1981, that claimant sustained a compensable injury to his low back on that date and awarded claimant 15% unscheduled permanent partial low back disability, that being an increase of 10% over and above the July 27, 1982 Determination Order.

No brief having been received from the employer, we are somewhat uncertain just what portions of the Referee's order the employer wants reviewed. The employer did not request a hearing on the Proposed and Final Order of non-complying status which was issued on January 28, 1982. On April 5, 1982 the employer did request a hearing on the issue of whether claimant sustained a compensable injury, thereby objecting to the acceptance of the claim by the SAIF Corporation, as processing agent. A notice of hearing was sent to the employer on November 18, 1982. The employer, however, did not appear at the December 27, 1982 hearing nor did anyone appear on his behalf. The Referee proceeded with the hearing and concluded that claimant was a subject employe at the time of his injury, that he sustained an injury while in the course and scope of his employment and awarded claimant 15% unscheduled permanent partial disability.

Assuming arguendo that it was appropriate for the Referee to consider the issues of compensability in view of the fact that the employer did not appear at the hearing to present any evidence on that issue, and also assuming arguendo that this issue is properly before the Board for review, we find no error in the Referee's conclusions and we affirm his order.

ORDER

The Referee's order dated January 24, 1983 is affirmed.

LUCINE T. SCHAFFER, Claimant
Welch, Bruun, et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

Own Motion 83-0255M
September 8, 1983
Own Motion Determination

The self-insured employer voluntarily reopened claimant's June 21, 1972 industrial injury claim for a worsened condition related to claimant's original injury, after expiration of claimant's aggravation rights. The claim now has been submitted for closure pursuant to ORS 656.278.

Claimant recently has undergone additional surgery for treatment of her injury-related right knee condition. The claim was reopened as of June 3, 1982. Claimant's condition was determined to be medically stationary on May 25, 1983. This

recent surgical procedure appears to have improved the overall condition of claimant's right knee. It has been noted that claimant eventually will require a total knee replacement, although at the present she is considered too young for such a prosthesis.

Claimant has received awards for scheduled permanent partial disability totaling 97.5° for a 65% loss of the right leg, by Determination Orders dated October 9, 1973 (which award was increased by Stipulation dated June 3, 1974), May 3, 1977, and August 27, 1980. By a Referee's order dated April 13, 1981, claimant was awarded an additional 30° for 20% loss of her right leg; however, this additional permanent disability award was vacated by an Order on Review. 33 Van Natta 511 (1981). We held in our Order on Review that: "Given our conclusion that claimant is entitled to medical services and claim reopening, we believe it is premature to rate claimant's extent of disability." 33 Van Natta at 512. We determined that claimant was entitled to the pain center treatment that had been recommended by her treating physician; however, it is apparent from the information presently before us that claimant failed to enroll in the pain center as recommended. Instead, this surgery was performed in June of 1982.

Although we vacated the additional 20% permanent disability awarded by the Referee, in view of the insurer's obligation to pay this award pending Board review of the Referee's order, ORS 656.313, it is more likely than not that this 30° of scheduled permanent disability was paid to and received by claimant prior to issuance of the Board order vacating that award. In determining whether claimant presently is entitled to additional permanent disability, it is appropriate to consider the award granted by the Referee, even though it was vacated subsequently by the Board. Cf. ORS 656.222, Roy J. Fenton, 34 Van Natta 1686, 1689 (1982). Consideration of "past receipt of money" is particularly apropos in determining whether to exercise our discretionary authority pursuant to ORS 656.278 to grant additional permanent disability.

Even without considering the additional 20% discussed above, we find that 97.5° of scheduled permanent partial disability adequately compensates claimant for the present permanent impairment attributable to her original industrial injury. Accordingly, no additional award for permanent disability is warranted.

ORDER

Claimant is awarded compensation for temporary total disability from June 3, 1982, through and including May 25, 1983.

DIXIE FITZPATRICK, Claimant
Welch, et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 80-07316
September 9, 1983
Order on Remand

On review of the Board's order dated July 9, 1982, the Court of Appeals reversed the Board's order and remanded for entry of an order awarding claimant compensation for permanent total disability. The court also remanded for allowance of a reasonable attorney's fee payable out of the increased compensation. OAR 438-47-045(1); Morris v. Denny's, 53 Or App 861, 866 (1981).

Accordingly, the above referenced Board order is vacated, and claimant is awarded compensation for permanent total disability as of July 16, 1980. Claimant's attorney is allowed 25% of this increased compensation as a reasonable attorney's fee for services rendered before the Court of Appeals, not to exceed $2,000, payable out of and not in addition to claimant's compensation.

IT IS SO ORDERED.

CLIFFORD MATHENY, Claimant
Hayner, Waring, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 81-01410
September 9, 1983
Order on Remand

On review of the Board's order dated September 15, 1982, the Court of Appeals reversed that portion of the order which found that medical services rendered by Dr. Davis were not compensable. The court has remanded for an order requiring SAIF to pay for the medical services and for imposition of a penalty and attorney's fee.

Accordingly, that portion of the above-referenced Board order finding that medical services rendered by Dr. Davis are not compensable is vacated, and SAIF is directed to pay said medical expenses. SAIF further is ordered to pay claimant a penalty in the amount of 25% of the medical bills outstanding at the time of the hearing herein, and to pay claimant's attorney an associated attorney's fee in the amount of $250.

IT IS SO ORDERED.

MARNELL F. BINKLEY, Claimant
David Force, Claimant's Attorney
Spears, et al., Defense Attorneys

WCB 82-07301
September 13, 1983
Order on Reconsideration

We issued our Order on Review herein on August 15, 1983, affirming and adopting the Referee's order, which upheld the employer's denials of claimant's aggravation claim. Claimant has requested reconsideration of our order.

On the merits, we adhere to our former order; however, we will attempt to clarify the issues we believe have been adjudicated in this proceeding and which we intended to determine by our original order.

Claimant sustained an injury with this employer in 1977. This claim is one for aggravation of that injury, made pursuant to ORS 656.273. The employer issued two denials. The initial denial dated July 27, 1982 is clearly one denying responsibility for claimant's aggravation claim, stating that a subsequent employer is responsible for payment of claimant's compensation. That denial states: "Please be advised that at this time we take no position on the compensability of your claim, as we deny we are the responsible employer."

On October 1, 1982 this employer issued a second denial which clearly put in issue compensability of claimant's current condition, with respect to this employer.

The Referee upheld both denials; however, we understand her order as an adjudication of this employer's responsibility for claimant's current condition, as indicated by the following passage from her order:

> "The medical reports and deposition from Dr. Fletchall also indicate that the long haul driving on rough, washboardy roads [i.e., a more recent work exposure] contributed somewhat to the claimant's current condition even if the original injury was contributing to a major portion of the claimant's condition. Taking the entire medical evidence into consideration I find the claimant has failed to prove his current condition is the responsibility of PMT. Since the employee did not file a claim against any subsequent employer there can be no further finding on the question of who if anyone is responsible."

Our understanding of the Referee's order is that it determined that claimant had failed to establish that his current condition is the responsibility of PMT as an aggravation of his 1977 industrial injury with this employer. It is based on this understanding that we affirmed and adopted the Referee's order.

ORDER

On reconsideration of our Order on Review dated August 15, 1983, we modify our prior order as set forth above. Except as modified, we adhere to our former order, which hereby is republished and reaffirmed.

RODNEY V. CALVIN, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 82-06744
September 13, 1983
Order Denying Motion to Dismiss

The employer moves to dismiss claimant's request for review of the Referee's order dated July 14, 1983. The employer contends that claimant's request for review was not filed with the Board in a timely fashion. ORS 656.289(3), OAR 436-83-700(2).

The employer's motion alleges that claimant's attorney mailed the request for review on August 13, 1983, and that the thirty day period for requesting Board review expired on August 12, 1983. In fact, the first day of the 30-day limitation period was July 15, 1983, the day after the date of the Referee's order. See ORS 174.120. Computing the limitation period from July 15, 1983, the 30th day was August 13, 1983, which was a Saturday; therefore, the following Monday, or August 15, 1983, was the last day for filing. The envelope in which claimant's request for review was mailed appears to be postmarked August 15, 1983, although the postage meter stamp contains the August 13 date. Postmark controls, OAR 436-83-700(2), Matthew Sampson, 34 Van Natta 1145 (1982), and claimant's request for review was timely filed.

ORDER

The employer's motion to dismiss claimant's request for Board review is denied.

ROBERT D. KELLEY, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
Liberty NW Insurance Corp.

Own Motion 83-0229M
September 13, 1983
Own Motion Order

Claimant, by and through his attorney, has requested that the Board exercise its own motion authority and reopen claimant's November 12, 1974 industrial injury claim for an alleged worsening of his injury-related condition.

Claimant has requested a hearing with reference to the same claim which is the subject of his request for own motion relief. This request for hearing has been assigned WCB Case No. 83-03807.

It is the policy of the Board generally to deny consideration of a request for own motion relief while litigation is pending. There appears to be no reason in this case to depart from the Board's general policy. Accordingly, claimant's request for own motion relief presently is denied. Upon resolution of the pending litigation, claimant may renew his request for own motion relief.

ORDER

Claimant's request for own motion relief is denied.

CARL L. SMITH, Claimant
English & Metcalf, Claimant's Attorneys
Richard Hammersley, Attorney
Wolf, Griffith et al., Defense Attorneys

WCB 80-02661
September 13, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review and the insurer cross-requests review of Referee Pferdner's order which: (1) Upheld the insurer's partial denial of claimant's alleged causalgia condition; and (2) awarded claimant compensation for 40% loss of use of the left arm. Claimant challenges the partial denial and argues that he should receive additional compensation, either unscheduled or scheduled or both. The insurer maintains that the award granted by the Referee is excessive.

In May 1979 claimant's left arm was caught on a board while he was working as an edger trimmer in a sawmill. His arm sustained some form of stretching injury as he struggled to jerk it free before it was pulled into the rollers. Initial medical opinion was that the injury was fairly insignificant. Over the following years, however, claimant has reported more and more severe and varied upper left body symptoms. There is little, if any, medical agreement on the nature and extent of claimant's problems that are causally related to the May 1979 injury.

Drs. Olmschied and Grewe opine that claimant suffers from causally-related causalgia. Dr. Rich disagrees with that diagnosis and finds some support for his position in the examination findings of Drs. Koch, Corbett and Dumke. The parties argue about the relative persuasiveness of these various opinions. Based on our review of the record, we find the opinion of yet another physician, Dr. Zivin, to be closest to the mark. Dr. Zivin observed that it was "difficult, in view of the paucity of objective medical examination data, to provide an absolutely clear diagnostic impression" of claimant. While we do not think that absolute clarity is required, we find the medical record in this case sufficiently conflicting and confusing that we cannot affirmatively say that claimant has persuasively proven that he suffers from causalgia that is causally-related to his May 1979 industrial injury.

Matters do not become much clearer when we turn to the question of the extent of claimant's disability. Claimant has complained of limitation of motion and pain in his left shoulder and neck, extending into his face. If established to be permanent and disabling, these complaints would justify an award for unscheduled disability, unless they are related to causalgia that we have found not compensable. Suffice it to say that we are not persuaded that any of claimant's symptoms in areas other than his left arm are permanent and disabling and causally-related to his May 1979 injury.

Claimant also contends that he has a psychological disability that justifies an unscheduled award. We agree that claimant suffers from a psychological condition that is a compensable consequence of his industrial injury. It does not follow that unscheduled disability should be awarded. In Julia I. Hicks, 33 Van Natta 497 (1981), aff'd 57 Or App 838 (1982), and Joseph Needham, 32 Van Natta 63 (1981), we concluded that only an award for scheduled disability is warranted when a psychological condition manifests itself only in the form of increased impairment in a scheduled member. That is the situation in this case.

Finally, the parties dispute whether claimant's left arm impairment is physiological only, psychological only or a combination of both physiological and psychological. On this record, we are not sure whether that distinction makes any practical difference because claimant is entitled to an award for the permanent loss of use of his left arm regardless of the reason for or explanation of that loss of use. If it does matter, we think that claimant probably does suffer from some minimal left arm impairment that is physical in origin, but it is clear that the majority of his arm impairment is psychological in origin. As for the extent of that impairment, we conclude that we are unable to improve on the Referee's assessment.

ORDER

The Referee's order dated July 15, 1982 is affirmed.

ESTHER M. ANDERSON, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-11132
September 14, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Howell's order which awarded claimant benefits for permanent total disability.

Claimant, who was 60 years of age at the time of the hearing, had been employed as a bookkeeper for Cutler Manufacturing Company since 1969. On March 15, 1977 claimant sustained a compensable injury to her right ankle. Surgery was performed. Claimant subsequently reinjured her right ankle and was fitted with a short leg brace. She eventually received a total of 40% scheduled permanent partial right foot disability.

Claimant generally functioned well after being fitted with the leg brace but, apparently due to instability in the right ankle, suffered another fall in April 1980 in which she injured her left ankle. She fell again in December 1980, which resulted in a fracture of her second lumbar vertebra. Although neither of these fall-related injuries necessitated surgery, claimant was fitted with a short leg brace for her left ankle in order to prevent any future ligament tearing in that ankle. Claimant was also fitted with a brace for her back which she wore for approximately one year while recovering from her fractured vertebra.

On October 12, 1981 claimant was examined by three physicians from BBV Medical Services. Claimant complained of sporadic right and left ankle pain as well as low back pain. The examining physicians reported that claimant demonstrated several inconsistencies during the examination and diagnosed:

> "1. Right ankle lateral instability, secondary to recurrent sprain, post lateral ankle reconstruction, with residual laxity as described.
>
> "2. Right fifth metatarsal fracture, proximal, healed.
>
> "3. Left ankle lateral sprain dating to 12-80 by history, healed.
>
> "4. Lumbar 2 compression fracture, healed.
>
> "5. Functional overlay - severe.
>
> "6. Exogenous obesity - moderate.
>
> "7. Falling episodes without orthopedic or neurologic basis."

The examiners concluded that claimant was medically stationary with 20 to 30% right ankle impairment and minimal left ankle and low back impairment.

In addition to her injury-related impairment, claimant has suffered from a chronic asthma condition for 20 to 30 years. This condition has been largely controlled with appropriate medication administered by Dr. Schultz.

Claimant was referred to the Callahan Center in May 1982 for a vocational assessment. Claimant exhibited a distinctly uncooperative attitude to the evaluators at the Center. This uncooperativeness interfered with several vocational tests to such an extent that the test results were considered to be significantly below claimant's abilities and aptitudes.

On May 20, 1982 Dr. Loeb, a psychologist at the Center, reported that:

> "Her original injury seems to have taken over much of her life and has involved moving as well as the family's rallying around her to alter her environment. She eventually began receiving Social Security payments and now has come of age to receive benefits from her deceased husband as well. It does appear that this lady voices interest in returning to work and at the same time makes it clear that she thinks this unrealistic and that she is largely 'going through the motions.'"

Dr. Loeb diagnosed a psychophysiological reaction with secondary gain aspects.

During testing for physical tolerance, claimant demonstrated that she was able to work for a six-hour period on clerical and bookkeeping types of activity. During the first day of such testing, claimant took thirteen breaks. By the end of the evaluation, however, claimant was only taking one or two breaks in six hours. The physical therapy evaluator also noted that claimant became noticeably more adept at sitting and rising from her chair as the evaluation progressed and that she exhibited appropriate body mechanics in her movements, despite initial complaints of her inability to do so.

The Referee stated that:

> "Claimant's physical condition alone is very nearly totally disabling. Dr. Burr felt claimant could do sedentary work only with no lifting or bending and no prolonged standing or walking. He noted that her asthma, alone, was terribly disabling."

Although the Referee found that there was a signficant element of functional overlay involved in claimant's performance at the Callahan Center, he stated, "I am also persuaded that claimant's physical condition alone would have precluded her from completing

the evaluation on a six hour per day basis." Although he noted that claimant had made no real efforts to seek work, the Referee found that under Butcher v. SAIF, 45 Or App 313 (1980), and its progeny, claimant was excused from that requirement because seeking work would have been "futile." He concluded that claimant was permanently and totally disabled. We disagree.

We do not find that claimant's physical condition alone is as disabling as the Referee indicated. Clearly claimant has a material disability in her right ankle. This disability involves permanent and marked instability in the ankle which requires claimant to wear a leg brace. Claimant has received an award of permanent partial disability in recognition of this loss.

Despite the fact that claimant has sustained other injuries, it appears that the right ankle disability constitutes the majority of her impairment. Although claimant also wears a brace on her left ankle, it appears that this was prescribed mainly as a prophylactic measure to prevent future possible damage to her left ankle. In fact, in his January 14, 1981 report, Dr. Burr indicates that claimant has no significant instability in the left ankle. Similarly, Dr. Martens reported on August 1, 1980 that claimant had only a mild instability in her left ankle due to recurrent strains from falls caused by her right ankle. Dr. Martens indicated that claimant would have difficulty with prolonged walking, standing, stair climbing, and walking on uneven ground. This is basically the same conclusion reached by Dr. Burr in his June 12, 1979 report in which he indicates that claimant is capable of sedentary employment.

Nor does it appear that the injury claimant sustained to her second lumbar vertebra resulted in any substantial disability. Claimant received only conservative care for that injury, and the physicians from BBV Medical Services reported on October 12, 1981 that the compression fracture had healed, that claimant had no neurologic impairment and that she had minimal disability in her back as a result of that injury. The examiners concluded that there was no reason that claimant could not return to bookkeeping work.

This conclusion is also supported by the evaluation which took place at the Callahan Center. The examiners there found that claimant had only moderate limitations of motion in her back with straight leg raising to 80°. By the end of her evaluation, and despite questions about the reliability of the results, claimant demonstrated her ability to perform bookkeeping work for at least a period of six hours at a time with only one to two breaks. This is further demonstrated by an automobile trip claimant made to the Ontario, Oregon area prior to the hearing, driving all the way there and back by herself.

We also do not find that claimant's preexisting asthma condition presents any impediment to her employment. Despite the opinion of Dr. Burr (who never treated claimant for this condition) that claimant was "terribly disabled" due to her asthma condition alone, it appears in fact that claimant's asthma has been successfully under control for many years. Prior to her ankle injury in 1977, claimant was able to perform her functions as a

bookkeeper for many years with no interference from her asthma. In fact, subsequent to her ankle injury, claimant worked for the Mental Health Division on a temporary basis for ninety days, and at another ninety day temporary job for the State involving food stamp distribution. There is no indication that claimant's asthma interfered with her ability to perform these jobs, nor is there any indication that it would currently preclude her from bookkeeping work.

Under all of these circumstances, we are simply unpersuaded that claimant's physical problems are so severe as to prevent her from returning to bookkeeping work. Certainly claimant would be unable to work at jobs involving any significant standing and/or walking activities. However, claimant is able to engage in a sedentary occupation, and claimant's occupation prior to her injury (bookkeeping) was sedentary in nature. Claimant's treating physician indicates she is not precluded from such employment.

Social/vocational considerations also figure into determinations of permanent total disability. Wilson v. Weyerhaeuser Co., 30 Or App 403 (1977). Claimant is fortunate because such factors are relatively favorable in her case. Although she is 60 years of age, she has a high school education and has taken a one year course in bookkeeping. She is of average mental capacity, and appears to have no emotional or psychological handicaps, other than a tendency to somewhat overfocus on physical problems. The record indicates that she is a capable bookkeeper and had been for many years prior to her injury. We conclude that claimant is not physically or socially/vocationally precluded from returning to bookkeeping work similar to that in which she was engaged prior to her injury.

Moreover, even if there were not a specific job that claimant appears able to do, we would not agree with the Referee that claimant is excused from the seek-work requirement of ORS 656.206(3). We do not find that claimant's physical impairment and relevant social/vocational factors are so substantial as to indicate that it would be a "futile" act for claimant to seek work. On the contrary, we believe that, if claimant made a serious effort to secure a bookkeeping position or some related sedentary office employment, her talents and experience in that field would likely make such an endeavor successful. But claimant has made little, if any, such attempt.

Our conclusion that claimant has not proven total disability requires us to consider the question of extent of partial disability. As previously indicated, claimant's most significant injury was to her right ankle and she has previously received awards totaling 40% loss of use of the right foot (ankle). We find no basis in the record for concluding that this award should be increased. As also previously indicated, claimant's right ankle injury and resulting impairment has caused falls which produced injuries to claimant's left ankle and low back. SAIF has never suggested that claimant's left ankle and low back injuries are not compensable, but claimant has received no permanent disability awards for these secondary injuries. Although there is little medical evidence concerning the extent of permanent impairment in the left ankle and low back areas, the BBV Medical Services

examiners did suggest minimal impairment in both of those areas. Applying the loss-of-use standard, we find an award for 10% loss of the left ankle is appropriate. Applying the loss-of-earning-capacity standard as best we can to a very limited record, we find an award for 20% unscheduled low back disability is appropriate.

ORDER

The Referee's order dated November 24, 1982 is reversed. Claimant is awarded 13.5° for 10% loss of her left foot (ankle) and 64° for 20% unscheduled low back disability. These awards are in lieu of the Referee's award and in addition to the previous awards for claimant's right ankle. Claimant's attorney's fee should be adjusted accordingly.

LESLIE DENNY, Claimant
W. Brad Jonasson, Jr., Claimant's Attorney
Fellows & McCarthy, Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-06225
September 14, 1983
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Williams' order which affirmed the self-insured employer's denials of claimant's bilateral hand conditions. On review claimant has raised the additional issues of entitlement to interim compensation, penalties and attorney fees for failure to pay interim compensation. The interim compensation and related issues were neither raised nor litigated at hearing; therefore, we decline to consider those issues on Board review.

With respect to the issue of compensability, we adopt the Referee's findings of fact, affirm his conclusion and make the following additional comments. There is no evidence to support a claim for compensability of claimant's left hand condition. Claimant's right hand condition has been diagnosed as carpal tunnel syndrome. We think claimant's claim for that condition is primarily in the nature of an occupational disease claim. In order for claimant to prove the compensability of her carpal tunnel syndrome as an occupational disease, it is necessary for her to establish that her work with this employer was the major contributing cause to the development of this condition. Gygi v. SAIF, 55 Or App 570 (1982). Claimant has failed to do so.

Claimant's work activities on April 27 and 28, 1981 appear to have contributed to the acute onset of carpal tunnel symptoms. This two day period of apparently intense work activity could be viewed as giving rise to a claim more in the nature of an injury. Cf Donald M. Drake Co. v. Lundmark, 63 Or App 261 (1983). But even if this claim were viewed from the perspective of an "injury" which caused an underlying condition to become symptomatic, there is no evidence (other than the evidence of a temporal relationship between the two days of work activity and the onset of symptoms) to suggest a work connection between the "injury" and the compensation

claimed. We do not think this case presents an uncomplicated medical question; claimant, therefore, must establish the compensability of her claim by competent medical evidence. Uris v. Compensation Department, 247 Or 420 (1967). Even the medical opinions which support the claim on the basis of an occupational disease theory strongly militate against a finding that claimant's two days of intensive work activity materially contributed to her carpal tunnel syndrome. We thus conclude that this claim is not compensable on an industrial injury theory, either.

ORDER

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

MICHAEL R. ELSE, Claimant
Roger D. Wallingford, Claimant's Attorney
Wolf, Griffith, et al., Defense Attorneys

Own Motion 83-0214M
September 14, 1983
Order Deferring Own Motion Relief

Claimant, by and through his attorney, has requested that the Board exercise its own motion authority and reopen his February 12, 1973 industrial injury claim for a worsened condition allegedly related to claimant's original injury. Claimant's aggravation rights have expired.

Claimant's 1973 injury occurred while he was employed by Hamberg's OK Tire Store, insured by Fireman's Fund. Claimant has submitted a copy of a recent denial issued by Fireman's Fund which, in pertinent part, states:

> "[ORS] 656.278 advises that the Workers' Compensation Board has the continuing authority to alter earlier action on claims. In the event you wish to reopen your claim for other than medical expenses, you must apply, or make your Own Motion to the Workers' Compensation Board.
>
> Additionally, request for reopening for aggravation is being denied as it appears you sustained an intervening injury February 7, 1983 while employed with Lucky J. T."

This denial letter, dated July 19, 1983, is a formal denial containing the usual notice of hearing rights in accordance with ORS 656.262(7).

Claimant's request for own motion relief indicates that he has filed a new injury claim with Lucky J.T. Company, which has been denied, and that this denial is the subject of a hearing request filed by claimant in WCB Case No. 83-04647. This employer is insured by the SAIF Corporation according to our agency records, and a hearing presently is scheduled for November 9, 1983 in Eugene, Oregon. Claimant's request for own motion relief also indicates that he has requested a hearing contesting the July 19, 1983 denial issued by Fireman's Fund.

Employers/insurers have statutory authority to voluntarily reopen a claim for payment of temporary and/or permanent disability benefits, despite expiration of a claimant's aggravation rights. ORS 656.278(4). The denial issued by Fireman's Fund may be construed as the insurer's refusal to voluntarily reopen the claim pursuant to ORS 656.278. That denial correctly refers to a claim for medical services as being one which is not the subject of a request for own motion relief pursuant to ORS 656.278, with reference to this claim. Claimant's injury occurred in 1973; accordingly, any claim for medical services is governed by the provisions of ORS 656.245. Medical service issues are subject to the insurer's obligation to issue a formal denial and claimant's corresponding right to request a hearing pursuant to ORS 656.283. ORS 656.245(2). Donald L. Lentz, 35 Van Natta 1084 (July 20, 1983).

It is not entirely clear from the terms of the denial issued by Fireman's Fund whether it intends to deny a claim for medical services, or whether the denial simply intends to put in issue the expiration of claimant's aggravation rights. In view of the reference to a more recent industrial injury, however, it appears that the denial raises an issue concerning insurer responsibility for medical services. Assuming that a controversy exists, the issue of claimant's entitlement to, and Fireman's Fund's responsibility for, particular medical services is an issue which should be resolved in the Hearings Division pursuant to ORS 656.245. See Ralph R. Lee, 35 Van Natta 1109 (July 26, 1983).

With respect to claimant's request for own motion relief for payment of additional temporary total and/or permanent disability benefits in connection with his 1973 industrial injury, the Board will defer further consideration of claimant's request until such time as there is a resolution of the litigation pending in the Hearings Division. Upon resolution of this litigation, claimant and Fireman's Fund should advise the Board as to how they wish to proceed with regard to claimant's request for own motion relief.

IT IS SO ORDERED.

WESLEY E. GRAHAM, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-11769
September 14, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The employer requests review of Referee Neal's order which set aside its denials of December 16, 1981 and January 13, 1982, and ordered the employer to accept responsibility for claimant's disability which commenced on December 3, 1981. Claimant cross-requests review of the Referee's award of attorney fees.

Claimant was employed by FMC Marine & Rail Equipment Division on April 15, 1980 when he sustained a groin injury while lifting a piece of angle iron. The claim was accepted and claimant underwent a right inguinal hernia repair on April 22, 1980. Shortly thereafter claimant began experiencing back difficulties. A Form 801 was filed by claimant on August 18, 1980 alleging that he suffered a back strain as well as a hernia in the April 1980 incident. On August 22, 1980 FMC denied that claimant sustained a back injury on April 15, 1980, but accepted the claim as an aggravation of the hernia injury.

On September 11, 1980 Dr. Nag diagnosed claimant as suffering from a lumbar strain with no specific evidence of nerve root compression. A myelogram was subsequently performed. The results were negative. On January 8, 1981, however, Dr. Nag reported that he believed claimant's back problems were being caused by an improperly fitted leg prosthesis. (Claimant underwent a partial left leg amputation in 1968 following a motor vehicle accident. He also suffers from preexisting diabetes.) As a result of Dr. Nag's report, FMC issued a denial of claimant's back condition on January 23, 1981. A Determination Order issued on April 20, 1981 granting claimant time loss benefits to the date of FMC's denial.

On April 22, 1981 Dr. Nag reported that claimant had been fitted with a new prosthesis, but that it had not relieved his back pain. Dr. Nag concluded that this indicated that the back condition was not caused by the ill-fitting prosthesis after all, but by a lumbar strain. Claimant was examined by the Orthopaedic Consultants on June 2, 1981. Dr. Puziss was among the examining physicians. The Consultants concluded that claimant suffered a back strain at the same time he incurred his hernia, but that it had resolved objectively and that claimant was medically stationary. X-rays of claimant's spine were reported as being normal.

A hearing was held before Referee McCullough on July 9, 1981. The Referee concluded that claimant suffered a compensable back strain when he incurred his hernia. The Referee's order states:

* * *

> "There is no evidence that claimant had any back problems prior to the incident at work on April 15, 1980. There is no evidence that his back condition is due to any degenerative condition."

FMC's denial was set aside.

Claimant was laid-off from work at FMC in February 1981. As near as we are able to discern from the record, he returned to work in June 1981 as a taxi-cab driver. A Determination Order issued on November 10, 1981 setting aside the previous Determination Order and granting claimant additional time loss benefits. No award of permanent partial disability was made.

On December 5, 1981 claimant presented himself at the Kaiser Sunnyside Clinic with complaints of increased back pain. Claimant informed the physicians at the clinic that he was delivering a large potted plant on the night of December 3, 1981. While climbing a short flight of stairs he lost his balance, started to fall, took a couple of steps down and jumped about two-and-a-half feet, landing on his feet and suffering low back pain which radiated into his right leg.

On December 16, 1981 FMC denied responsibility for the medical treatment rendered at Kaiser. The basis of the denial was that the treatment was required as a result of a non-industrial aggravation of the low back strain. An amended denial issued on January 13, 1982 which denied responsibility on the basis that claimant's treatment was the result of a new injury sustained in the course of claimant's employment as a taxi-cab driver. No claim was filed against the second employer, Broadway Cab.

On February 2, 1982 Dr. Duckler diagnosed degenerative joint disease with no herniated disc present. However, on February 18, 1982 he diagnosed an acute and chronic lumbosacral strain. On February 17, 1982 a computed tomography of claimant's lumbar spine was performed. The conclusion was narrow spinal foramina at the L5-S1 level. The degree of narrowing, however, was not thought sufficient to be of any clinical significance.

On March 29, 1982 claimant was examined by Dr. Puziss, who was on the Orthopaedic Consultants panel which examined claimant in June 1981. Dr. Puziss examined X-rays of claimant's spine and noted that they revealed mild degenerative spondylosis at L4-5, but that the disc spaces were well preserved. He diagnosed chronic low back strain syndrome with no evidence of herniated disc. Dr. Puziss noted that claimant had persistent low back pain since the 1980 injury with little in the way of objective findings. He felt that his current examination of claimant yielded findings nearly identical with those of the Consultants' examination of 1981. Dr. Puziss also stated:

> "It seem[s] plausible, however, that the patient does have persistent back pain and that the back pain had caused him to discontinue cab driving. It appears that he had a temporary aggravation of his underlying back strain condition in early December 1981 while working for Broadway Cab, when he stepped backward landing on both feet and sustaining a compression-type injury to his lower back, while carrying a potted plant."

He concluded that claimant was medically stationary. He noted degenerative disc disease with few objective findings and no permanent impairment.

On June 10, 1982 Dr. Duckler responded to several questions posed by claimant's attorney:

> "I would first answer that Mr. Graham's back condition is a result of an injury of April 1980 and was materially worsened when I examined him on December 10, 1981 . . .
>
> "In answer to your second question, his back condition was materially worsened and within reasonable medical probability his on the job injury of April 15, 1980 was a material contributing cause of the worsened condition in which I found him."

On September 24, 1981 Dr. Tilson, who also examined claimant, responded to questions posed by the defense as follows:

> "In reply to your specific questions: 'Given the fact that his original back claim of April 15, 1980 was closed in June of 1981 with no permanent impairment and with a report from Orthopaedic Consultants that he had reached a 'pre-injury status,' [m]y client would like to know if, in fact, within reasonable medical probability, the incident he suffered in December of 1981 was a new injury as opposed to an aggravation of his April 15, 1981 claim.' Answer: Yes. I believe it was a new injury."

Dr. Tilson further indicated that within a reasonable medical probability the December 1981 incident contributed independently to claimant's need for additional medical care and disability. Dr. Tilson noted that claimant did exhibit "bridging symptomatology" since the 1980 injury, but he did not feel that it was of such a nature to prevent claimant from working. He also stated that since claimant was able to work before the December 1981 incident, but not subsequent to it, this indicated "historical change" in his condition, and that claimant suffered an "independent and intervening" injury in December 1981.

On September 9, 1982 Dr. Puziss, in a "check the boxes" report, indicated that he felt that the December 1981 incident was sufficient in and of itself to cause a low back strain regardless of the April 1980 injury. Dr. Puziss indicated on October 12, 1982 that he concurred with Dr. Tilson's report. However, on October 26, 1982 Dr. Tilson indicated that claimant's back condition subsequent to December 1981 was a "recurrence of the same degenerative condition, with the same symptomatology, the same location and the same type of pain which Mr. Graham suffered following his April 15, 1980 injury." We are not certain what Dr. Tilson intended by this. There is no indication in his September 24, 1981 report that he believed claimant's back problem was a result of a degenerative condition.

On October 11, 1982 Dr. Duckler indicated that he did not concur with Dr. Tilson and that, "I feel his injury was an aggravation of previous injury -- difficult judgment." The final medical

report contained in the record also comes from Dr. Duckler. Dr. Duckler indicated that claimant's back condition was worse in December 1981. He reiterated his opinion that this represented an aggravation of claimant's 1980 injury for which he was previously treated. He noted that the symptoms were similar, the location of the pain was the same, and that although there was a period of time in which claimant returned to work, he continued to have symptoms referrable to his back strain. Dr. Duckler further stated that the December 1981 incident was probably an incident that only served to make claimant more aware that his back pain remained, was significant and was increasing in severity.

The most perplexing issue in this case is determining the applicable legal standard, in view of the fact that claimant did not file a claim against a potential new injury employer, Broadway Cab, but instead filed only an aggravation claim against his former employer, FMC. At the hearing claimant argued that the applicable standard was that set forth in Grable v. Weyerhaeuser Co., 291 Or 387 (1981). The Referee disagreed since the claimant's potential new injury occurred while he was employed at Broadway Cab. The Referee also concluded that since claimant did not file a claim against the second potentially liable employer, the last injury rule did not apply because it is a rule of responsibility, and the only question to be answered was whether claimant established that the December 1981 incident represented an aggravation of his 1980 industrial injury. Cf Peterson v. Eugene F. Burrill Lumber, 57 Or App 476 (1982), aff'd. 294 Or 537 (1983); but compare Perdue v. SAIF, 53 Or App 117 (1981). The Referee concluded that claimant had established an aggravation claim.

On review both parties have presented excellent briefs and arguments. The employer's attack on the Referee's order is two-pronged. First, it argues that claimant's back difficulties are the result of a degenerative condition unrelated to the first injury. Secondly, it argues that under the rule of Smith v. Ed's Pancake House, 27 Or App 361 (1976), the evidence indicates claimant sustained a new injury in December 1981 while employed by Broadway Cab. Claimant, however, counter-attacks by arguing that the employer is precluded from arguing that claimant's back difficulties are the result of a degenerative condition, since it was previously determined by Referee McCullough that claimant did not suffer from a degenerative condition and, since that order was not appealed, that it remains the "law of the case," and, therefore, res judicata. Claimant additionally argues that under the standard of either Grable or Smith, he has established the compensability of his claim as an aggravation.

We first address the employer's argument that claimant's current back difficulties are the result of a degenerative condition unrelated to the first injury. To begin with, although we agree with claimant that the unappealed Referee's order of September 22, 1981 is res judicata, we disagree with his contention that this prohibits the employer from arguing that claimant's current back problem is due to a degenerative condition. It is true that Referee McCullough found that claimant did not have a degenerative condition at the time of the July 9, 1981 hearing. However, the human body is not a static organism. Physiologic changes, the

aging process being only the most obvious, occur whether we wish them to or not. We agree with claimant that it is res judicata that claimant did not have a degenerative condition at the time of the hearing before Referee McCullough. However, this does not prevent the employer from arguing that such a condition has arisen in the interim.

Although we agree, as a matter of law, that the employer is not precluded from arguing that claimant's current condition is the result of a degenerative process, as a matter of fact, we find that the record does not so indicate. The evidence in relation to claimant's degenerative condition is convincing that although he appears to have such a condition, it is very mild. The computer tomography of February 17, 1982 revealed the existence of a degenerative process, but it was felt that the narrowing was not sufficient to be of any clinical significance. In his report of March 29, 1982 Dr. Puziss notes that claimant suffers from a degenerative process, but also indicates that it is "mild", and that claimant's disc spaces appear to be "well preserved." We do not agree with the employer's argument that Dr. Puziss related the back strain syndrome to the degenerative condition. Dr. Puziss only stated that he believed claimant's degenerative condition, rather than the back strain condition, would be responsible for any permanent impairment, and that the degenerative condition limited him from performing heavy work. That may be relevant to any future issue concerning extent of disability, but it is not relevant to the current issue of compensability of the December 1981 occurrence. We additionally note that Dr. Puziss, in the very same report, indicates that claimant sustained a temporary aggravation of "his underlying back strain condition." (Emphasis added.)

The employer also relies on Dr. Tilson's report of January 17, 1982 in which he states that claimant's 1980 injury represented an aggravation of a "long-standing pre-existing degenerative condition." However, Dr. Tilson does not indicate how he arrived at the conclusion that claimant's degenerative condition was "long-standing" or how it preexisted the 1980 injury, when the evidence in the record, in fact, indicates (as noted in Referee McCullough's order) that the condition did not preexist the 1980 injury. We, therefore, disagree with Dr. Tilson's statements in this regard, as well as the employer's argument that claimant's current condition is the result, not of his back strain syndrome, but of the degenerative condition.

The remaining question, which we find more difficult concerns the appropriate legal standard in this situation, where a worker sustains either an aggravation of a prior compensable injury, or a new injury, the risk of which is insured by another employer, and claimant declines or fails to file a claim against the potential new injury employer/insurer. In Robert Luhrs, 34 Van Natta 1039 (1982), the Board dealt with a similar question in an occupational disease setting. In Luhrs, the claimant filed an occupational disease claim against a single employer which was not the last in a series of potentially responsible employers. We stated that the applicable rule to be followed in such situations was:

* * *

"[W]hether the claimant's work conditions, when compared to claimant's nonemployment

> exposure, are the major contributing cause of the claimant's condition. If the employer is able to produce evidence of a subsequent work exposure which may be a contributing cause of the worker's condition, it is appropriate to consider such evidence, together with evidence of possible nonindustrial exposure, in making the determination of whether the exposure at this employer's place of business was a major cause of claimant's condition."

In SAIF v. Luhrs, 63 Or App 78 (1983), the court disagreed. The court stated that the employer against whom the claim was filed, could assert the last injurious exposure rule of Inkley v. Forest Fiber Products Co., 288 Or 337 (1980), and Bracke v. Baza'r, 293 Or 239 (1982), as a defense, so long as that employer was not the last employer in a series of potentially responsible employers. Once the defense is asserted, it is the claimant's burden to establish that the employment against which the claim was filed was the actual cause of the disease. 63 Or App at 84.

Although the current claim is based on an industrial injury, rather than an occupational disease, see Boise Cascade Corp. v. Starbuck, 61 Or App 631 (1983), by parity of reasoning, we believe that the rule articulated by the court in Luhrs is applicable in successive industrial injury situations, as well as claims for occupational disease. See also Dick L. Babcock, 35 Van Natta 325 (1983). There appears to be no valid reason to conclude that an earlier employer in a series of potentially causal employments can assert the last injurious exposure rule as a defense, but cannot assert the same defense in cases of successive injury. Clearly employers in successive injury situations have an interest in consistent application of the last injury rule, just as employers in successive occupational exposure situations have an interest in consistent application of the last injurious exposure rule. See Bracke, supra, 293 Or at 250, n.5.

The employer's arguments that claimant has sustained a new injury rather than an aggravation are sufficient to invoke the last injury rule as a defense. Claimant's burden then, is to establish that he has suffered an aggravation of his 1980 FMC injury, rather than a new injury while employed with Broadway Cab, even though no claim was ever filed against Broadway Cab. If the evidence indicates that claimant sustained a new injury rather than an aggravation, FMC would not be responsible for the current claim. As noted in Luhrs, however, where the court stated that the defense would not be successful if the evidence indicated that the earlier employment was the actual cause of the disease, 63 Or App at 84, the last injury rule will not be successful as a defense if the evidence indicates that claimant has suffered an aggravation of his previous injury rather than a new injury. Cf Peterson v. Eugene F. Burrill Lumber, 294 Or 537 (1983). The evidence so indicates here.

Dr. Duckler has consistently maintained the opinion that claimant's condition was materially worse in December 1981 and that this worsening represented an aggravation of claimant's 1980

injury. He so indicated in his report of June 10, 1982 and reiterated his position on October 11, 1982. His report of November 4, 1982, as summarized previously, is particularly convincing. Even Dr. Puziss, in his report of March 29, 1982, indicates that claimant's December 1981 condition represented a temporary aggravation of claimant's 1980 back strain condition, despite his unexplained and seeming agreement with Dr. Tilson in his "check the boxes" report of September 29, 1982 and his signature on a letter from the employer's counsel. Additionally, it is somewhat difficult to determine exactly what Dr. Tilson's real position is. He initially seems to indicate that claimant's December 1981 condition represents a new injury, whereas on October 26, 1982 he indicates that claimant's condition represents a "recurrence" of the "same degenerative condition . . . which Mr. Graham suffered following his April 15, 1980 injury." As we already have indicated, there is nothing in the record which supports the proposition that claimant's problem following the 1980 injury was the result of any degenerative condition. In view of this seeming inconsistency, we feel more secure, as did the Referee, in relying on the opinion of Dr. Duckler.

Additionally, as the Referee noted, despite the fact that Orthopaedic Consultants concluded on June 5, 1981 that claimant had returned to his pre-1980 injury status with no permanent disability, claimant continued to experience back difficulties thereafter, which did not fully resolve. As Dr. Duckler noted, claimant experienced the same symptoms of the same nature in the same area as before which he continued to experience following the initial 1980 injury. Only the severity of the symptoms increased in December 1981 and it does not appear that the 1981 incident was sufficient to independently contribute to claimant's continuing back strain condition. Hoffman Construction Co. v. Mcallister, 62 Or App 449 (1983). We, therefore, conclude, as did the Referee, that claimant's 1981 back strain represents an aggravation of his continuing and chronic 1980 back strain injury, the responsibility for which lies with FMC.

With regard to the attorney fee issue raised by claimant's cross-request for review, we agree that a fee somewhat larger than that awarded by the Referee is appropriate, and we, therefore, modify that portion of the Referee's order.

ORDER

The Referee's order dated December 16, 1982 is affirmed in part and modified in part. That portion of the Referee's order which awarded claimant's attorney a fee of $1,000 is modified. Claimant's attorney is awarded an additional $400 for a total of $1,400 as a reasonable attorney's fee for services before the Referee. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $600 as a reasonable attorney's fee on Board review, to be paid by the employer.

RALPH W. GURWELL, Claimant
Kenneth Peterson, Claimant's Attorney
Moscato & Meyers, Defense Attorneys

WCB 82-11071
September 14, 1983
Order Denying Renewed Motion to Dismiss and Reinstating the Briefing Schedule

On May 24, 1982 we denied the self-insured employer's motion to dismiss on the basis of our decision in Michael J. King, 33 Van Natta 636 (1981). The employer has now renewed its motion to dismiss, relying on the court's reversal of our King decision in Argonaut Insurance Co. v. King, 63 Or App 847 (1983). The issue is whether there was timely notice of claimant's request for Board review by service of that request on the opposite parties or otherwise.

We find the facts relevant to the motion to dismiss to be as follows. The Referee's ultimate order was issued on March 31, 1983. On April 4, 1983 claimant's attorney mailed a request for Board review to the Board and mailed a copy of that request to the self-insured employer's attorney. Claimant's attorney did not send a copy of the request for review to the self-insured employer. The Board received the request for review on April 6, 1983. Pursuant to Board rules and standard procedures, Board staff then mailed a computer-generated letter acknowledging claimant's request for review to all parties on April 8, 1983. Specifically, a copy of this acknowledgement was sent to the self-insured employer.

The employer argues that the court's decision in Argonaut Insurance Co. v. King, supra, requires dismissal of claimant's request for review because the employer was not served with a copy of claimant's request for review within 30 days of the Referee's ultimate order. On the facts before us, we disagree for two reasons.

First, it is established that, although the employer was not served with a copy of the request for review, the employer's attorney was served. In Nollen v. SAIF, 23 Or App 420 (1975), the court applied the usual agency-law principal that notice to an attorney is imputed to the attorney's client, and concluded that: "Regarding the sufficiency of service on claimant's attorney rather than on him personally, such is sufficient service [in satisfaction of the notice requirement of ORS 656.295(2)] where no prejudice has been shown." 23 Or App at 423. We do not understand the court's recent decision in King to change this rule announced in Nollen. We thus conclude that the employer received sufficient notice of claimant's request for review by timely service on its attorney.

There is a second and additional line of analysis that leads to the same conclusion. As stated above, all parties including the employer received actual notice of claimant's request for review within the 30-day appeal period by virtue of the Board's April 8, 1983 acknowledgement of the request for review. Actual notice that is conveyed within a required statutory period is usually sufficient notice, even when that notice is conveyed by some means other

than the literal requirements of a statute. Stroh v. SAIF, 261 Or 117 (1972). Although the issue may be debatable, we do not understand the court's recent decision in King to provide otherwise.

For both of these reasons, the employer's renewed motion to dismiss is denied.

The briefing schedule herein shall be resumed as follows. The employer shall file its brief within 20 days of the date of this order; the Board will accept a reply brief from claimant if filed within 10 days of the employer's brief; and this case will then be docketed for review.

IT IS SO ORDERED.

JAMES H. HENTHORNE, Claimant
John Bassett, Claimant's Attorney
Horne & Tenenbaum, Defense Attorneys

WCB 82-07223
September 14, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Podnar's order which upheld the insurer's denial of claimant's claim for injuries sustained in an accident on May 4, 1982. The issues on review are whether claimant was within the course of his employment when the accident occurred, whether the accident was caused by an idiopathic condition and whether claimant's knee condition is causally related to the automobile accident.

Claimant was employed as a salesman at the time of the accident. He spent about half his time in an office and about half his time traveling, soliciting and servicing accounts. On the morning of the accident in question he left his home in Milwaukie and drove to Gresham where he met three clients. He then returned to his home in Milwaukie where he stayed for about fifteen minutes. He then left his home with the intention of going to the Elks Club in Milwaukie to solicit a new account; enroute to the Elks Club he intended to stop at a barber shop in order to get his hair cut. An examination of the two maps introduced into evidence indicates that traveling to the Elks Club via the barber shop was a rather indirect route to the Elks Club. Before claimant reached the barber shop he was involved in an automobile accident.

Claimant testified he had no memory of the accident. He said he remembered nothing from about one half mile before the scene of the accident. The medical evidence indicates that it is equally possible that claimant's lack of memory is attributable to a concussion claimant suffered in the accident or to a fainting spell which caused the accident.

The Referee found that claimant was within the course of his employment:

> "Due to the nature of his employment, good grooming is certainly a benefit, and I find him to be within the course and scope of his employment. If the errand to the barber

shop is categorized as a purely personal errand, I would still find that claimant's driving the route he drove, with the intention of stopping at the barber shop and then the Elks club, constituted a dual purpose with claimant acting within the course and scope of his employment."

We disagree with the Referee's finding on the course of employment issue. To find that a trip to the barber shop, or similar grooming-related activity, is work related stretches the compensation system beyond the breaking point. Some minimum appearance considerations are perhaps conditions of all employment; however, it does not follow that grooming activity is within the course of employment. The Court of Appeals has held that an injury which occurred to a police officer while exercising at home was not within the course of his employment even though he was required as part of his employment contract to maintain good physical condition. Haugen v. SAIF, 37 Or App 601 (1978). Similarly, getting a haircut is not within the course of this claimant's employment, even though he may have been expected to maintain good grooming as a condition of his employment.

We also find that, because claimant significantly deviated from the direct route to the Elks Club, the dual purpose doctrine does not apply. He was attending to personal business and was not within the course of his employment.

The Referee found that claimant had failed to prove by a preponderance of the evidence that his accident was work related because he failed to prove it was not caused by an idiopathic condition. We affirm and adopt those portions of the Referee's order concerning whether claimant's accident was caused by an idiopathic condition.

Because we find claimant's automobile accident is not a compensable incident, we do not reach the question of whether his knee condition is causally related to the accident.

ORDER

The Referee's order dated March 10, 1983 is affirmed.

KIM A. LANDIS-ALLEN, Claimant
Emmons, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 82-07172
September 14, 1983
Order on Review

Reviewed by Board Members Lewis and Barnes.

The insurer requests review of those portions of Referee McCullough's order which: (1) Found it responsible for claimant's current back condition, including surgery; (2) found that claimant was entitled to temporary disability beyond September 1980, when the insurer had terminated payment of temporary disability; and (3) assessed penalties and associated attorney fees on a variety of grounds. Claimant cross-requests review of that portion of the Referee's order which found that the insurer correctly computed claimant's temporary disability rate.

The principal question involves whether claimant's need for back surgery in October 1982 was causally related to claimant's May 1980 industrial back injury claim. A threshhold problem is whether this issue was properly before the Referee. The Referee identified Dr. Tsai's July 31, 1982 report as a claim for surgery. The relevant portion of that report states:

> "I have nothing conservative to offer. Surgery in the form of L4-5 diskectomy is probably the treatment of choice. The patient is to make up her mind. If she wants to go ahead with surgery, a second opinion will be carried out, as required by the insurance company, as this is an on-the-job injury. If she desires no surgical intervention, she will be returned to the services of Dr. William Endicott. . ."

A subsequent October 5, 1982 report from Dr. Endicott, who had been claimant's treating doctor since her May 1980 injury, states:

> "I feel that with a positive CT scan, a positive myelogram and with the findings she has had which are now shifting to the left side, that we are looking at a ruptured intervertebral disc, and I feel surgery is necessary on this patient. She is definitely willing to have this done."

When the hearing convened on October 27, 1982, the Referee stated one of the issues to be:

> "There is no written denial in the record, but the [insurer] is denying . . . as of today . . . claimant's entitlement to medical services of any kind, including surgery . . ."

The insurer's attorney responded that he agreed:

> ". . . except the point that we make with regard to the surgery, namely, that it is not right to rule in regard to a denial of responsibility in regard to that. * * * [W]e don't have to take that position [that the surgery is denied] until we, in fact, receive some request for medical services, which we haven't gotten . . . [T]his whole third issue of future medical services is not ripe for consideration at this time, and in effect, you would be issuing an advisory opinion if you rule on that question."

Whether the question of claimant's entitlement to surgery was properly before the Referee and ripe for adjudication depends on Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), as interpreted in Thomas v. SAIF, 64 Or App 193 (1983). Syphers seemingly held that this agency lacks jurisdiction over denial-type issues until

there has been a claim and either a denial or the statutory time for accepting or denying has passed. Thomas held that there is no such jurisdictional problem in the sense of a jurisdictional defect that can be noted by this agency on its own initiative, but rather authority to hear and decide denial-type issues before there is a denial depends upon the objection or acquiescence of the employer/insurer.

As for whether there was a pre-hearing claim for surgery in this case, we disagree with both the Referee and the insurer. As previously stated, the Referee identified Dr. Tsai's July 31, 1982 report as a claim for surgery. We disagree. We do not believe that a reference to surgery "probably" being appropriate treatment, coupled with both a reference to the claimant having to decide and the possible need for a second opinion -- none of which came from claimant's treating doctor -- is sufficient to give reasonable notice to an employer/insurer that additional medical services then are being claimed.

As previously quoted, the insurer's position at the time of the October 27, 1982 hearing was that it had received no claim for surgery. We disagree. We believe that Dr. Endicott's October 5, 1982 report, in which the doctor stated he believed surgery was necessary and that claimant wanted to proceed with surgery, was clearly sufficient to constitute a claim.

However, identifying the October 5 report as the claim raises the Syphers problem that the insurer's statutory response time had not expired when the October 27 hearing convened. Which leads to the Thomas problem that the insurer's counsel both (1) agreed with the Referee's statement that the insurer was denying surgery as of the time of the hearing and (2) objected that the issue of surgery was not then ripe for adjudication.

We are not completely confident that we understand how the Thomas refinement of Syphers should be applied in this situation, but we conclude that the Referee had and we have authority to rule on the compensability of the surgery in question.

On the merits, we affirm and adopt those portions of the Referee's order finding the surgery to be compensable.

We disagree, however, with the Referee's assessment of a penalty of 25% of the cost of the surgery. The Referee reasoned in part, incorrectly we have concluded, that the references to the possibility of surgery in Dr. Tasi's July 31, 1982 report were sufficient to constitute a claim and that the insurer's denial at the October 27, 1982 hearing was thus untimely. The Referee also commented on the various things he thought the insurer could and should have done in response to various medical reports submitted during August and September 1982 which mentioned the possibility of surgery. It is true that there was considerable medical consideration of the possibility of surgery during this period, but the facts remain that: (1) There is nothing that we can identify as a claim for surgery that was submitted to the insurer more than 60 days pre-hearing and thus more than 60 days pre-"denial"; and (2) an insurer has 60 days in which to accept or deny. Moreover, given

the debatable nature of the conclusion that the proposed surgery was even in denied status at the time of the hearing, we think it is inappropriate to consider assessing a penalty for a tardy denial.

On the remaining issues of claimant's entitlement to temporary disability beyond September 1980, the proper computation of claimant's temporary disability benefits, and a penalty for termination of temporary disability benefits in September 1980, we affirm and adopt the relevant portions of the Referee's order.

ORDER

The Referee's order dated January 5, 1983 is affirmed in part and reversed in part. That portion that assessed "a penalty of 25 percent of the cost of the medical services, specifically surgery" is reversed. The remainder of the Referee's order is affirmed.

Claimant's attorney is awarded $400 as a reasonable attorney's fee for services rendered on Board review in connection with the issues of the compensability of surgery and claimant's entitlement to compensation for temporary disability, to be paid by the insurer.

TIMOTHY D. MARTINEZ, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 83-0250M
September 14, 1983
Own Motion Order

The SAIF Corporation has requested that the Board, in the exercise of its own motion authority, set aside a Stipulation dated December 10, 1981, entered into by and between SAIF and claimant in the above-referenced claim and Claim No. D 403183 (relative to a September 4, 1979 injury). We find that SAIF's application to the Board is not a proper subject for consideration by the Board pursuant to the provisions of ORS 656.278. For the following reasons, we deny SAIF's request for own motion relief and refer this matter to the Hearings Division for the initiation of proceedings pursuant to ORS 656.283.

A request for relief generally will not be considered by the Board in the exercise of its own motion authority while other administrative or judicial remedies are available. OAR 436-83-810(1)(a). See also ORS 656.278(2) and Peter A. Zaklan, 35 Van Natta 716, 719-723 (1983).

The document in question is entitled Stipulation and Order of Dismissal. By its terms claimant was granted additional permanent disability, out of which claimant's attorney received an attorney's fee; SAIF recovered an overpayment of temporary disability benefits; it was agreed that claimant's complaints of pain in his neck and shoulder were not related to either industrial injury claim; and claimant's pending hearing request was dismissed. This Stipulation and Order of Dismissal was approved by a Referee on December 10, 1981.

In Mary Lou Claypool, 34 Van Natta 943 (1982), in addition to discussing the grounds upon which a disputed claim settlement or

stipulated settlement may be set aside, the Board discussed the nature of such stipulations and whether, upon approval by a Referee or the Board, they share the same characteristics of finality as other agency orders. See generally ORS 656.289(3), 656.295(8).

> "The action of a Referee or the Board in approving a disputed claim settlement [or a stipulated settlement award] is usually expressed in the form of an 'order.' Nothing in the statute requires an order of approval. Expression of approval in the form of an order is largely customary. That custom is a matter of efficiency when a pending request for hearing or request for Board review is dismissed upon approval of a disputed claim settlement. The efficiency is that a single signature or group of signatures on a single document simulataneously results in approval of the disputed claim settlement and dismissal of the pending hearing/review request. But as a matter of technical administrative law, the only order is the order of dismissal; the simultaneous approval of the disputed claim settlement does not become an order in general administrative law or specifically under ORS ch. 656 merely because it is embodied for convenience in the same document.
>
> * * *
>
> "In summary, an order of dismissal -- entered because of approval of a disputed claim settlement or for any other reason -- is final if not appealed within 30 days, but the action of approving a disputed claim settlement [or stipulated settlement award] does not acquire the same finality." 34 Van Natta at 945, 946.

It follows, therefore, that when a party challenges a disputed claim settlement or stipulated settlement award and requests that it be set aside, the proper procedure for requesting such relief, which is a "question concerning a claim," is to request a hearing pursuant to ORS 656.283. As we previously have stated, vacating a prior settlement is an extraordinary remedy to be granted sparingly only in the most extreme situations, James Leppe, 31 Van Natta 130 (1981), Mary Lou Claypool, supra, 34 Van Natta at 946. The proper procedural avenue to follow when requesting this extraordinary relief is to request a hearing, as opposed to requesting own motion relief pursuant to ORS 656.278.

Accordingly, we construe the material that has been submitted to us ostensibly under our own motion authority as a request for hearing pursuant to ORS 656.283. This is a new hearing request made by the SAIF Corporation, and any disposition made by a Referee is pursuant to ORS 656.289. This order does not

constitute an own motion referral by the Board under the provisions of OAR 436-83-820.

ORDER

SAIF's request for own motion relief is denied. This matter is referred to the Hearings Division for the initiation of proceedings pursuant to ORS 656.283.

MILDRED E. MORELLI, Claimant
Michael Dye, Claimant's Attorney
Gary Jones, Defense Attorney

WCB 82-07623
September 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Gemmell's order which modified the August 4, 1982 Determination Order by increasing claimant's award of unscheduled disability compensation from 15% to 45% of the maximum allowable for permanent partial disability. The insurer contends that the award is excessive. We agree and modify the award.

Claimant sustained a compensable injury to her neck, right shoulder and right arm on November 5, 1980 when she slipped and fell down the steps of a school bus. As a result claimant was left with mild radiculitis of her right upper extremity, mild cervical spondylolysis at C5-6, cervical and right shoulder strain and a pain syndrome from which she suffers constant moderate aching pain. Claimant now has limitations in all the planes of range of motion in her cervical spine. Her physician has limited her to light work (no lifting over 20 pounds) and has limited her from activity involving repetitive bending, lifting, stooping, pushing, pulling, climbing or crawling. Claimant is 38 years of age and possesses a high school education. She was injured while working as a school bus driver, a job she had held for seven years. Bus driving is the only paid job she has ever held, and she is now precluded from working at that job due to her physical restrictions.

Although we find that claimant has suffered a reduction in her ability to obtain and hold gainful employment, we find that, when applying the above facts to the guidelines at OAR 436-65-600, et seq., and comparing this case to other similar cases, claimant would be properly compensated by an award of 30% unscheduled disability compensation.

ORDER

The Referee's order dated March 14, 1983 is modified. Claimant is awarded 96° for 30% unscheduled disability compensation for her neck injury. This award is in lieu of prior awards. Claimant's attorney's fees shall be adjusted accordingly.

DALLAS C. POAGE, Claimant
Barton & Armbruster, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00555
September 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Nichols' order which set aside its denial of claimant's mental stress claim. The issue is compensability.

Claimant was employed as a police sergeant. In September 1981 a person who was under arrest, handcuffed and hobbled spit in claimant's mouth. Claimant reacted by kicking the arrested person in the head. Claimant's employer reacted by first suspending claimant with pay during an investigation, then transferring claimant to a desk job in the police department and ultimately terminating claimant's employment in January 1983.

In October 1981 claimant filed an 801 claim form, alleging he "became very depressed [due] to internal investigation awaiting disciplinary action." About the same time, claimant began receiving psychiatric treatment.

The Referee seemingly concluded that claimant's stress claim arose within the scope of claimant's employment under McGarrah v. SAIF, 59 Or App 488 (1982). Although we think the issue is only tangentially raised, we do not necessarily agree. It is clear that injuries sustained while engaged in activity that an employer has prohibited are not compensable. For example, in Frosty v. SAIF, 24 Or App 851 (1976), claimant was a charter bus driver who took a group skiing, went skiing himself despite instructions from his employer not to do so, and was injured while skiing; the court concluded that claimant's injuries did not arise within the scope of his employment. In McGarrah, the court mentioned a hypothetical based on the Frosty facts:

> "A better test of the Board's rule, in its face, might be presented if the claimant in Frosty suffered a psychological disability as a direct result of his supervisor having castigated him severely for having skiied while on a charter run, contrary to express instructions, even though he performed well the job for which he was hired." 59 Or App at 454.

The court stated:

> "That question, however, is not presented here and we do not decide it." Ibid.

We think the facts of this case present exactly the same question as the hypothetical drawn from Frosty. This claimant has been subjected to employer discipline for having assaulted a prisoner in his custody contrary to express instructions. It is quite clear that a claim for physical disability sustained while assaulting a prisoner would not be compensable, as illustrated by Wayne Patterson, 34 Van Natta 1493 (1982):

> "Claimant . . . 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 . . . while doing something he had no right to do in connection with his employment or anything else."

How then can employer disciplinary action for engaging in exactly the same prohibited activity possibly lead to a compensable claim for psychological disability? The Court of Appeals' decision in McGarrah does not answer that question; indeed, it expressly leaves that question unanswered. Since we think the parties' arguments in this case only tangentially raise that question, and since the McGarrah case is now pending in the Supreme Court, we also will leave that question unanswered for purposes of this case.

The parties' arguments focus, instead, primarily on the rule requiring major work causation to establish the compensability of an occupational disease.

There is little dispute in the evidence. After the incident of September 1981, claimant was treated or examined by Dr. Oksenholt, Dr. Kuttner and a Psychological Consultants panel. We find Dr. Kuttner's deposition and the comprehensive Psychological Consultants reports to be most helpful. All doctors involved generally agree that claimant had various pre-existing personality disorders and weaknesses. All doctors involved generally agree that there were nonemployment sources of stress in claimant's life, including problems in his marriage, problems associated with his relationship with his mistress and problems in connection with the health of his parents and his relationships with his brothers. All doctors involved generally agree that there were employment sources of stress in claimant's life. Dr. Kuttner's deposition contains the most comprehensive identification of the employment stress: what claimant perceived as hostility toward him by the Chief of Police for several years before the September 1981 incident; what claimant perceived as some form of conspiracy toward him by his fellow police officers; the loss of self-esteem associated with the loss of his job because of the September 1981 incident; and a sense of betrayal because his fellow officers "ratted" on him by reporting his attack on his prisoner in September 1981.

The significant area of disagreement in the medical evidence involves the relative nature and magnitude of the work and nonwork causation of claimant's psychological disability. The Psychological Consultants panel opined that stress in connection with claimant's work amounted to no more than 5% of the cause of claimant's psychological disability. In his deposition, Dr. Kuttner at first expressed some reluctance to quantify causation so precisely but ultimately stated he agreed that the panel's opinion was "in the ballpark" as far as being similar to his own. Dr. Oksenholt, who is apparently a general practitioner, opined without explanation that claimant's psychological disability was principally related to his job.

Were this the only evidence, we would feel quite comfortable

in finding that claimant has not proven major work causation. The conclusions of Psychological Consultants and Dr. Kuttner -- that work causation was in the ballpark of 5% -- are clearly inconsistent with a finding of major work causation. And the edge on both explanation for opinions and expertise has to go to Psychological Consultants and Dr. Kuttner over Dr. Oksenholt.

In his deposition, however, Dr. Kuttner went on to testify:

> "A. * * * I do feel that this on-the-job trauma that we have described was the triggering stimulus. * * * I'm not sure if Oregon Workers' Compensation laws are that fair to all parties involved, but I know we need to address ourself to the
>
> limitations provided within that area. Suffice it to say if that incident had not happened, I don't think he would have gone over the brink. He might have had a little rough spot. I think he might have been tense; he might have been less effective on the job for awhile. I don't think we would have seen anything to this degree . . .
>
> * * *
>
> "Q. All right. The Psychological Consultants set a percentage disability related to the injury stress on the job at two to five percent. Then they said disability related to other factors, 50 percent. Now, how do you reconcile your opinion that this particular incident was the triggering event and your agreeing with the Psychological Consultants that it was two to five total stress. Could you explain that, please.
>
> "A. Yes. * * * If the camel's back is already overloaded, it doesn't take much to break it. And he was -- we're talking about a relatively weak back, psychologically speaking; combined with a lot of other stresses and adding a little bit more pressure on this was probably fairly considerable pressure, because it fits this man's particularly constitutional problems of masculinity and being accepted and that type of thing.
>
> "Q. So is that the reason why even if we were to concede that only two to five percent of this total stress was particularly on-the-job related we would find that that is what triggered or caused to a reasonable medical certainty the disability syndrome that you diagnosed?

"A. Yes. I think this is a fair bet. There are many other types of stresses that you or I might find very upsetting, but I don't think would have been as affecting to him as this particular incident was."

The Referee's order relied upon this straw-that-broke-the-back reasoning in finding the claim compensable. Claimant's arguments on review rely on this same reasoning in defense of the Referee's conclusion.

So long as the issue is the compensability of an occupational disease, we do not understand a "straw" of work causation to be sufficient. The classic formulation of the major-causation test in James v. SAIF, 290 Or 343 (1981), and SAIF v. Gygi, 55 Or App 570 (1982), requires comparing work causation and nonwork causation of a given result (disease) and determining which predominates. We think it is implicit in that formulation that the lesser causal force can be the final increment of causation that produces a given result (disease). We think it is clear that the final increment of causation is not the same as major causation. For example, if the evidence in a case established that a worker's employment environment was responsible for 90% of the cause of a disease, we do not think anyone would seriously contend that the disease is not compensable because the ultimate precipitating cause of disability was not work related. Cf. Geenty v. Hyster, Inc., 23 Or App 146 (1975) (worker's degenerative upper back disease, which first became manifest off the job when he leaned over in bed to kiss his wife, held compensable). Conversely, it follows that, when nonemployment factors are the major cause (many straws), a disease claim is not compensable just because employment factors were the last straw.

On the other hand, if this were an injury claim, in which the relevant standard is material causation, then analysis about straws breaking backs would be relevant and possibly dispositive. Which brings us to the final question of whether we should view this claim as being more in the nature of an injury claim. We think this is a borderline situation. To the extent that claimant is relying on stress with his supervisor over a period of years, his claim is rather clearly for an occupational disease. To the extent that claimant is relying on the specific disciplinary incident after he attacked a prisoner -- what Dr. Kuttner called an "on-the-job trauma" and "triggering stimulus" -- his claim seems to move quite a ways toward the injury end of the spectrum. Based on the 801 claim form that claimant executed, his claim was apparently first made on a disease theory. SAIF clearly denied the claim as one for occupational disease on December 14, 1981. At the beginning of the hearing, claimant's attorney agreed with the Referee's statement that the issue was "the compensability of the denied occupational disease claim." Yet, perplexingly, a majority of claimant's present arguments before the Board are based on injury claim/material causation precedents and doctrine. Under all these circumstances, despite some doubts, we are unwilling now to decide a different issue than the stated issue at hearing.

Viewed as a claim for occupational disease, we conclude that claimant has not established major work causation.

ORDER

The Referee's order dated October 15, 1982 is reversed. The SAIF Corporation's denial dated December 14, 1981 is reinstated and affirmed.

ALLEN L. REED, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 82-0155M
September 14, 1983
Own Motion Order

Claimant, by and through his attorney, has requested that the Board exercise its own motion authority and grant claimant the following relief:

> "That the Board either set aside its April [Own Motion Determination] Order and reopen this claim for the provision of the services recommended by Drs. Smith and Fagan or, in the alternative, that the Board grant claimant an award of permanent total disability."

By an Own Motion Determination dated April 22, 1983, the Board awarded claimant compensation for temporary total disability from June 8, 1982, through March 14, 1983, and granted claimant an additional unscheduled permanent disability award equal to 20% of the maximum allowable, for a total unscheduled award of 50% for injury to claimant's low back. The Board previously had reopened this July 5, 1974 industrial injury claim by a December 27, 1982 Own Motion Order.

Most of the information submitted in support of claimant's renewed request for own motion relief relates to an apparent claim for medical services in the form of a request for authorization of an elective surgical procedure recommended by Dr. Donald T. Smith. There also is an issue lurking in the background concerning whether SAIF should pay for a psychiatric evaluation which has been suggested, apparently for the purpose of determining whether claimant is a good candidate for the proposed surgical procedure.

There appears to be no contention that claimant's condition has worsened since the last arrangement of compensation herein, i.e., the Board's April 22, 1983 Own Motion Determination. Nor would any such contention appear to be supported by the information presently before the Board. The Board's most recent Own Motion Determination appears to be well-founded in law and fact. The claimant's request that the Board reopen this claim for the provision of medical services is not a proper subject of a request for own motion relief. ORS 656.245(2). Donald L. Lentz, 35 Van Natta 1084 (July 20, 1983).

Claimant has a pending hearing request in WCB Case No. 83-03881. Claimant's hearing request, dated April 25, 1983, designates further medical treatment, penalties and attorney fees, and SAIF's alleged failure to comply with the terms of a November 1982 stipulated order whereby SAIF agreed to provide certain

medical care pursuant to ORS 656.245. This litigation recently has been placed in inactive status. In view of the nature of the benefits claimant presently is seeking, we believe it is more appropriate for claimant to pursue his remedies pursuant to ORS 656.245. We find no basis for granting the relief presently requested pursuant to ORS 656.278. Accordingly, claimant's renewed request for own motion relief is denied.

IT IS SO ORDERED.

BILL SAVAGE, Claimant
Ringle, Herndon, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-05638
September 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Menashe's order which awarded claimant benefits for permanent total disability.

Claimant, who was 51 years of age at the time of the hearing, suffered a compensable injury to his low back on April 22, 1977 while employed as a deputy sheriff for Clackamas County. The injury was diagnosed as a lumbosacral strain. Claimant was also found to have a spondylolisthesis at L5.

Several years prior to his 1977 injury, claimant sustained a neck injury which resulted in fractures to the third, fourth and fifth cervical vertebrae. Although the fractured vertebrae healed, claimant suffered a severe psychological reaction, variously diagnosed as anxiety neurosis, depression and psychophysiological musculoskeletal disorder, as a result of that injury. This psychological reaction was treated by Dr. Parvaresh. This treatment was generally successful, but claimant developed a number of phobias, particularly with regard to medical treatment. Nevertheless claimant functioned relatively well physically and psychologically (i.e., he was able to work) until his 1977 low back injury. Following that injury claimant experienced an exacerbation of his underlying psychological condition. Dr. Parvaresh related the exacerbation to the 1977 compensable injury.

On September 13, 1977 Dr. Surbaugh diagnosed a probable herniated L4-5 disc and recommended that claimant undergo a myelogram and a probable laminectomy. Apparently due to his phobia about medical treatment, claimant refused to undergo either procedure. Claimant's psychological condition was eventually found compensable and his refusal to undergo myelogram and surgery was found reasonable after a hearing before Referee Ail in a prior proceeding in 1979.

Claimant thereafter continued to receive conservative orthopedic treatment, primarily from Dr. Conner, and psychiatric treatment from Dr. Higley. On February 26, 1980 Dr. Stolzberg conducted a psychiatric examination of claimant. Dr. Stolzberg found claimant to be suffering from a moderately severe reactive mixed depression, anxiety state and psychoneurotic disorder as a result of his 1977 low back injury and his earlier cervical injury. It was also noted

that claimant had a tendency toward somatic symptoms. Dr. Stolzberg concluded that at the time of her examination that claimant was "very mildly limited, if at all" by his psychiatric condition. Dr. Higley reported on July 30, 1980 that he agreed with Dr. Stolzberg that claimant was only mildly limited, if at all, by his psychiatric condition.

Although claimant's psychological condition had improved, his orthopedic condition generally remained static. However, as the Referee noted, the physicians treating claimant's physical condition have generally assessed claimant's disability from a psychological standpoint, and the physicians treating his psychological condition have generally assessed claimant's disability from a physical standpoint.

The Orthopaedic Consultants reported on April 28, 1980 that claimant complained of steady low back pain aggravated by jarring, pulling hard, lifting anything heavy, bending, standing or walking. They reported that sitting did not trouble claimant but driving long distances did, and that exacerbations of his back pain triggered vomiting spells (diagnosed by Dr. Higley as a "somatic-visceral reflex"). The Consultants reported that it was not possible to give an accurate estimate of claimant's back impairment due to his psychological condition.

On June 18, 1980 Dr. Higley reported that claimant was physically disabled from work as deputy sheriff and from jobs involving physical effort. Dr. Conner, in several succinct reports beginning on September 5, 1979, opined that claimant was permanently and totally disabled as he was unable to perform any repetitious activity involving bending, stooping or squatting for any period of time without exacerbations of pain, nausea and vomiting.

The last complete orthopedic examination of claimant appears to have been performed by Dr. Hoff on November 10, 1981. Claimant's physical condition appeared to have been somewhat improved since the April 28, 1980 examination performed by the Orthopaedic Consultants. Dr. Hoff found that, although claimant complained of pain, he was able to stand on his toes and heels and walk, and that he had adequate strength for this exercise. No atrophy was noted and claimant's reflexes were found to be "brisk and active and symmetrical." Only slight decreases in sensation were noted. Although claimant's ranges of back motion were restricted, he was found to have full 90° straight leg raising. Dr. Hoff apparently felt that many of claimant's physical symptoms were psychological in origin; in any event, the doctor concluded: "I am unable to separate his physical symptoms which contribute to his physical problems from those of a psychological overlay."

The last attempt at determining claimant's physical impairment appears to have been made by the Orthopaedic Consultants in their report of October 11, 1978. Their best guess was that claimant's physical impairment was minimal. To date, claimant has not undergone any surgical procedures as a result of his 1977 back injury.

On February 9, 1982 claimant experienced a muscle spasm in his back which caused him to fall and strike his head. He was admitted

to Willamette Falls Community Hospital on that same day and released under Dr. Conner's care on February 13, 1982. SAIF denied that this injury represented an aggravation of claimant's 1977 industrial injury. This denial was raised as an issue at the hearing in this case and claimant stipulated that his resulting condition was medically stationary at the time of the hearing. See Kociemba v. SAIF, 63 Or App 557 (1983); Gary A. Freier, 34 Van Natta 543 (1982). The Referee found the head injury to be a compensable consequence of claimant's prior industrial injury and set aside the denial. SAIF does not take issue with this finding.

The Referee concluded that when all of claimant's difficulties, both physical and psychological are taken into consideration with his age, education, adaptability, training, job experience, etc., claimant is permanently and totally disabled. The Referee also found that, although claimant made no attempt to seek employment since he was injured five years earlier, it would have been "futile" for him to do so, and that he was, therefore, excused from the requirements of ORS 656.206(3). We disagree with both of the Referee's conclusions and reverse.

As noted above, it is difficult to separate claimant's physical impairment from his psychological impairment. Since these conditons appear inseparable, we have decided not to attempt to rate the extent of claimant's orthopedic and psychological disability separately. The orthopedic specialists have perhaps over-emphasized what they perceived as a psychological condition, while the mental health experts have perhaps tended to over-emphasize what they perceive as an orthopedic problem. Considering the medical evidence as a whole, the consensus seems to be that claimant is suffering from no psychological condition which impairs his mental abilities; rather, claimant has a psychological disorder which manifests itself in the form or increased somatic complaints and symptoms. In other words, we understand the medical consensus to be that claimant does have a certain level of orthopedic impairment; but that the claimant's reported physical symptoms do not correlate with the doctors' objective findings; and that thus much of claimant's difficulty has been described in terms of "psychoneurotic disorder."

Whether purely physical, purely psychological or (most likely) a combination of the two, claimant's condition unquestionably precludes him from heavy and medium work. However, considering the medical evidence as a whole, it is not clear that claimant is totally precluded from light work and it is quite clear that he is not precluded from sedentary work. Dr. Conner states only that claimant is precluded from jobs involving repetitive bending, stooping or squatting activities which would exacerbate his pain. The fact that claimant cannot perform work involving such repetitive activities does not necessarily mean he is totally disabled. Dr. Higley indicates that claimant is precluded from working as a deputy sheriff or from jobs involving physical activity. Although Dr. Higley does at one point state that the orthopedic specialists have concluded claimant is totally disabled, it does not appear that he ever offered such an opinion himself. Claimant's testimony at the hearing indicates that he is able to engage in activities that could be classified as light.

Combining all of the somewhat confusing and contradictory medical reports in this record, we think that the best that can be said of the matter is that, although claimant certainly has a material disability, he is not permanently and totally disabled from a medical standpoint alone. The next question then becomes whether claimant is permanently and totally disabled when his medical condition is combined with his social/vocational background.

Claimant is only 51 years of age and has a high school education. The record indicates that claimant is of at least average intelligence. His job experiences have been diverse and colorful. Following graduation from high school claimant entered the United States Navy for a period of two years where he was mainly involved in athletics. Following his discharge, claimant became a professional wrestler. Claimant estimated that in the course of his career, he participated in almost 4,000 professional matches throughout the world and held numerous championships at various times. Claimant testified that he also has worked on several occasions as a professional wrestling referee. In addition to his career as a professional wrestler, claimant became a licensed auctioneer in 1969, conducted numerous auctions, and owned and apparently managed an auction house in the Woodburn area.

Following his retirement from professional wrestling claimant obtained work as a custodian for a high school in Oregon City. After approximately two years of work as a custodian, claimant went to work as a jailor for the Clackamas County Sheriff's Department. Claimant did auction work while employed by the Sheriff's Department and taught courses in self-defense. In addition to this, claimant purchased and ran a pizza business in 1970. He was later transferred to the civil division of the Sheriff's Department where his interests turned to politics. Claimant ran for the office of Clackamas County Sheriff and won the primary but lost the general election. In addition to these activities, claimant has been active in real estate investment and has acquired several income producing properties over the years including apartments and a gas station.

Clearly claimant is precluded from several of his former occupations. There is no question that he could not return to professional wrestling or physically active police work. However, claimant does have demonstrated skills in many different areas that would appear to be either subject to direct application (such as his auctioneering, teaching and investment/managerial abilities), or transferable to other endeavors that are suitable to claimant's residual functional capacity (it is common, for example, for persons who have been sports "stars" to obtain positions in sports broadcasting and journalism).

In Home Ins. Co. v. Hall, 60 Or App 750 (1983), the issue, as here, was permanent total disability. Claimant was 57 years of age, had a 10th grade education and possessed no special job skills. Her physical condition limited her ability to sit or stand for extended periods of time, bend, lift, climb stairs or drive a car for any distance. The court concluded that the claimant failed to establish total disability, reasoning that the claimant had not established that she was willing to seek regular gainful employ-

ment, that she had not made reasonable efforts to do so, and that she was not in a class of persons about whom it could be said that efforts to obtain employment would obviously be futile.

We believe that the same can be said for the claimant in the current case. Since the time of his injury in 1977, claimant has made no efforts whatsoever to obtain employment, nor has he demonstrated that he is willing to seek gainful employment. Claimant's residual functional capacity does not appear to be substantially different from the claimant's in Hall, and he certainly has much more vocational experience and many more transferable skills. We are not convinced that efforts to obtain employment would have been "obviously futile" for claimant in this case.

The question concerning the extent of claimant's partial disability remains. A series of Determination Orders have been issued in the course of the processing of claimant's 1977 low back injury claim, all of which have awarded time loss only. We assume the absence of any award for permanent disability by Determination Order is explained by the absence of objective medical verification of permanent impairment which, in turn, is possibly explained by claimant's refusal to submit to a myelogram. However, claimant's hearing testimony indicates impairment in the form of disabling pain. We think the existence of impairment in the form of disabling pain is generally corroborated by the medical evidence, despite the debate about orthopedic versus psychological causation. It is difficult to assess both the magnitude and the permanence of disabling pain on this kind of record; our overall assessment, considering claimant's impairment, age, education, occupational background and adaptability, is that claimant would be properly compensated for the effects of his 1977 low back injury by an award for 60% unscheduled permanent partial disability.

ORDER

The Referee's order dated May 26, 1982 is reversed in part. Claimant is awarded 192° for 60% unscheduled permanent partial disability; this award is in lieu of all prior awards. Claimant's attorney's fee with regard to the extent of disability issue should be adjusted accordingly. The remainder of the Referee's order is affirmed.

CAROL M. STRAETZ, Claimant
Evohl F. Malagon, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 82-02513
September 14, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of those portions of Referee Seymour's order which required the employer to pay interim compensation from March 23, 1982 until July 13, 1982 and assessed a penalty and attorney's fee for failure to pay interim compensation. We understand the cognizable issues on review to be: (1) Whether the employer's "denial letter" of March 23, 1982 terminated the employer's duty to pay interim compensation; and (2) whether the employer's alleged good faith (although admittedly now incorrect) belief that it did not have to pay interim compensation is a defense to a claim for a penalty and attorney's fee.

Claimant sustained a compensable low back injury in October 1980. She was released to light duty in July 1981 and to unrestricted work in August 1981. The employer offered her a light-duty job in July 1981 which claimant indicated she would accept but to which she never reported. In August 1981 the employer terminated her for excessive absenteeism.

In January 1982 claimant's low back condition worsened causing her to be hospitalized for evaluation and treatment. The employer was notified of claimant's hospitalization. In response, the employer sent claimant a letter on March 23, 1982 informing her that it would pay medical expenses but not time loss because she had voluntarily left her job for reasons other than her injury and, therefore, had "removed [herself] from the labor market." The letter contained no notice of hearing rights. Claimant had filed a request for hearing a few days before this "denial letter" on the issues of failure to pay interim compensation and penalties/attorney fees.

The employer's claims manager testified that he believed that the employer was under no legal obligation to pay interim compensation if the claimant had voluntarily removed herself from the labor market. He also stated that he did not include appeal rights in the "denial letter" because he knew that claimant was represented by an attorney who was well versed in workers' compensation law.

The Referee ordered the employer to pay interim compensation until July 13, 1982, when a Determination Order issued. The Referee specifically held that the March 23, 1982 "denial letter" was not sufficient to toll the employer's duty to pay interim compensation. He also assessed a 25% penalty for failure to pay interim compensation through July 13, 1982.

The employer argues that the March 23 "denial letter" was a sufficient denial to terminate its duty to pay interim compensation because claimant did not need to be informed of her hearing rights because she already had requested a hearing on the very issue with which the denial was concerned. It further argues that a penalty is not appropriate because of its failure to pay interim compensation because it had a reasonable belief that the law did not require payment of interim compensation to a claimant not in the labor market. The employer concedes that under the current case law it had an obligation to pay interim compensation at least until its March 23 "denial letter." However, it argues that Stone v. SAIF, 57 Or App 808 (1982), and Likens v. SAIF, 56 Or App 498 (1982), were wrongly decided. It correctly notes that the Board is not the proper forum to address that issue.

We agree with the employer's argument that its March 23 "denial letter" was sufficient to terminate its duty to pay interim compensation. We have held that where an employer/insurer issues a denial without a statement of hearing rights, the denial nevertheless terminates the duty to pay interim compensation if the claimant has requested or thereafter requests a hearing. Patricia Dees, 35 Van Natta 120 (1983); Angela V. Clow, 34 Van Natta 1632 (1982); Delbert Greening, 34 Van Natta 145 (1982); Terry Dorsey, 31 Van Natta 144 (1981). Without repeating everything we have said about this issue before, we continue to think that deviation from the statutory requirement of notification of hearing rights is harmless

error when a hearing is, in fact, requested and held on the validity of a denial.

On the facts of this case, we disagree with the employer's position that its belief that the law did not require payment of interim compensation is a defense to a claim for penalties/attorney fees. There is, of course, an abstractly correct foundation for the employer's position: The holding of the Court of Appeals in Norgard v. Rawlinsons, 30 Or App 999, 1003 (1977), that an insurer's legitimate doubt about its legal duty prevents a finding of unreasonable conduct such as to warrant penalties/attorney fees. However, in Likens v. SAIF, supra, the court not only found that an employer/insurer must pay interim compensation to a claimant who is not in the labor market; the court found that the failure to do so in that case was "unreasonable." 56 Or App at 501. Given that finding in Likens, we do not see how we can possibly find that the employer in this case had a Norgard-type legitimate doubt in this case about its statutory obligation. Accordingly, we affirm the Referee's award of a penalty.

ORDER

The Referee's order dated August 11, 1982 is modified in part. The employer is ordered to pay claimant interim compensation from January 19, 1982 through March 23, 1982; this award of interim compensation is in lieu of that ordered by the Referee. The remainder of the Referee's order is affirmed with the understanding that the penalty ordered will apply to the reduced amount of interim compensation ordered herein.

HARRY A. WESTMORELAND, Claimant
Kirkpatricks & Pope, Claimant's Attorneys
Wolf, Griffith, et al., Defense Attorneys

WCB 82-07779
September 14, 1983
Order on Review

Reviewed by the Board en banc.

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

Claimant, a truck driver, alleges that he injured his upper back on August 2, 1982 while hand-cranking the landing gear on his truck. Claimant testified that he felt a sudden, stabbing pain between his shoulder blades. No one witnessed the incident, but claimant reported the alleged injury to his supervisor upon returning to the truck terminal and went to an emergency room the same day.

The emergency room report of Dr. Boss indicates that claimant suffered an upper back strain and that Dr. Boss believed the condition to be work related. Dr. Boss later reported to the insurer that he did not recall claimant mentioning that he had been treated by a chiropractor several days before the alleged on-the-job injury. While hospitalized, claimant was seen by his family physician, Dr. Lundquist. Claimant reported to Dr. Lundquist that he had injured himself while cranking the landing gear on a truck at

work. Dr. Lundquist noted that claimant had a low back injury and surgery in January 1981 but the doctor was apparently unaware that claimant had any prior neck or upper back problems or had received treatment for such problems. Claimant was also interviewed by an investigator for the insurer while hospitalized. Claimant denied having any prior neck injuries.

At the hearing, claimant testified that he had not seen any doctors between June of 1982 and August 2, 1982. Then, on further cross examination, claimant admitted that he had been treated by Dr. Wenham in early July because his neck had "popped out of place." Claimant was then asked if he had also been treated by another chiropractor, Dr. Zimmerman, in July of 1982. Claimant testified that he did not recall any such treatment. Again on further cross examination claimant admitted that Dr. Zimmerman had treated him for neck problems and that he had also been treated in July of 1982 for neck difficulties by Dr. Reinberg. Claimant asserts that the pain he experienced in July was different from the sharp pain he felt between his shoulder blades at the time of the alleged August 2, 1982 incident. However, claimant reported to Dr. Wenham in July that he had trouble with his neck and between his shoulders. Dr. Wenham diagnosed cervical and thoracic subluxations. Claimant also reported to Dr. Zimmerman that he was having pain between his shoulder blades and in his neck on July 26, 1982.

In summary, during the two months immediately prior to the alleged work injury, claimant was treated by a total of three chiropractors. Claimant's reported symptoms to these doctors all involved the upper back and neck area, and their reported diagnoses all involve the upper back and neck area.

The Referee found that claimant: (1) Had "not been candid"; but (2) had otherwise proven the compensability of his claim. We agree with the first finding and disagree with the second.

The primary question in this case is whether claimant's problems after August 2, 1982 were caused by an on-the-job injury or were merely a continuation of the upper back and neck problems that claimant has been receiving treatment for prior to the alleged incident. We think this is a complex medical question which requires expert medical evidence. No such evidence is contained in the record before us. Because of the incomplete histories given to the doctors who treated claimant following the alleged August 2 incident, their conclusions that claimant's condition was work related are of little value. In short, there is not a single opinion from a single doctor in this record who was aware of claimant's June/July chiropractic treatments and who stated that claimant's problems after August 2 were caused by a work injury.

ORDER

The Referee's order dated March 4, 1983 is reversed. The insurer's denial dated August 12, 1982 is reinstated and affirmed.

Board Member Lewis Dissenting:

I would affirm the Referee's order which found claimant had proven that he sustained a compensable injury from the evidence presented.

I do not view the Referee's statement "that claimant has not been candid in disclosing his prior injuries, and only in cross examination was it discovered that he had prior medical treatment for his neck and back" as a finding that claimant was not credible.

When you look at the testimony of claimant on cross-examination claimant was asked to look at a written statement he had made to an investigator while he was in the hospital:

> "Q. He also covered whether or not you had any prior injuries and then he asked,
>
> Question: 'How did you injure your neck?'
>
> Answer: 'I was cranking the landing gear up and all of a sudden I felt a sharp pain between my shoulder blades.'
>
> Question: 'Has that ever happened before?'
>
> Answer: 'No, never.'
>
> That dialogue is correct?
>
> "A. Yes.
>
> "Q. And then he asked you down at the bottom of the page,
>
> Question: 'Did you have any problems driving over?'
>
> Answer: 'No.'
>
> Question: 'Have you ever had a neck injury before?'
>
> Answer: 'No.'"
>
> (Transcript, page 26, lines 2 through 21.)

It is plain to see that claimant said he did not injure his neck in this way before, that is, cranking on the landing gear of his truck. He was not necessarily saying he had never injured his neck. Also on page 27 of the transcript, lines 2 to 14:

> "Q. In between when you saw Dr. Lundquist in June of 1982 and your admission into the hospital on August 2, 1982, did you have any treatment with any doctors?
>
> "A. Not to my recollection.
>
> "MR. POPE: What kind of doctors do you mean, Counsel?

"MR. TERRALL: Any doctors, Counsel: therapists, chiropractors, podiatrists, naturopaths.

"THE WITNESS: Yeah, I believe I did. I seen a chiropractor for popping my neck out of place in between that time."

It is just as plain claimant answered the question as it pertained to his on-the-job injury. It was only after the question had been clarified by claimant's attorney that he said he was treated by a chiropractor.

I believe the above testimony may show some confusion on claimant's part but, like the Referee, I find that when viewing all the evidence as a whole, this testimony is not enough to prevent a finding of compensability. I, therefore, respectfully dissent and would affirm the Referee's order.

TOM E. DOBBS, Claimant
Pozzi, et al., Claimant's Attorneys
McDonald, et al., Defense Attorneys

WCB 81-04006
September 15, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Mulder's order which dismissed claimant's request for hearing for want of jurisdiction. The issue is whether claimant filed a timely request for hearing in relation to the July 23, 1981 Determination Order.

I.

Claimant was employed as a dishwasher and bouncer by the Dory Restaurant on September 12, 1980 when he sustained a left ankle injury. Claimant was attempting to contain an altercation between several restaurant patrons when one of the patrons stepped on claimant's left ankle. Claimant was transported to the hospital in Lincoln City where Dr. Arbeene diagnosed a left distal fibular fracture, disruption of the left distal tibial-fibular syndesmosis, rupture of the left deltoid ligament and a posterior malleolar fracture of the left ankle. The claim was accepted by the SAIF Corporation. On September 14, 1980 Dr. Arbeene performed a repair of the ligament, an open reduction, and internal fixation of the distal tibial-fibular syndesmosis disruption with a bone screw and a closed treatment of the malleolar fracture of the distal left tibia.

Following his ankle surgery claimant was treated by Dr. Swanson who removed the transfixion screw on November 26, 1980. Dr. Swanson reported on December 29, 1980 that claimant had 7° of dorsiflexion with his knee extended and otherwise had a full range of ankle motion with minimal tenderness but had some aching in the ankle with prolonged walking. Claimant was released to return to full time work effective December 30, 1980. Following this work release, claimant received physical therapy treatments for approximately two weeks, following which he reported that he was able to

walk with much less discomfort and felt that he was regaining his dorsiflexion range of motion. Dr. Swanson's examination of March 12, 1981 revealed that claimant had no tenderness about the ankle and lacked only three to four degrees of dorsiflexion as compared to his right ankle. Dr. Swanson stated: "It is my feeling that this patient has a minimum permanent disability related to aching in his ankle and a slightly decreased range of motion of that ankle versus the opposite side."

On April 12, 1981 claimant was in Yakima, Washington when he slipped while getting out of his car, twisting his left foot and apparently his back as well. A physician in Yakima apparently prescribed muscle relaxants for claimant's back but did not examine his ankle. Claimant was examined by Dr. McLaughlin on April 22, 1981. Dr. Swanson reported that Dr. McLaughlin's x-rays revealed a possible slight avulsion fleck of the lateral malleolus. Dr. Swanson felt that an additional ten days of physical therapy was indicated and, by May 8, 1981, reported that the avulsion fleck was completely united.

A Determination Order issued on July 23, 1981 awarding claimant temporary total disability from September 12, 1980 through December 29, 1980 and 10% scheduled permanent partial left foot disability. On August 13, 1981 SAIF issued a partial denial in relation to the April 2, 1981 incident in Washington.

On April 29, 1981 the Board received a request for hearing from claimant indicating temporary total disability as the issue.

On July 14, 1981 the Board received a supplemental request for hearing with a cover letter which stated:

> "On behalf of claimant herein I request that the Request for Hearing on file in this matter be amended to include the issue of extent of permanent partial disability."

It should be noted that no Determination Order had yet been issued.

On July 28, 1981 the Board received a second supplemental request for hearing from claimant, which stated:

> "On behalf of claimant herein, I request that the Request for Hearing on file in this matter be amended to include the issue of temporary partial disability."

At this point, the July 23, 1981 Determination Order had issued.

On August 17, 1981 the Board received a third supplemental request for hearing from claimant, which stated:

> "On behalf of claimant herein, I request that the Request for Hearing on file herein be supplemented to include the following issues:
>
> "1) Unreasonable claim denial on SAIF's denial dated August 13, 1981 * * *

"2) Attorney fees."

Neither the initial request for hearing, nor any of the three supplemental requests for hearing made any reference to the July 23, 1981 Determination Order.

When the hearing convened on November 2, 1982 the parties agreed that the August 13, 1981 partial denial would not be an issue. SAIF then moved to dismiss claimant's request for hearing, at least in relation to any issue concerning extent of permanent partial disability, asserting that claimant failed to file a request for hearing in relation to the Determination Order in a timely manner.

The Referee found that claimant's initial request for hearing and the first supplemental request for hearing were filed prior to the issuance of the Determination Order and were, therefore, inadequate to confer jurisdiction over any issue with regard to that Determination Order. He additionally found that the second and third supplemental hearing requests were inadequate to raise the issue of extent of permanent disability based on Lucy (Froyer) Anderson, 34 Van Natta 1249 (1982), and Donald K. Shaw, 34 Van Natta 1260 (1982). The Referee thus concluded that he had no jurisdiction to consider a challenge of the Determination Order and dismissed claimant's request for hearing. With commendable foresight, however, the Referee nevertheless took evidence on the merits.

II.

Claimant contends that the Referee did have jurisdiction over the issue of permanent partial disability. He contends that the two post-Determination Order supplemental hearing requests served to "renew all issues raised prior to the Determination Order," and incorporated by reference the issues raised by the two pre-Determination Order hearing requests. Claimant seems to concede that the pre-Determination Order requests probably would have been premature under Syphers v. K-W Logging, Inc., 51 Or App 769 (1981), but argues that his premature hearing requests were renewed by the two post-Determination Order hearing requests. Claimant also would distinguish the Board's decisions in Anderson and Shaw.

SAIF argues that claimant's attorney was not even aware of the existence of the Determination Order at the time the two post-Determination Order supplemental hearing requests were filed, and that these two supplemental requests could not serve to give the premature requests later filing dates because "filing dates just do not jump around like that."

Both the claimant and SAIF present cogent arguments for their respective positions.

After the Referee's decision in this case, the Court of Appeals issued decisions in both Shaw and Anderson. The Board's decision in one was reversed. Shaw v. SAIF, 63 Or App 239 (1983). The Board's decision in the other was affirmed without opinion.

Anderson v. SAIF, 63 Or App 675 (1983). We are sure that the court's decisions in these cases are the most recent and most relevant precedents, but we are not sure about the exact meaning of the different results at the court level.

In Shaw, the chronology of events was as follows:

(1) July 14, 1980: Determination Order issued awarding claimant permanent partial disability.

(2) August 15, 1980: Second Determination Order issued rescinding first and reopening the claim.

(3) October 28, 1980: Third Determination Order issued closing claim and awarding the same permanent partial disability as the first.

(4) June 25, 1981: Claimant requested a hearing specifically objecting only to the first two Determination Orders. There was no mention of a third Determination Order and claimant's attorney was not aware of it until just prior to the January 1982 hearing.

The court in Shaw concluded that the Referee had jurisdiction to hear objections to the third Determination Order even though claimant did not request a hearing specifically in relation to that Determination Order and even though claimant's attorney was unaware of it until just prior to the hearing. The court said:

> "The third determination order provided the same permanent partial disability as the first one. There is no claim of surprise, which would have provided a basis for continuance. OAR 436-83-200. The issues are clearly raised by claimant's June, 1981, request for hearing * * *. Claimant's objections to the third determination order are the same as those to the first and second." 63 Or App at 243.

The court also stated that any jurisdictional defect was cured by ORS 656.012(2)(b) which provides that one of the objectives of the Workers' Compensation Law is to eliminate as much as possible the adversary nature of compensation proceedings.

The chronology of events in Anderson was as follows:

(1) April 2, 1980: SAIF issued a partial denial with regard to a claimed psychological condition.

(2) April 16, 1980: Determination Order issued awarding claimant no permanent disability for her accepted hand condition.

(3) May 6, 1980: Claimant filed request for hearing alleging extent of disability as the issue for determination.

(4) January 21, 1981: Claimant requested postponement of the hearing, again specifying only extent-of-disability issues.

(5) July 31, 1981: Claimant filed amended request for hearing protesting the April 2, 1980 partial denial.

In Anderson, the Referee and the Board concluded that we lacked jurisdiction over the partial denial issue because of the time limit stated in ORS 656.319(1). The claimant argued that her May 6, 1980 hearing request on the Determination Order was adequate as against the denial. We concluded that ORS 656.283(2) only related to the form by which a request for hearing may be made and did not have any effect on the time limits stated in ORS 656.319, and that OAR 436-83-200 only relates to specificity of issues and could have no effect on the statutory time limitations within which a hearing request on a denial may be filed. We additionally cited Shaw as authority for our decision in Anderson. Although the Court of Appeals reversed our decision in Shaw, it affirmed without opinion our decision in Anderson, despite the factual and analytical similarity of these two cases.

We are not sure that we understand the net effect of the court's decisions. It is possible to interpret the court's decision in Shaw as meaning that any hearing request filed within one year of the issuance of a Determination Order is jurisdictionally sufficient to raise any and all issues relating to the Determination Order. Cf. 63 Or App at 243, footnote 2: "If claimant's request for a hearing had made no reference at all to the first and second determination orders, it would clearly have been sufficient." It is not possible to interpret the court's decision in Anderson as meaning that any hearing request filed within 60 days of the issuance of a denial or partial denial is jurisdictionally sufficient to raise any and all issues relating to the denial because, although the claimant in Anderson did file a hearing request within 60 days of the partial denial, the court affirmed our finding of no jurisdiction. The court may have intended to impose stricter jurisdictional standards on requests for hearings on denials than on requests for hearings on Determination Orders.

This case is more similar to Shaw because supplemental requests for hearing on something were filed within one year after the Determination Order that claimant now seeks to challenge. We join claimant in the assumption that the two hearing requests that were filed even before that Determination Order was issued were premature and jurisdictionally insufficient under Syphers. The question is whether either or both of the supplemental hearing requests filed after the Determination Order was issued are jurisdictionally sufficient.

We conclude that claimant's second supplemental hearing request filed on July 28, 1981, after the July 23, 1981 Determination Order had been issued, is jurisdictionally sufficient. It set forth an issue (temporary partial disability) that can be relevant at a hearing on a Determination Order. (Admittedly, temporary partial disability issues also can arise and be litigated before a claim is closed.) The fact that claimant's attorney was apparently unaware of the existence of the Determination Order when he filed this supplemental hearing request is irrelevant under the court's decision in Shaw.

III.

As noted above, the Referee admitted all evidence offered on the extent-of-disability issues despite the fact that he concluded he had no jurisdiction over those issues. We conclude that it would serve no purpose to remand to the Referee to write an order when we have a complete evidentiary record before us. We proceed to the merits of the extent-of-disability issues.

We disagree with claimant's contention that he is entitled to additional temporary total disability beyond December 29, 1980. Claimant was given a full work release by his treating physician, Dr. Swanson, on December 29, 1980. There is no evidence in the record which contradicts Dr. Swanson's work release. Dr. Swanson apparently felt that claimant's need for physical therapy would not interfere with his ability to work. It is true that Dr. McLaughlin, who subsequently examined claimant on April 22, 1981, did not feel that claimant was then medically stationary. However, Dr. McLaughlin's examination took place after the disputed incident of April 2, 1981 in Washington, responsibility for which SAIF had denied. Dr. Swanson's chart notes of April 24 and May 8, 1981 indicate that claimant may have sustained a slight avulsion fleck as a result of that incident. Dr. Swanson eventually found claimant to be medically stationary once again on May 8, 1981. Thus, at most, claimant was not medically stationary between the April 2, 1981 incident and Dr. Swanson's May 8, 1981 report. This does not establish that claimant was unable to work the prior December when he was given a full work release. Moreover, responsibility for the April 2, 1981 incident has been denied, and any issue relevant to that denial was not before the Referee and is not before us. We, therefore, affirm the Determination Order's award of temporary total disability.

We also affirm with regard to the issue of the amount of permanent partial disability awarded by the Determination Order. Dr. Swanson's reports all indicate that claimant has a very minimal amount of permanent disability as a result of the September 1980 injury. He has a virtually complete range of motion and has only some slight discomfort. Claimant's testimony offered nothing which would significantly contradict Dr. Swanson's conclusions.

ORDER

The Referee's order dated December 7, 1982 which dismissed for lack of jurisdiction is reversed. On the merits, the July 23, 1981 Determination Order is affirmed.

STEPHEN R. GOODE, Claimant
Richardson, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-08264
September 15, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Galton's order which set aside: (1) Its partial denial of further chiropractic treatments and mileage expense; (2) its partial denial of claimant's aggravation claim; and (3) a Determination Order as premature. The employer contends the Referee erred in relying on the doctrine of res judicata in setting aside the denial of chiropractic treatment. It also contends that claimant failed to prove an aggravation and that the Determination Order was not premature.

Claimant has a compensable low back condition. In July 1982 a hearing was held before Referee Gemmell on the issue of whether claimant's low back condition had worsened since the last award of compensation. Intertwined with that issue was the question of whether the chiropractic treatments claimant then was receiving were compensable. On August 18, 1982 Referee Gemmell issued an order holding that claimant had suffered a compensable worsening. The order required the claim to be reopened and benefits paid until the claim was closed pursuant to a Determination Order.

On August 27, 1982 the employer issued a partial denial which rejected responsibility for further chiropractic treatments and related expenses after July 1, 1982. The employer stated that it was denying the treatment because they were not necessary or reasonable. This conclusion was apparently based on the July 6, 1982 report of Orthopaedic Consultants. At some unknown date the employer submitted claimant's claim for closure and a Determination Order was issued on September 20, 1982 granting temporary total disability compensation from March 1, 1982 through July 1, 1982. Claimant's treating physician, Dr. Kiest, reported to the employer on September 3, 1982 that claimant was having disc problems and that it was probable that claimant would require surgery. On September 29, 1982 Dr. Kiest reported that he had scheduled claimant for a laminectomy and removal of a probable herniated disc. The employer issued a partial denial on September 23, 1982 rejecting responsibility for aggravation, further time loss benefits and further medical treatment including surgery. These two denials are the basis for the present controversy.

The Referee found that the issue of entitlement to additional chiropractic treatment was controlled by the earlier August 18, 1982 order, issued by Referee Gemmell, under the doctrine of res judicata. In Million v. SAIF, 45 Or App 1097 (1980), the Court of Appeals stated:

> "Collateral estoppel applies 'only to material issues or determinative facts which were actually or necessarily adjudicated in the prior action.' Jones v. Flannigan, 270 Or 121, 124 (1974). Res judicata, on the other hand, applies not only to every claim included in the pleadings but also to every

> claim which could have been alleged under the same 'aggregate of operative facts which compose a single occasion for judicial relief.' Taylor v. Baker, 279 Or 139, 144 (1977); Dean v. Exotic Veneers Inc., 271 Or 188, 194 (1975)." 45 Or App at 1102.

In the present case, we believe the first hearing before Referee Gemmell resolved all questions concerning the worsening of claimant's condition and the compensability of chiropractic treatments through the date of the hearing. However, any further treatments or changes in claimant's condition were not and could not have been at issue in the first hearing because they had not occurred yet. Lewis Twist, 34 Van Natta 52, 34 Van Natta 290 (1982); Gary E. Freshner, 35 Van Natta 528 (1983). The Referee concluded that the employer should have requested that Referee Gemmell reconsider her order or should have raised the denial of further treatments on appeal to the Board. We disagree. The chiropractic treatments were not denied until after Referee Gemmell's order had been issued. The issue of later chiropractic treatments was not ripe at the time of Referee Gemmell's order because the claim for the treatments was not yet in a denied status. Hettie M. Eagle, 33 Van Natta 671 (1981); Syphers v. K-W Logging, Inc., 51 Or App (1981).

We, therefore, must examine the merits of the claim for the later chiropractic treatments. Claimant has been receiving chiropractic treatments for his back from Dr. Christensen since March of 1982. Dr. Gatterman examined claimant for the employer on May 3, 1982 and reported that claimant had responded well to Dr. Christensen's treatments and that claimant would benefit from continued, bimonthly palliative chiropractic care for six to eight weeks. On September 22, 1982 Dr. Gatterman reported that claimant's condition had improved and that further chiropractic treatments were not needed. Claimant and Dr. Christensen believe that the chiropractic treatments relieve claimant's pain symptoms and are beneficial. Dr. Kiest is of the opinion that claimant is still having significant symptomatology and that he probably will need surgery.

We believe claimant is experiencing pain in his back and that he believes the treatments given by Dr. Christensen have been beneficial. Claimant's treating chiropractor believes the treatments were necessary and there has not been any allegation that the treatments were excessive in their frequency. Thus, the employer is responsible for the palliative chiropractic treatments under ORS 656.245. Milbradt v. SAIF, 62 Or App 530 (1983); Marlene Strauser, 34 Van Natta 168 (1982).

On the issue of whether claimant has proven an aggravation, we find that he has. Our decision on this issue depends on whether we accept the testimony of Dr. Kiest, claimant's treating physician, or Dr. Raaf, a consulting physician. The Referee specifically found that Dr. Kiest was quite persuasive and that Dr. Raaf was not persuasive. On this record, we are unable to voice complete agreement with those findings. Both doctors are articulate in support of their respective positions. We defer to Dr. Kiest's position because he is the treating physician and we find no compelling reason not to. Lucine Schaffer, 33 Van Natta 511 (1981).

On the premature closure issue, we affirm the Referee because Dr. Kiest's chart notes indicate that claimant was not stationary at the time the Determination Order issued. Whether or not the Evaluation Division actually had possession of those notes is irrelevant to determining whether claimant was, in fact, medically stationary as the Determination Order stated. The question of whether the employer forwarded these chart notes to the Evaluation Division would only be relevant if penalties were in issue. They were not. The Referee erred in making a finding on this question and in commenting on the employer's conduct based on that finding.

ORDER

The Referee's order dated November 26, 1982 is affirmed. Claimant's attorney is awarded $400 for services on Board review, to be paid by the employer.

DOUGLAS E. THOMAS, Claimant
Myrick, Coulter, et al., Claimant's Attorneys
Frohnmayer, Deatherage, et al., Defense Attorneys

WCB 82-02498
September 15, 1983
Order Denying Motion to Dismiss and Admitting Appellant's Brief

The employer moves to dismiss claimant's request for Board review on the basis of claimant's alleged failure to timely file his appellant's brief with the Board. Claimant, at the same time, has moved that the Board accept the appellant's brief received by the Board two days after the date specified in the Board's briefing schedule.

On August 3, 1983, the Board mailed its 5012 form letter providing the parties with the transcript of the proceedings before the Referee and establishing the schedule for filing briefs on Board review. That form stated: "Appellant has twenty (20) days or until 8-23-83 to file a brief." Claimant's appellant's brief was received by the Board on August 25, 1983. On August 26, 1983, the Board received both claimant's motion and the employer's motion.

Claimant's motion alleges, by counsel's affidavit, that counsel received the transcript of the proceedings on August 4, 1983, and that on August 24, 1983, counsel mailed to the Board (apparently with a copy to employer's counsel) claimant's appellant's brief.

We previously have held and stated that failure to file an appellant's brief is not a basis for dismissal of a request for review, although briefs are a significant aid in the review process. Vicki Pine, 35 Van Natta 619 (1983), Pamela S. Bernhardt, 35 Van Natta 787 (1983). See also Olin Yoder, 35 Van Natta 607 (1983). Even if claimant had failed to file his appellant's brief at all, the employer's motion would not be granted. Claimant, in fact, has filed his appellant's brief, although not in technical compliance with the briefing schedule established by the Board. The question remains, therefore, whether the Board should accept claimant's appellant's brief.

OAR 436-83-720(3) provides:

> "The party requesting Board review shall file its brief with the Board within twenty (20) days after receipt of the transcript of the record from the Referee. Respondent shall file its brief within twenty (20) days after appellant's brief is served on respondent. Appellant shall file its reply brief within ten (10) days after being served with the respondent's brief. * * *"

OAR 436-83-700(2) provides that the requirement of ORS 656.289(3), that a party request Board review within thirty days of the date of a Referee's order, is satisfied upon mailing the request to the Board. We find that it is reasonable to interpret OAR 436-83-720(3), regarding timely filing of briefs, in accordance with the provisions governing the procedure for timely requesting Board review. OAR 436-83-700(2).

Based upon counsel's allegations concerning receipt of the transcript that was mailed under cover of the Board's August 3, 1983 briefing schedule, and the allegations concerning the date on which claimant's appellant's brief was mailed, which was exactly twenty days after receipt of the transcript, we find that claimant's appellant's brief was timely filed based upon the applicable administrative rules. The brief, however, was not filed in strict compliance with the briefing schedule established by the Board in that it was mailed two days after the date specified therein. Parties to a proceeding on Board review should attempt to comply with the briefing schedule established by the Board. Where, however, a party has failed to technically comply with the Board's briefing schedule, but nevertheless has complied with the applicable administrative rules governing the procedures on Board review, the administrative rules govern the parties' obligations and compliance with those rules is sufficient. Cf Fulgham v. SAIF, 63 Or App 731 (1983).

The foregoing should not be construed as a restriction upon the Board's discretion to accept and consider a brief which is not timely filed under the maximum limitations provided by the administrative rules. The Board has discretion to make exceptions in appropriate cases, where a party has established good cause for the failure to comply with the party's obligations. It is not, however, necessary to accept claimant's appellant's brief for reasons that are discretionary in nature, in view of claimant's compliance with the applicable administrative rules.

We deem it appropriate to adjust the briefing schedule herein in order to allow the employer twenty days from receipt of this order within which to file its respondent's brief.

ORDER

The employer's motion to dismiss claimant's request for review is denied. Claimant's appellant's brief is accepted and will be considered by the Board as part of its review. The employer is

allowed twenty (20) days from receipt of this order within which to file its respondent's brief. The Board will accept a reply brief from claimant if received within ten (10) days of the employer's respondent's brief. Thereafter, this case will be docketed for Board review.

DOUGLAS CHIAPUZIO, Claimant
Samuel Hall, Jr., Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 80-01301
September 16, 1983
Order on Remand

On review of the Board's Order dated September 28, 1982, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated April 26, 1982.

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

IT IS SO ORDERED.

WILLIAM JAMESON, Claimant
Allan Coons, Claimant's Attorney
Darrell Bewley, Defense Attorney

WCB 81-01724
September 16, 1983
Order on Remand

On review of the Board's Order dated October 29, 1982, the Court of Appeals reversed the Board's Order and reinstated the Order of the Referee dated November 27, 1981.

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

IT IS SO ORDERED.

ELMER J. CUMMINGS, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-05612
September 19, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Quillinan's order finding that the claim was not prematurely closed. Premature closure is the only issue on review.

The Board affirms and adopts the order of the Referee with the following comment. The Referee in essence affirmed the Determination Order which found claimant medically stationary on May 6, 1982. However, she said she found claimant medically stationary on June 3, 1982, the date the Determination Order issued. Based on our review of the evidence, we think that the claimant was medically stationary on May 6, 1982 as found in the Determination Order.

ORDER

The Referee's order dated March 10, 1983 is modified. The Determination Order of June 3, 1982 which determined that claimant was medically stationary on May 6, 1982 is specifically affirmed. Those portions of the Referee's order concerning extent of disability are affirmed.

EDUARDO YBARRA, Claimant
Doblie & Francesconi, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-02081
September 19, 1983
Order Reinstating Proceedings on Board Review

On July 20, 1983 the Board entered an Order of Dismissal, dismissing claimant's request for review based upon his withdrawal of that request. Thereafter claimant gave some indication that, in fact, he was desirous of having the Referee's order reviewed; therefore, the Board abated its prior Order of Dismissal on August 11, 1983. It now is clear that claimant withdrew his request for review based upon a misunderstanding of the procedural consequences of that action, and that claimant believes he is aggrieved by the Referee's order. The employer/insurer has indicated no opposition to reinstatement of the proceedings on Board review.

Accordingly, the Board's Order of Dismissal entered herein on July 20, 1983, hereby is withdrawn and these proceedings are reinstated. The transcript of the proceedings before the Referee will be ordered and a briefing scheduled will be established in due course.

IT IS SO ORDERED.

LaJUAN D. ALLEN, Claimant
Grant, et al., Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 82-02652
September 20, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Brown's order which awarded 112° for 35% unscheduled permanent partial disability in addition to the 64° for 20% unscheduled disability granted by a Determination Order dated March 16, 1982. Cumulatively claimant has received a total award of 90% unscheduled disability. The Referee's order also assessed a penalty and attorney's fee against the insurer. On review claimant raises as issues extent of disability and the amount of the penalty. Claimant contends he is permanently and totally disabled.

Claimant is a 52 year old man with a long history of low back and psychological problems. The first injury in this record was in January 1968 when claimant injured his low back while pulling green chain in California. The injury apparently was accepted under the California Workers' Compensation system. There is no indication in this record what sort of disability award claimant received because of that injury. A partial bilateral discectomy was performed in October 1968. In July 1969 claimant presented Dr. Forcade of San Francisco with a list of 29 complaints which were then bothering him. Dr. Forcade opined:

> "It is very obvious that this man is either extremely hypochondriacal or is voicing all of the complaints for monetary gain."

Claimant moved to Oregon. On March 6, 1974 he again compensably injured his low back while lifting a bar of steel while doing steel fabrication work. In June 1974 he received a bilevel spinal fusion at L5-6 and L6-S1. (Claimant is somewhat unusual in that he possesses six lumbar vertebrae, as opposed to the usual five.) He continued having intermittent sharp pains in his back following that operation. In April 1975 Dr. Halferty of the Disability Prevention Division, which was then under the Workers' Compensation Board, opined that claimant had at least a moderate functional overlay.

At Dr. Halferty's request claimant was referred to Drs. Hickman and Fleming for psychological evaluation. They opined:

> "There is evidence that this client is experiencing a moderately severe psychological reaction with major emphasis on his somatic complaints....
>
> "This moderately severe psychopathology is largely attributable to the alleged injury."

It was felt that claimant was highly motivated and the prospects for returning him to work were good.

In June 1975 a Determination Order awarded claimant 25% unscheduled permanent disability. In August 1975 claimant underwent another laminectomy. Following the operation claimant lost a great deal of blood due to hemorrhaging. Five days after the surgery claimant began hallucinating. He experienced what was later described as a psychotic episode. His physicians then had him examined by Dr. Robert Luther, who became his treating psychiatrist. Dr. Luther's first report of record is dated October 3, 1975. He opined at that time:

> "The final diagnosis was psychosis of undetermined etiology, but most likely secondary to organic and functional causes surrounding the two surgeries."

Claimant was operated on again in December 1975 for excision of pseudoarthrosis at L4-5 and for a spinal fusion at L4 through S2. Dr. Luther released claimant for the surgery somewhat reluctantly.

> "He is, as you know, a man of marginal psychological strength, but should not be denied orthopedic surgery on the basis of his psychopathology."

Following the surgery claimant continued to complain of subjective pain and numbness in his left leg. Range of motion findings were limited. In December 1976 his orthopedist, Dr. Weinman, evaluated him for claim closure. He opined:

> "According to the Oregon rating, he has moderately severe loss of function to the

> injured part and would be limited to more sedentary work and to a job which would allow him to stand or sit at will. Apportioning it according to his problem prior to his March, 1974 injury, in my opinion, would split the impairment 50-50 with what he had before the last injury. My recommendations are for rehabilitation to some kind of an occupation which doesn't involve the requirement of standing for long periods of time, sitting for long periods of time, repeated bending, lifting or stooping or twisting the back. The sooner the vocational rehabilitation can be accomplished, his claim closed and the economic status known, the better for then he can form goals of what he wants to do for the rest of his life which should help his physical and psychological status."

A Determination Order issued February 19, 1977 awarding claimant an additional 10% unscheduled award for low back disability.

On February 28, 1977 Dr. Luther reported:

> "I have again, over the past four months, seen Mr. Allen who has decompensated into a depressive-like picture which includes some elements of what looks like organic loss, including memory deficit and confusion, and which also includes some paranoid and other ideation....
>
> "I feel that what we are seeing at this time is related to the severe decompensation, post-operatively, which Mr. Allen presented in August of 1975."

Dr. Luther's reports continue in a negative vein throughout the record. He consistently describes claimant as suffering from a "severe psychotic depression." In 1977 Dr. Luther terminated claimant from a vocational rehabilitation program because he felt claimant was not well enough to participate. In January 1978 Dr. Luther reported:

> "He continues to be quite dependent on his wife and spends a good deal of time sitting in the house looking out the window. He periodically shows additional interest in things and ambition to do them, but has not sustained this for any significant period of time."

In June 1978 claimant was evaluated by Dr. Arlen Quan, a psychiatrist. Dr. Quan opined that claimant is suffering from "depressive neurosis, chronic, mild to moderate." He noted, however, that because claimant was taking anti-psychotic medication "it is hard to tell whether his condition is not a more severe one, that is, of psychotic proportions and under partial control."

In July 1979 claimant was sent to the Callahan Center at Dr. Luther's suggestion. The psychologist at the Callahan Center evaluated claimant and observed:

> "Patients showing this test pattern most frequently carry a diagnosis of psychoneurotic neurosis, obsessive compulsive reaction or anxiety reaction in a basically schizoid personality.
>
> "Mr. Allen conveys the impression of being optimistic about the program....He will likely require considerable support in view of the fact that he is still vulnerable to regressive reactions to stress. In all likelihood, Mr. Allen will continue to need psychiatric support for an extended period of time if he is to progress back into the work world."

At the end of the four and one half week program claimant reported that he felt moderate improvement and less depression. However, the closing evaluation notes that claimant appeared more depressed than usual at the time he left the center.

In November 1979 claimant enrolled in a vocational rehabilitation program for training as a Job Service Representative. In April 1980 he was terminated from the program because he felt unable to continue with the program. Dr. Luther verified this inability. Dr. Luther reported to the vocational rehabilitation counselor that claimant would have some depression indefinitely and would probably need a sheltered type job rather than one in the regular market place.

In a report to the insurer dated May 21, 1980 Dr. Luther noted that claimant continued to have significant depression which varied from month to month. The depression was at its best following the Callahan program because claimant felt some sense of accomplishment. Dr. Luther then said:

> "He and his wife continue to consider additional ways of earning a living, but up to now it has been difficult due to the degree of his depression to find something he can do.
>
> "He continues on Sinequan, approximately 100 mg. per day, and Stelazine 5 mg. per day. It would appear that he will continue to have this depression indefinitely, but perhaps it would lessen somewhat to the point where he could do some kind of minimal work."

Claimant and his wife entered a motel management school in mid-1980 and successfully completed it in November 1980. Claimant has never obtained a motel management job.

Dr. Luther rated claimant's psychological impairment for the insurer in August 1981:

> "His psychotic depression is somewhat improved from two years ago, but he continues to be very subject to stress and continues to be very dependent on his wife.
>
> * * *
>
> "Using the AMA guides to disability, I would say that Mr. Allen fits somewhere into the Class II Impairment of the Whole Man, somewhere in the order of 30-40 percent as his depression has lasted many years and has created a loss of interest in his activities, psychomotor retardation, but he is able to take care of personal hygiene and other self-care activities."

In November 1981 Dr. Luther wrote the Rehabilitation specialist concerning claimant's ability to do motel management.

> "As you know, Mr. Allen continues to show symptomatology of his depression, and it is my view that the hope of running a motel is very dependent on having Mr. and Mrs. Allen function as a team in that his day-to-day functioning is not real consistent, and at times Mrs. Allen will have to fill in for her husband."

In January 1982 Southern Oregon Medical Consultants evaluated claimant's physical status. They opined:

> "It is very doubtful that this individual will return to regular work. We recommend that he continue with psychiatric care. With regard to his ability to stand, walk, sit and drive an auto, in an eight hour day the patient could do a cumulative of two hours of each of the four categories."

They felt claimant could occasionally lift twenty pounds, frequently lift ten pounds and continuously lift five pounds. He could bend and squat occasionally but could not climb. He can use his arms and hands, but cannot use his feet for repetitive movements.

A March 16, 1982 a Determination Order granted claimant an additional 20% unscheduled disability award, for a total award of 55%. Claimant appealed the Determination Order.

Dr. Luther testified at the hearing. He testified that claimant has a permanent psychotic depression. He said claimant is capable of intermittent work on an unpredictable schedule. He feels claimant needs a sheltered type job where he can be supervised because his judgment, energy level and concentration are adversely affected by his depression.

The Referee gave little weight to Dr. Luther's opinions.

> "He has apparently not considered that claimant was able to maintain sustained activity hours per day for four plus weeks while at the Callahan Center. He has not considered the fact that claimant has successfully completed an on-the-job training program in motel management....
>
> "The Callahan Center personnel observed claimant in all of the phases of his disability, extensively over a four week period. I am inclined to give that series of reports more recognition than Dr. Luther's testimony, vis-a-vis Mr. Allen's working capacity.
>
> "Based on these reports, I believe that it is probable that Mr. Allen is employable in the competitive labor market. He is severely limited in the physical things that he can do. He is further limited because his depression further limits him from working in stressful situations."

We disagree with the Referee's characterization of Dr. Luther's opinions and his understanding of the Callahan Center reports.

Dr. Luther was fully aware of the Callahan Center stay. He initially suggested that claimant be sent to the Center. He also said that claimant's psychological condition was at its best following that experience.

Dr. Luther was also aware of the motel management attempt. He actually encouraged claimant to attempt to learn to manage motels. It is clear that he thought claimant could manage a motel with assistance from his wife.

The Callahan Center reports do not call into question Dr. Luther's conclusions. They note that claimant was able to sustain activity four hours per day during his stay and that at the end of the stay he reported improvement in his depression. The Center staff merely recommended an attempt at retraining and continued psychiatric care.

Although Dr. Luther's conclusions are uncontroverted, they do not support an award for permanent total disability. He believes that claimant is able to do work in a sheltered situation such as motel management with claimant's wife. Thus, it is apparent that Dr. Luther does not believe that claimant is precluded by his psychological disability from "regularly performing work at a gainful and suitable occupation." ORS 656.206(1). He believes claimant could do motel work and that it would be beneficial for him to do so.

Likewise, claimant is not precluded from working by his physical problems. Southern Oregon Medical Consultants place claimant's physical capacity in the light work category. Thus, he is physically capable of doing motel management work.

Even though we disagree with the Referee's characterization of Dr. Luther's reports, we agree with his finding that claimant is not permanently and totally disabled. Considering the entire record and comparing this case with other similar cases, we conclude that the Referee's award of 90% unscheduled disability is appropriate.

We also affirm and adopt that portion of the Referee's order imposing a penalty and associated attorney's fee.

ORDER

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

KENNETH T. LEIGH, Claimant
Hansen & Wobbrock, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-02469
September 20, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Knapp's orders which affirmed a Determination Order dated January 26, 1982, which awarded no compensation for unscheduled permanent disability. Extent of permanent disability is the only issue.

Claimant is a 52 year old man who has worked as a sheetrocker for the past 25 years. He compensably injured his low back in November 1978. He received an award for 25% unscheduled permanent disability by Determination Order in 1979. The medical evidence indicates that he presently is precluded from returning to his regular work.

After taking into consideration the guidelines found at OAR 436-65-500, et seq, and comparing this case to other similar cases, we conclude that claimant would be more appropriately compensated for his compensable injury by an award for 35% unscheduled disability.

ORDER

The Referee's orders dated January 5, 1983 and February 15, 1983 are reversed. Claimant is awarded an additional 32° for 10% unscheduled permanent partial disability for injury to his low back. Claimant's total unscheduled permanent disability award to date is 112° for 35% of the maximum allowable. Claimant's attorney is allowed an attorney's fee of 25% of this additional compensation, not to exceed $3,000, for services before the Referee and the Board.

WANDA J. LINGO, Claimant
Callahan, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-05958 & 81-10925
September 20, 1983
Order on Further Reconsideration

Claimant's attorney has requested reconsideration of the Board's August 25, 1983 Order on Reconsideration insofar as that order fails to award counsel a reasonable attorney's fee for services rendered before the Board on the employer's request for

reconsideration, which included appearing personally before the Board for the purpose of presenting oral argument pursuant to the employer's request. On reconsideration of our Order on Review, we adhered to our determination concerning the compensability of claimant's hiatal hernia. We, therefore, find it appropriate to award claimant's attorney a supplemental fee for services rendered before the Board in connection with the employer's request for reconsideration.

ORDER

The Board's Order on Reconsideration dated August 25, 1983 is modified to award claimant's attorney a supplemental attorney's fee in the amount of $350, to be paid by the self-insured employer. Except as modified, the Board adheres to its prior order, which hereby is reaffirmed and republished.

ROY G. McCONNELL, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Lindsay, Hart, et al., Defense Attorneys

WCB 82-04764
September 20, 1983
Order Denying Dismissal

The Board has received claimant's motion to dismiss the employer/insurer's request for review on the grounds it was not timely filed.

The request for review was postmarked on the 29th day of the appeal period; therefore, the request for dismissal is hereby denied.

IT IS SO ORDERED.

SILAS BRASMER, Claimant
Doblie, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-04199
September 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Menashe's order which awarded claimant compensation for permanent total disability. SAIF contends that the Referee erred in finding claimant permanently and totally disabled. Claimant has cross-requested review of the Referee's order contending that the Referee erred in finding claimant permanently and totally disabled as of the date of the hearing. Claimant argues that the appropriate date for permanent total disability status is August 17, 1981, the date on which his vocational file was closed.

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

The Referee found that although claimant's physical impairment was substantial, the weight of the medical evidence established that claimant "probably retains the physical ability to perform some work," and although claimant could probably not return to any of his previous jobs, he was not totally incapacitated from a physical standpoint alone. We agree with that conclusion.

Since the Referee concluded that claimant was not permanently and totally disabled from a physical standpoint alone, he then considered whether claimant's physical condition, when combined with the relevant social/vocational factors as noted in Wilson v. Weyerhaeuser, 30 Or App 403 (1977), resulted in a finding of permanent total disability. The Referee concluded that when all of these factors were combined, there did appear to be a "narrow area of the labor market available to the claimant." We agree with this conclusion also.

Having concluded that claimant was not permanently and totally disabled from a physical standpoint, and having similarly concluded that claimant was not permanently and totally disabled when social/vocational considerations were factored in, the Referee then stated that the case boiled down to a question of whether claimant made reasonable efforts to seek work in the area of the labor market remaining open to him. We agree with this also, for such failed efforts provide a form of "acid test" in deciding borderline permanent total disability cases. See Dock Perkins, 31 Van Natta 190 (1981). Having gone this far, however, the Referee then concluded (as we understand his order) that although claimant made minimal efforts in this direction, they were nevertheless reasonable under the circumstances, as claimant suffered from an "emotional condition." Finding that claimant suffers from an "emotional condition," the Referee went on to conclude that claimant's lack of motivation is not attitudinal in nature, but rather is influenced by "an injury-related psychological condition." It is that conclusion with which we disagree.

As the Referee noted, although claimant does have a material disability, he is not permanently and totally disabled from a physical standpoint alone. The Orthopaedic Consultants concluded that from a physical standpoint claimant is capable of light and sedentary work activities. The physicians at the Northwest Pain Center reached a similar conclusion after claimant completed the Pain Center program. Even Dr. Schwartz appears to agree with that conclusion in his deposition. When questioned, however, Dr. Schwartz admitted that he was considering claimant's age, past job experience, etc., when opining that claimant was permanently and totally disabled. As we noted in Keith K. Evans, 34 Van Natta 1035 (1982), aff'd without opinion, 63 Or App 255 (1983), when a physician renders an opinion based more on social/vocational factors than medical considerations, we will decline to substitute his judgment in such matters for our own.

From a social/vocational standpoint, claimant does appear to have fewer favorable factors than would be desirable. The main obstacle in this area appears to be claimant's sixth grade education. Additionally, claimant's past work experience appears generally to have been limited to medium and heavy work. Claimant's age (52), while somewhat of a negative factor, is not so unfavorable that we feel it would be a useless gesture for him to attempt to return to work. Despite the fact that the majority of claimant's past work experience has been in the medium and heavy catagories, it does appear that claimant possesses some skills which would be transferable to employment within his physical

restrictions. Richard King, a rehabilition counselor, was particularly enthused about the possibilities of claimant securing employment in automobile parts sales. Mr. King felt that claimant's past job experience in this general area would be an exceptionally positive factor in claimant's favor, and that his sixth grade education was not necessarily a negative factor, as claimant had at least average intelligence and had demonstrated abilities in this area. Although Dr. Colistro expressed his opinion that claimant would not be able to engage in such work, we believe that Mr. King is better qualified to render a vocational opinion than Dr. Colistro.

Turning our attention to ORS 656.206(3), we cannot agree with the Referee that claimant has established that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. We find that there is a good deal of evidence in the record which casts doubt on claimant's motivation to return to work. Although he was perceived to be fairly well motivated from a vocational standpoint when he entered the Pain Center program, it appears that that conclusion was increasingly called into question as claimant progressed in the program. On July 29, 1981 Dr. Cramer reported: "I suspect that he has the capacity to make a satisfactory adaptation to work, although at the present time this is not of very high priority."

Dr. Painter indicated in his July 29, 1981 report that claimant had attempted to operate his own small engine repair business but that he experienced an exacerbation of back pain when he tried to lift lawn mowers out of automobile trunks. Progress notes from Field Services Division dated November 21, 1980 indicate that claimant was referred for an interview to Larry's Shoe Repair, but that after looking over the facilities claimant decided he could not stand for eight hours a day. Other than applying for a security guard position, claimant has made no additional efforts to obtain employment. Claimant, in fact, testified at the hearing that he did not consider himself totally disabled, and that he would never know if there was work he could perform unless he tried.

On December 4, 1981 Dr. Ball, a psychiatrist, examined claimant. Dr. Ball described a typical day in claimant's life as follows:

> ". . . he usually gets up fairly early in the morning, around 5:30 or 6:00, will drink some coffee, will take care of the tasks of daily living. He will drive downtown and maybe walk a block or so, then he will have a cup of coffee there. He will come back home around 10:00 A.M., cook himself some breakfast, read the paper, and rest, then he will go downtown again and apparently meet some local cronies that he likes to kibitz with. He also claims he likes to 'kid the waitresses.' In the afternoon he may go back home. He may also go to a home where there are several elderly people residing and visit with them during the

> afternoon. When the weather has been good at times he might try his luck at fishing. In the evenings he will either stay home, watch a little television, read, occasionally go to a restaurant, and he readily admits at times he might just go and 'get tanked.'"

Dr. Ball diagnosed claimant as having a long history of a standing personality disorder and problems of an impulse control disorder. He noted that claimant appeared to be somewhat depressed but concluded that the depression was situational rather than injury-related. Dr. Ball also stated:

> "Silas Brasmer was referred for vocational rehabilitation assistance following his consultation at Orthopaedic Consultants in 1978. Efforts to assist him to be employable were non-successful and this examiner questioned his motivation at that time. It appears then that secondary gain factors most likely play a paramount role in his case."

Dr. Schwartz reported on June 3, 1982 that he was in complete agreement with Dr. Ball.

Claimant also was examined by Dr. Colistro, a psychologist, on February 1, 1982. As did Dr. Ball, Dr. Colistro diagnosed claimant as suffering from depression, but stated that it was a depression reaction "arising from an eroded level of self-esteem secondary to the residual pain and physical limitations caused by his injury." Dr. Colistro rather surprisingly concluded that claimant did not suffer from any personality disorder.

Whether Dr. Ball is correct in concluding that claimant's depression is not injury related, or Dr. Colistro is correct in concluding that it is injury related, we do not find the fact that claimant may be somewhat depressed necessarily excuses him from the requirements of ORS 656.206(3). It would seem that if Dr. Colistro is correct in his opinion that claimant is depressed because of his loss of self-esteem that came with the loss of his job, securing employment would be the best medicine for claimant's depression. Neither Dr. Ball nor Dr. Colistro indicate that claimant's depression would prevent or interfere with efforts to obtain employment. We, therefore, cannot agree with the Referee's conclusion claimant's depression excuses him from making a reasonable effort to obtain employment within his physical capabilities. Claimant is not so disabled that it would be futile for him to seek employment; and considering the efforts that claimant has made in this regard, we do not find it to have been a reasonable effort, in light of the medical evidence and relevant social/vocational factors.

We have concluded, as did the Referee, that claimant is not permanently and totally disabled from a physical standpoint, nor is he permanently and totally disabled when social/vocational factors are considered. We also have concluded that claimant has made less than reasonable efforts pursuant to ORS 656.206(3). The question

then remains, what is the appropriate extent of claimant's disability? We conclude that in view of claimant's material physical impairment and his somewhat less than favorable social/vocational factors, an award of 75% unscheduled permanent partial disability more accurately represents the extent of claimant's disability.

Since we have concluded that claimant is not permanently and totally disabled, it is not necessary to address the question raised by claimant's cross-request for review.

ORDER

The Referee's order dated December 29, 1982 is modified. Claimant is awarded 240° for 75% unscheduled permanent partial disability, that being an increase of 80° or 25% over and above the November 26, 1980 Determination Order. Claimant's attorney's fee should be adjusted accordingly.

ROBERT C. BUTSON, Claimant
Welch, et al., Claimant's Attorneys
Keith Skelton, Defense Attorney

WCB 82-04034
September 22, 1983
Order on Review

Reviewed by Board Members Ferris and Barnes.

Liberty Mutual Insurance Company, as the former insurer of Champion Building Products, requests review of that portion of Referee Wilson's order which found that Liberty Mutual was precluded by res judicata reasoning from denying coverage of claimant's carpal tunnel syndrome claim.

Liberty Mutual provided workers compensation insurance for Champion Building Products until October 1979. Before its coverage ended, claimant sustained a compensable injury which Liberty Mutual accepted and processed. In the course of processing that injury claim, at some point and in some way claimant asserted that he also had work-related carpal tunnel syndrome. This led to Liberty Mutual's December 4, 1980 denial, which stated in part: "Because this [carpal tunnel syndrome] is classified as an occupational disease, rather than an occupational injury, I refer you [to] the present insurance carrier for Champion Building Products." This denial was the subject of a prior proceeding, WCB Case No. 80-11184. Although the above-quoted language from the denial could be read as raising an issue of whether Liberty Mutual's coverage ended before claimant's carpal tunnel condition became disabling, the Referee's order in that prior proceeding does not discuss the issue of coverage. The Referee's order in that proceeding nevertheless set aside Liberty Mutual's December 4, 1980 denial of claimant's carpal tunnel syndrome condition. The Referee found "that some symptoms of claimant's carpal tunnel syndrome began to appear in early 1980," i.e., after Liberty Mutual's coverage had ended in October 1979. Despite the rather glaring conflict between finding a disease was first symptomatic in 1980 and remanding that disease to an industrial insurer that ceased providing coverage in 1979, neither Liberty Mutual's motion for the Referee to reconsider nor its request for Board review specifically raised any issue about its coverage. (The Board affirmed and adopted the Referee's order.)

Liberty Mutual then, on April 13, 1982, issued the denial in issue in this proceeding. This April 1982 denial states: "We were not the insurance carrier for Champion Building Products at the time you began having difficulty with the carpal tunnel syndrome." In this case, the Referee concluded that Liberty Mutual's April 1982 denial was invalid because the issue of coverage was or could have been raised in the prior proceeding.

We agree. From the above-quoted wording of Liberty Mutual's December 1980 denial that gave rise to the prior proceeding, interpreted in context, it would appear that coverage was an issue in the prior proceeding. Perhaps the Referee and the Board erred in that proceeding in not recognizing the coverage issue, but res judicata precludes relitigation of both correct and incorrect decisions. Alternatively, we think it is even more clear that the coverage issue could have been litigated in WCB Case No. 80-11184, and res judicata precludes relitigation of both issues that were raised and issues that could have been raised. It is understandable that the coverage issue may have gotten "lost" in WCB Case No. 80-11184 because that case also involved numerous other issues; but this does not change the fact that the coverage issue could have been raised in that prior proceeding.

ORDER

The Referee's orders dated December 1, 1982 and December 22, 1982 are affirmed. Claimant's attorney is awarded $300 as a reasonable attorney's fee for services rendered on Board review, to be paid by Liberty Mutual Insurance Company.

MALISA A. CORRIEA, Claimant
Bischoff, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-11243
September 22, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Brown's order which overturned its denial of claimant's occupational disease claim for psychological problems and headaches allegedly caused by the beeping of cash registers in the employer's supermarket.

We reverse the Referee because we find claimant did not timely file a request for hearing pursuant to ORS 656.319(1). The employer denied claimant's occupational disease claim on July 20, 1981. Claimant did not request a hearing to protest that denial until December 14, 1981. Her request was thus filed after the 60th day but before the 180th day. In order for her request for hearing to be timely, claimant must establish good cause for not filing by the 60th day.

The only reason for the late filing which claimant offers is that the employer did not send her attorney a copy of the denial even though it knew she was represented by an attorney. The Board has held that the employer is under no obligation to send a copy of the denial to a claimant's attorney. Evelyn LaBella, 30 Van Natta 738 (1981). In LaBella we said:

> "The essence of 'good cause' is some cogent and reasonable explanation for the inaction of not requesting a hearing within the 60 days allowed. Claimant's assumption that her attorney received a copy of Safeway's denial letter was neither cogent nor reasonable.... Moreover, even if claimant's attorney had received a copy of Safeway's denial, it was not reasonable for claimant to assume he would request a hearing in the absence of standing instructions or subsequent instructions from her to do so." 30 Van Natta at 742.

We find that claimant has failed to establish good cause in this case.

Even if claimant had filed her request for hearing in a timely fashion, we find that she has failed to prove by a preponderance of the evidence that her occupational exposure was the major contributing cause of her psychological problems and headaches.

ORDER

The Referee's order dated January 24, 1983 is reversed. The employer's denial of July 20, 1981 is reinstated and affirmed.

BETTY L. COUNTS, Claimant
Bischoff & Strooband, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-01199
September 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Nichols' order sustaining the SAIF Corporation's denial of compensation for her February 25, 1981 injury. SAIF cross-requests review on the issue of whether the claim was timely filed. The timeliness of the claim and compensability are the only issues on review.

Claimant alleges that she experienced a sudden onset of back pain as she was lifting a patient at the nursing home where she worked on February 25, 1981. Claimant sought medical treatment for the pain on March 4, 1981. However, claimant apparently did not file a claim for the injury until September 1981. Although claimant did not file the claim within thirty days of the injury as required by ORS 656.265, we agree with the Referee that the late filing is excused because the employer failed to show that it was prejudiced by the late filing. In fact, the record indicates that the employer's memory of the events surrounding the incident was quite good. Accordingly, we affirm the Referee on the question of whether the claim is barred for late filing.

On the merits the Referee sustained the employer's denial because claimant had failed to prove that her underlying spondylolisthesis was worsened by the on-the-job incident. As we recently noted, the messages from the court have been confusing on the

question of whether the Weller v. Union Carbide, 288 Or 27 (1979), requirement that claimant prove a worsening of the underlying condition applies to injury cases as well as occupational disease cases. Paul Scott, 35 Van Natta 1215 (August 19, 1983). In Scott, we declined to apply the Weller requirement to injury cases on the authority of Boise Cascade v. Wattenbarger, 63 Or App 447 (1983), and Jameson v. SAIF, 63 Or App 553 (1983). Until we get further guidance from the courts, we will continue to decline to apply the Weller requirement to injury cases.

Claimant's physician, Dr. Adams, states unequivocally that claimant's increase in pain was caused by her injury of February 25, 1981. Accordingly, we find treatment for that pain and any time loss occasioned by that pain compensable. We wish to make it clear that we are not saying that SAIF is responsible for claimant's underlying disease. It is only responsible for symptoms caused by the industrial injury.

ORDER

The Referee's order dated November 5, 1982 is reversed. The claim is ordered accepted and is remanded to SAIF for processing. Claimant's attorney is awarded $1,000 for services at hearing and before the Board, to be paid by the SAIF Corporation.

BILL RAY FERGUSON, Claimant
Franklin, et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 81-01210
September 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Braverman's order which held: (1) That claimant's psychological condition is not compensable and, therefore, refused to consider it in rating his disability; (2) that the claim was not prematurely closed; and (3) that claimant is entitled to an additional 45% disability for a total of 60% disability for his low back condition. The issues on review are whether claimant's psychological condition is compensable, whether the claim was prematurely closed and the extent of claimant's disability, including permanent total disability.

FACTS

Claimant is a 43 year old former supervisor in a frozen food plant. He was compensably injured in October 1977 when he was attempting to move a 500 pound barrel which began to slip. He caught the barrel but wrenched his back in the process.

Claimant initially received only conservative treatment from a chiropractor which was unsuccessful in alleviating his back pain. He soon began seeing Dr. Michael Gillespie, who noted severe low back pain and opined that claimant had suffered a low back strain. Dr. Gillespie was the first of over twenty-five doctors claimant has seen for his back condition. He has also seen several psychol ogists since his injury.

From the outset the medical reports noted that claimant

appeared to be a very nervous person. The early reports also indicate a consensus by the medical profession that there was an element of functional overlay to claimant's subjective pain symptoms. Nevertheless, claimant continued to see various physicians in search of a cure for his low back pain. In January 1978 he convinced a doctor to do a myelogram. The myelogram revealed a large extradural defect at L4-5. Within 48 hours after the myelogram claimant was admitted to the emergency room of the local hospital with severe chest pains. A cardiac infarction was suspected, but after testing no cardiac involvement was discovered. The discharge summary notes that the chest pains were relieved by a placebo. It was suspected that the chest pains were related either to his back problems or were the result of an esophageal spasm.

During this period of time claimant developed an anal fissure which Dr. Zawatsky linked with the industrial injury. Dr. Zawatsky felt that the amount of codeine claimant had been taking for his pain had caused him to be constipated. This in turn led to the anal fissure.

In February 1978 claimant was seen by a psychiatrist, Dr. Roberts, who said he strongly suspected that claimant was malingering. He felt that claimant was experiencing emotional and financial secondary gain from his disability. However, his conclusion is weakened by the fact that in the three months between the industrial injury and this report claimant had worked 10 weeks and had been on temporary total disability only six weeks. Another report indicates that claimant and Dr. Roberts did not seem to get along.

In April 1978 Dr. Corbett evaluated claimant for possible back surgery. Dr. Corbett noted that subsequent to the myelogram, claimant had developed a severe case of nervousness. Dr. Corbett opined that the defect noted in the earlier myelogram was responsible for claimant's radiating leg pain. He felt that claimant's extreme anxiety and his fear of surgery accounted for the balance of claimant's pain symptoms. He felt, however, that claimant's family situation was also a contributing factor. He recommended surgery.

On April 24, 1978 Dr. Dumke performed a lumbar discectomy at L4-5. Immediately following the surgery claimant noted that some of the pain was alleviated, but he also began experiencing new pains including pain which radiated down his hips from his tailbone and upper back and chest pain. Dr. Dumke suspected functional overlay.

In June 1978 claimant was evaluated at the Northwest Pain Center by Dr. Seres and his staff. The consensus at the Pain Center was that claimant suffered from moderate to severe depression, psychophysiologic muscloskeletal disorder, chronic low back pain, passive aggressive personality, chronic marital and family problems, and that his economic security rested on continued disability. The pain center psychologists felt that claimant had fair motivation for pain rehabilitation, retraining and return to employment. They noted that claimant used pain killing drugs quite heavily and recommended that these be discontinued.

In August 1978 claimant was released to part time work at his previous job. He apparently worked part time from August 1978 until January 1979. He was on temporary total disability for the entire years of 1979 and 1980. During this period of time he continued to see doctors throughout the Northwest in a vain attempt to find someone who would cure his chronic pain.

In October 1979 Dr. Dortzbach, a clinical psychologist who saw claimant at the request of an orthopedic surgeon, opined that claimant suffered from a severe level of hypochondriasis. However, in December 1978 Dr. Gunn, an orthopedic surgeon, opined that claimant was genuinely in pain.

In May 1978 Dr. Vernon Shafer, a psychologist, reported that he was seeing claimant to help him face the reality of his physical situation.

In September 1979 a second myelogram was performed on claimant. The physician who initially read the myelogram, Dr. O'Brien, found some small defects at L3-4 and L4-5.

In November 1979 two orthopedic surgeons from Seattle, Drs. Lauren and Aberle, opined that claimant needed further surgery as the defect at L4-5 which appeared in both myelograms indicated that the first operation had failed to cure the problems. Apparently they felt that the wrong side of the L4-5 interspace had been operated on earlier.

This diagnosis is questioned by Dr. O'Brien who felt that further surgery was not called for. The insurer had denied any further surgery, but the question is moot because claimant did not contest the denial and indicates that he does not want further surgery.

In mid 1980 claimant was seen by Cascade Rehabilitation Counseling for vocational rehabilitation. Cascade's counselors felt that claimant lacked motivation. They noted that he refused to even consider any sedentary jobs recommended by the counselor. The only help he was willing to accept was some advice from the small business administration concerning an antique shop which he helped his wife to operate. At the time of the hearing, the antique shop was being sold because it had failed to make a profit.

A Determination Order was issued on January 28, 1981 awarding claimant 15% unscheduled disability for his low back. The insurer refused to pay for any further out of state medical treatments after that time with the exception of claimant's psychological treatments by Dr. Shafer.

Dr. Shafer has continued to treat claimant for his psychological problems and the insurer has continued to pay for these treatments. However, the Referee found that the psychological problems were not compensable and refused to consider them in rating claimant's disability.

I. Compensability of the Psychological Condition

Claimant has severe psychological problems which, insofar as

they affect his ability to work, consist of chronic pain complaints which are unrelated to any identifiable physical problems. The Referee said:

> "Upon review of all the evidence, I conclude that the psychological component of this claim is based on a preexisting personality disorder that impedes recovery but was not independently produced by the industrial injury nor was the industrial accident a major or material contributing factor to this preexisting problem. In my judgment the psychological component is not related to the industrial injury. It operates to confuse the back claim, its evaluation and medical recovery by this claimant, but is a parallel problem unaffected by the industrial accident."

The question in this case is whether claimant's industrial injury was a material contributing cause of his psychological condition or materially worsened claimant's preexisting psychological condition. Patitucci v. Boise Cascade Corp., 8 Or App 503, 508 (1972); Clara M. Peoples, 31 Van Natta 134 (1981). We find that claimant has proven by a preponderance of the evidence that his psychological condition was caused or materially worsened by his industrial accident.

There is some indication in the record that claimant may have had a preexisting psychological condition. From the very beginning of this claim, his physicians noted that claimant appeared to be an extremely nervous individual. Dr. Roberts suspected that claimant may have some characterological disorder. However, the evidence indicates that prior to his industrial injury he had never consulted a psychologist or psychiatrist. He had some prior marital problems but those problems increased markedly after his industrial injury. Prior to his injury he had never had problems with sexual functioning, yet after the injury he became impotent.

We are convinced, however, that the industrial injury has caused a material worsening in this preexisting condition. Within three months of the accident Dr. Zawatsky noted that claimant's psychological problems were becoming worse and interfering with his work and home life. Dr. Roberts suspected that claimant was malingering, but noted that there was evidence of a preexisting characterological disorder. Dr. Corbett felt that claimant's complaints of pain were caused by his extreme anxiety and fear of corrective surgery for his back problems. Dr. Hendricks felt that claimant had real physical problems complicated by functional overlay.

Dr. Seres at the Northwest Pain Center noted that claimant was severely depressed. He noted that prior to the injury claimant had had a very stable work history, but that after the injury he seemed to have significant reservations about returning to work. Dr. Yospe, a psychologist at Northwest Pain Associates, noted that claimant tends toward a passive aggressive personality. He felt claimant has a low threshhold for tolerating frustration. He felt that claimant was discouraged by his failure to improve physically

and was unable to accept his inability to find a cure. On discharge from the Northwest Pain program, Dr. Yospe noted that claimant had been able to function well at his job for years and now is at a crossroads where he needs to accept that he can no longer do his previous work. Dr. Yospe felt "the patient seems to be flirting more and more with a disabled form of adjustment."

Dr. Dortzbach, a psychologist, administered the MMPI to claimant and opined that claimant is within the mild to severe range of psychopathology. He found a severe level of hypochondriasis with a focus on somatic concerns. He felt that his feelings of inadequacy and tendency to use passive styles of coping with frustration contribute to his strong tendency to focus on medical concerns.

In 1979 Dr. Shafer, a clinical psychologist, began treating claimant. He indicated that he was trying to help claimant to face the reality that he is going to have to live his life within physical limitations. In 1980 Dr. Laurnen opined that even an individual who was originally stable psychologically would begin having problems given the physical problems and inconsistent medical treatment that claimant had experienced.

At the hearing Dr. Shafer testified in claimant's behalf. He testified that claimant had developed significant marital problems since his industrial injury and that much of his treatment had been directed toward solving those problems. However, he opined that the marital problems had stemmed from claimant's failure to adjust following his industrial injury. Dr. Shafer felt that there had been a spiraling effect in that the psychological problems stemming from the injury had worsened the marital problems which in turn worsened the psychological problems.

Dr. Shafer based his opinion on his conclusion that prior to the industrial injury claimant had used his work and athletic prowess as a way to verify his masculinity. When the injury cut him off from these outlets it caused a marked disruption in his life which led to his psychological problems.

We are convinced by Dr. Shafer's opinion, which is consistent with the majority of the medical evidence in this case, that claimant's psychological problems were materially worsened by his industrial injury. Accordingly, we find that his psychological condition is compensable and must be considered in rating claimant's permanent disability.

II. Medically Stationary Date

Claimant's attorney conceded that claimant was medically stationary on January 28, 1981 when the claim was closed, if only claimant's physical condition is taken into account. However, he argued that claimant's psychological condition is not medically stationary and that the claim should be reopened. We disagree. Dr. Shafer testified that claimant's condition has remained essentially unchanged during the entire course of his treatment. "But I must admit that on the whole, we have been phenomenally unsuccessful." We find that the claim was not prematurely closed. Therefore, we proceed to rate the extent of claimant's disability.

III. Permanent Total Disability

Claimant argues that he is permanently and totally disabled by the combination of his physical and psychological conditions. We disagree.

No doctor opines that claimant is totally disabled by his physical problems. However, Dr. Shafer testified that in his opinion claimant is totally disabled by his psychological problems. He felt that based on the MMPI, even if claimant's physical problems were cured by surgery, claimant would still continue to convert his psychological problems into a pain syndrome which would render him totally disabled.

The statute requires that in order to find a claimant totally disabled, he must show that he is willing to seek regular gainful employment and that he has made reasonable efforts to seek employment. ORS 656.206(3). Claimant has failed to meet that burden. Cascade Rehabilitation noted that claimant refused to even consider searching for sedentary jobs which Cascade suggested to claimant as possible jobs he could do.

Claimant has also failed to prove that it would be futile for him to search for work. Butcher v. SAIF, 45 Or App 313 (1980). Accordingly, we find that claimant has failed to prove that he is permanently and totally disabled.

IV. Permanent Partial Disability

Because we find claimant's psychological pain syndrome is a compensable consequence of claimant's industrial injury, we must consider it in rating the extent of his disability. We start from the premise that the Referee's finding that claimant's disability is 60% was made without considering the psychological factor. The insurer so concedes. In view of the seriousness of claimant's psychological pain syndrome, as evidenced by Dr. Shafer's opinion that claimant is permanently disabled by his psychological pain, we believe that claimant is entitled to an additional 15% unscheduled disability.

ORDER

The Referee's order dated July 22, 1982 is modified in part. Claimant is awarded 75% unscheduled disability for his low back problem and pain syndrome, in lieu of all other awards of permanent disability for those conditions. Claimant's attorney is allowed 25% of the increased compensation not to exceed $3,000, in lieu of the attorney's fee granted at hearing, payable out of claimant's compensation and not in addition thereto. The remainder of the Referee's order is affirmed.

ROBERT G. IRVIN, Claimant
Royce, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Bruce L. Melkonian, Attorney
Carl M. Davis, Ass't A.G.

WCB 82-03727
September 22, 1983
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The noncomplying employer requests review of Referee Galton's order which set aside the denial of claimant's occupational disease claim that was issued by the SAIF Corporation as the statutory processing agent for the noncomplying employer.

We reach just one of the three issues raised by the noncomplying employer: The question of whether the Referee erroneously precluded the noncomplying employer from presenting its position on the merits of the denial.

In November 1981 claimant made an occupational disease claim for a lung condition allegedly caused by his exposure to paint fumes while working for the noncomplying employer. After an investigation by the Workers' Compensation Department revealed that the employer was noncomplying, the claim was referred to SAIF for processing pursuant to ORS 656.054. On April 19, 1982 SAIF issued a denial which stated:

> "The file shows that you were not a subject worker of Dennis C. Dyer, dba Fleet Services at the time of your injury. You were, therefore, not a subject worker of the corporation and not within the course and scope of any employment. Therefore, without waiving other questions of compensability this formal denial is made."

Claimant requested an expedited hearing, which was held June 14, 1982. Both SAIF and the Workers' Compensation Department waived appearance at the hearing. The noncomplying employer appeared, represented by his own attorney. Claimant also appeared, represented by counsel.

The usual colloquy at the beginning of the hearing between the Referee and counsel to define the issues did not go smoothly, in large part because the noncomplying employer's attorney kept protesting that he had had insufficient time to prepare and requesting a postponement, a request which the Referee denied. Sandwiched in the discussion about whether the hearing would proceed and other preliminary matters, the issues were defined as follows:

> "THE REFEREE: As I understand it . . . there was a denial issued by SAIF Corporation, presumptively in behalf of the employer, on April 19, 1982 and the claimant has protested that denial. Is there any other issue that the claimant is raising to be litigated before me today?
>
> "[Claimant's attorney]: That the sole -- sole issue."

* * *

> "THE REFEREE: * * * Do you have any response . . . to the issue raised by claimant; that is, the protest of the SAIF denial, other than that the denial should be affirmed?
>
> "[Employer's attorney]: I don't believe so at this time. I believe that that could become an evidentiary question, but at this point in time I don't."

(The two portions of this quotation are separated by six transcript pages.)

After the Referee had ruled on all preliminary matters, claimant first called the noncomplying employer as a hostile witness. In the course of his testimony, there were objections to questions about the nature and amount of claimant's exposure to paint fumes. In apparent frustration, the Referee stated:

> "The REFEREE: I think you both have objected now to questions dealing with exposure. I thought we were here to litigate the denial which, to me, is whether or not the claimant is a subject worker. I don't, frankly, understand all of this other testimony except by virtue of background."

The employer's attorney then conceded that claimant was a subject worker, but argued that other issues remained for resolution:

> "There are a number of questions involving this. One is whether he was injured on the job. I guess that would be the main question: whether he was injured on the job."
>
> * * *
>
> "[I thought] that the issue really, in this case, was whether [claimant] was entitled to compensation because he suffered an industrial injury or is the victim of an industrial disease. I believe that is what we have all been talking about."
>
> * * *
>
> "I want to state as clearly as I can, for the record, there is no real doubt in my mind that [claimant] was an employee. * * * But, it's a very important question as to whether [claimant] has suffered an occupational injury of any sort, and that's what we are here to litigate."

(The three portions of this quotation are spread over four transcript pages.)

The Referee then ruled that no issue was properly before him except the question of whether claimant was a subject worker:

> "THE REFEREE: I will state, for the record, that Exhibit 6 is a denial of SAIF Corporation, issued in behalf of Dennis C. Dyer, doing business as Fleet Services. The only basis for denial of compensability of claimant's lung disease is that claimant was not a subject worker of the employer and, hence, not within the course and scope of any employment. The employer has conceded, on the record, that claimant was a subject employe. There is no other basis of the denial. There was nothing raised, at least at the commencement of this hearing, in terms of whether claimant was, in fact, injured on the job."
>
> * * *
>
> "THE REFEREE: [ORS 656.262(7) requires that] if a claim for compensation is denied, written notice of the denial stating the reasons for the denial shall be given to the claimant. SAIF Corporation did so in behalf of the employer in Exhibit 6. The only basis for denial of responsibility for claimant's lung disease was that he was not a subject worker of the employer at the time of the alleged injury. No additional contentions as to any other basis or bases of denial were stated until now. In opening remarks, claimant framed the issue as protesting the denial, and the only response, after various preliminary matters, from the employer, was that the denial should be affirmed."
>
> * * *
>
> "THE REFEREE: [I do not know of] any authority for the [proposition] that another basis or bases for denial may be raised orally at hearing which are not raised in the denial letter protested by the claimant."

(The three portions of this quotation are spread over ten transcript pages.)

There is no authority for some propositions because they are taken for granted. Whatever may have been the expectation when the requirement in ORS 656.262(7), that a written denial state "the reason for the denial," was first enacted in 1965, over the many years since then it has become commonplace for hearings on denials to address and consider reasons in addition to and even different from those stated in the denials. A denial of a workers' compensa-

tion claim is generally written by a non-attorney; if the wording of a denial had the same binding and limiting effect that a pleading written by an attorney might have, there would be a lot of claims processors who might be guilty of unauthorized practice of law. Furthermore, a denial does not terminate the right of an employer/insurer to investigate the claim further, and it is not unknown for additional investigation to result in shifts in the position of the employer/insurer, even to the point of revoking a prior denial and accepting a claim.

Moreover, if a hearing is requested on a denial of a claim, at some point the employer/insurer transfers control over the defense to its attorney, which often results in additional investigation of the claim, which can, in turn, lead to additional shifts in he position of the employer/insurer. Under present Board rules, there is no requirement that the exact position of any party be set out with the specificity of a civil-action pleading. For example, in Hughes v. Pacific Northwest Bell, 61 Or App 566, 571 (1983), the court quoted from the Board's order which had found that the claimant had made a claim for hearing loss only in one ear, but nevertheless concluded that claimant was entitled to a permanent disability award for binaural hearing loss. If there is that much latitude about any statement of what is being claimed, we think it necessarily follows that there has to be some latitude about what is being denied and the reasons therefor.

For all of these reasons, we disagree with the Referee and hold that a basis for a denial may be raised orally at hearing.

It is a closer question whether the noncomplying employer adequately did so in this case. Under the circumstances of this case, we resolve our doubts in the employer's favor. The hearing in this case was set on an expedited basis. There was then some delay in the employer arranging for legal representation. The employer's attorney protested at the start of the hearing that he had not had sufficient time to prepare. Although we agree with the Referee's reasons for denying the employer's request for a postponement, we do think that the decision to proceed with the hearing had some impact on the clarity of the definition of the issues that were to be heard. The result of all of these pre-hearing circumstances was a very general definition of the issues at the start of the hearing: Claimant wanted a denial set aside; the employer wanted the denial affirmed. It was only about 25 transcript pages into the testimony of the first witness before it became apparent that the parties had different understandings of this general definition, when the employer's attorney for the first time specifically stated that he wanted to contest the compensability of the claim on other than a subject-worker basis.

It would have been better practice -- and we think it is general practice -- to more specifically state the issues at the outset of the hearing. If claimant was surprised by the employer's "new" issue, i.e., issue that may go beyond the fair import of SAIF's denial, the proper remedy would have been to postpone or continue the hearing. Under current Board rules, however, we do not think it is proper procedure to deny any party a hearing on the merits of any claim or defense unless it affirmatively can be said that the claim/defense was not raised as an issue at the

hearing despite ample opportunity to do so. We are unable to affirmatively so conclude under the circumstances of this case and, therefore, remand to the Referee to allow the employer a hearing on the merits of its position that this occupational disease claim is not compensable.

ORDER

The Referee's order dated June 14, 1982 is vacated, and this case is remanded to the Referee for further proceedings consistent with this order.

GARY G. SHEFFLER, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-08130
September 22, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Brown's order granting claimant a total award for unscheduled disability of 80° or 25%, an increase from the 16° or 5% awarded by Determination Order. Extent of disability is the only issue on review.

Claimant is a 28 year old tile setter who compensably injured his low back in December 1981. Dr. Hockey performed a laminotomy in February 1982. In July 1982 Dr. Hockey found claimant medically stationary and assessed his permanent impairment as "minimum." Claimant has returned to tile setting with some limitations. We disagree with the Referee's award of permanent disability and find it excessive.

Applying the guidelines found in OAR 436-65-500, et seq. yields the following analysis. Because of Dr. Hockey's characterization of claimant's permanent impairment as "minimum," we assign a +1 factor for impairment. Claimant's age of 28 yields a -5 factor. Claimant's eleventh grade education yields a +2 factor. Claimant's job requires significant preparation, so we assign a +5 factor for work experience. Claimant has been released to his previous job, so we assign no factor for adaptability. There is no information on record concerning intelligence or claimant's emotional or psychological state, so we assign no factor to those considerations. Claimant has been released to his regular work; however, he testified that he has modified his work so it is lighter. Consequently, we decline to apply the -25 factor called for in the rules when a claimant has returned to his regular work and instead apply no factor to the labor market findings. Combining these factors as provided in the rules when rounded to the nearest 5 yields a 5% disability rating. After comparing that finding with other similar findings, we conclude that an award for 5% unscheduled disability is appropriate in this case.

ORDER

The Referee's order dated February 16, 1983 is reversed. The Determination Order dated September 14, 1982 which awarded 16° for 5% unscheduled permanent partial disability, is affirmed.

IRVIN L. SLATER, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-08962
September 22, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Seifert's order which set aside its denial of September 10, 1982. The issue for review is compensability.

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

In finding this claim compensable, the Referee, citing Weller v. Union Carbide Corp., 288 Or 27 (1979), Cooper v. SAIF, 54 Or App 659 (1981) and Cochell v. SAIF, 59 Or App 391 (1982), stated that claimant was required to establish that his March 1, 1982 industrial injury resulted in a worsening of his underlying back condition. He concluded that claimant had so established.

Although we agree with the Referee's conclusion finding the claim compensable, we disagree with his reasoning. As claimant states in his brief:

> "The case law cited by the Referee and the employer does not apply to this case because it is not an aggravation of a pre-existing condition. An examination of a case cited by the employer and the Referee will be helpful in illustrating the distinction. This case is Cochell v. SAIF, 59 Or App 391, 650 P2d 1088 (1982). In that case, the claimant specifically contended that he had a worsening of an underlying condition. No such contention was made in [claimant's] case. [Claimant's] back was more susceptible to injury as a result of his previous injuries, and he received a new injury; i.e. lumbosacral sacroiliac sprain." (Emphasis added.)

We agree with that statement.

There is no indication in this record that claimant suffered from any preexisting underlying condition. All that the evidence indicates is that due to previous injuries, claimant's back was more susceptible to injury. We do not believe that this enhanced sensitivity to injury qualifies as a "preexisting condition." And, in the absence of a condition which preexists the employment, the worsening requirement of Weller is not applicable. See John J. Wittlake, 35 Van Natta 350 (1983).

Additionally, we note that the Referee was correct when he observed that the Weller test has been applied by the Court of Appeals to cases involving industrial injury as well as occupational disease. Although undecided at the time of the Referee's order, we recently stated in Paul Scott, 35 Van Natta 1215 (1983), that the most recent pronouncements from the Court of Appeals indi-

cate that the worsening requirement of Weller does not apply in industrial injury cases. Boise Cascade v. Wattenbarger, 63 Or App 447 (1983), Jameson v. SAIF, 63 Or App 553 (1983). See also Betty L. Counts, WCB Case No. 82-01199, 35 Van Natta 1356 (decided this date). Therefore, even if claimant had an underlying condition, he would only be required to establish that the industrial injury resulted in symptoms which required medical care. We conclude that he has so established.

ORDER

The Referee's order dated April 18, 1983 is affirmed. Claimant's attorney is awarded an attorney's fee of $500 for services in connection with this review, to be paid by the self-insured employer.

ALICE B. WILSON, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-09820
September 22, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which affirmed the SAIF Corporation's October 10, 1980 partial denial and affirmed the November 1, 1980 Determination Order which awarded claimant 5% (7.5°) scheduled left leg disability.

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

Claimant argues that the Referee erred in applying the test of Weller v. Union Carbide, 288 Or 27 (1979), as this case involves an industrial injury rather than an occupational disease. Florence v. SAIF, 55 Or App 467 (1981). Alternatively, claimant argues that even if Weller does apply, she has established that her industrial injury resulted in a worsening of her underlying degenerative conditions.

With regard to claimant's assertion that the Referee misapplied the Weller test, we disagree, because we do not believe the Referee relied on Weller. SAIF's October 10, 1980 denial was only a partial denial. SAIF reaffirmed its acceptance of claimant's August 11, 1978 industrial injury but denied that it was responsible for her underlying degenerative back and hip conditions. It is clear that the Referee recognized this distinction when he stated:

> "If there was an exacerbation (of the underlying conditions) it had run its course. Claimant's present problems are as a result of underlying medical conditions that were not worsened. * * * Whatever claimant believes is wrong with her or what she complains about at this time is not due to the industrial injury."

The Referee did not find that claimant did not sustain a compensable injury on August 11, 1978. He found that claimant was no longer suffering from the effects of that industrial injury, that her current problems were due to her underlying condition and that the condition was not affected, except perhaps on a temporary basis only, by her industrial injury. We agree with all of these findings, and we believe that Weller is somewhat of a "red herring" issue in this case.

Claimant also takes issue with the Referee's affirmance of the Determination Order's award of 5% permanent partial disability. Claimant contends she is entitled to an increased award of unscheduled disability. SAIF, however, contends that claimant is entitled to no award of permanent partial disability.

Based on dollars per degree of disability, it is clear that the Determination Order made an award for scheduled rather than unscheduled disability. That award appears to have been based on the diagnosis that claimant sustained some minimal traumatic trochanteric bursitis as a result of her industrial injury. Since there is no indication that this extends into the acetabulum, a scheduled award was proper. John Cameron, 34 Van Natta 211 (1982); David Blair, 32 Van Natta 97 (1981). We find no evidence which indicates that claimant sustained any unscheduled permanent disability as a result of her injury.

SAIF's argument that claimant is entitled to no award for permanent partial disability raises a potential problem; that is, that it is inconsistent to affirm SAIF's partial denial of claimant's degenerative hip and back conditions, and yet affirm a permanent partial disability award that seems to be based on a degenerative hip condition. However, as we noted above, the permanent partial disability was awarded for a traumatic bursitis condition. Although it may be a narrow distinction from a medical standpoint, we believe that this represents a different condition than that which was denied by SAIF.

ORDER

The Referee's order dated November 15, 1982 is affirmed.

DOROTHY ALLEN, Claimant
Rolf Olson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-11459
September 23, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of that portion of Referee Johnson's order which increased the unscheduled permanent partial disability awarded by a Determination Order dated December 9, 1981 (as amended December 23, 1981), from 32° or 10% to 160° or 50%. Claimant cross-requests review on those portions of the order concerning penalties and attorney fees for alleged unreasonable delay in payment of certain medical expenses.

Claimant is a 54 year old drill press operator who compensably injured her right shoulder on February 8, 1980. Her condition was

diagnosed as bicipital tendinitis. Claimant was treated conservatively.

We agree that the award of permanent disability granted by the Determination Order is inadequate; however, we find the Referee's award excessive.

Considering the guidelines in OAR 436-65-500 et seq., and comparing this case to similar cases, we reach the conclusion that claimant would be more appropriately compensated by an award of 30% unscheduled permanent disability.

We base our conclusion on the following analysis. Claimant's age of 54 years yields a +8 factor. Her education and work experience have no impact. Her previous work was medium and she is now able to do only light work. Therefore, her adaptability yields a +5 factor. Claimant's labor market findings yield a -25 in that she has attained a GED, can do light work and has experience as a restaurant manager. The staff of Orthopaedic Consultants rated claimant's impairment as "mild." Dr. Teal, a treating physician, rated claimant's permanent impairment as "moderate." However, Dr. Teal had not examined claimant since May 18, 1981, while Orthopaedic Consultants last examined claimant on October 26, 1981. Based upon these opinions and the entire record, we assign a +30 factor for impairment due to claimant's limited ability, or inability, in the general industrial labor market to perform repetitive lifting, heavy lifting and repetitive overhead use of her right upper arm. Combining all of these factors yields a disability rating of 30%.

We affirm and adopt those portions of the Referee's order concerning a penalty and attorney's fee for unreasonable delay in payment of medical expenses.

ORDER

The Referee's order dated March 31, 1983 is modified in part. In addition to the 32° for 10% unscheduled permanent partial disability awarded by the December 9, 1981 Determination Order (as amended), claimant is awarded 64° or 20%, for a total award of 96° for 30% unscheduled permanent partial disability. In lieu of the attorney's fee allowed by the Referee, claimant's attorney is allowed 25% of the additional compensation awarded herein, not to exceed $2,000. The remainder of the Referee's order is affirmed.

BERT G. HARR, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Lindsay, Hart, et al., Defense Attorneys

WCB 82-03306
September 23, 1983
Order on Abatement

The Board has received insurer's motion to reconsider the Board's Order on Review dated August 25, 1983.

In order to allow sufficient time to consider the motion, the above-noted Board order is abated.

IT IS SO ORDERED.

JERRY W. LOWE, Claimant
Lyle Velure, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-11524 & 82-08041
September 23, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Brown's order sustaining the SAIF Corporation's denial of compensation for two alleged on the job incidents. Compensability is the only issue on review.

The Referee's order has two bases. The first is that claimant and his wife are not credible witnesses. We affirm and adopt those portions of the Referee's order which are based on those credibility findings. The Referee's alternative basis of decision is that claimant has failed to prove a worsening of an underlying condition. We recently have commented that following the Court of Appeals' decisions in Boise Cascade v. Wattenbarger, 63 Or App 447 (1983), and Jameson v. SAIF, 63 Or App 553 (1983), the prevailing point of view seems to be that there is no requirement that a claimant prove a worsening of an underlying condition in an injury case. Paul Scott, 35 Van Natta 1215 (August 19, 1983), Betty L. Counts, WCB Case No. 82-01199, 35 Van Natta 1356 (September 22, 1983). Accordingly, we do not adopt those portions of the Referee's order which rely on the conclusion that claimant failed to prove a worsening of his underlying condition.

ORDER

The Referee's order dated March 10, 1983 is affirmed.

LORRIE A. MINTON, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11134
September 23, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Peterson's order which set aside SAIF's denial of compensability for claimant's bilateral forearm condition. SAIF asserts that claimant has failed to prove that her condition is a compensable occupational disease. This claim has been before the Board previously, Lorrie A. Minton, 34 Van Natta 162 (1982), and was remanded to the Referee for further proceedings in light of the Court of Appeals decision in SAIF V. Gygi, 55 Or App 570 (1982).

The Board affirms and adopts the Referee's findings and conclusions in his order on remand with one comment. Subsequent to the Referee's order on remand, we issued our opinion in Patricia G. Davis, 35 Van Natta 635 (1983). In that case we held that where there has been a belated denial of compensability, as in the case at hand, the burden of proof is on the insurer to prove that the claim is not compensable. In the present case, we find that claimant has shown that she has suffered a compensable occupational disease regardless of who has the burden of proof. Thus, we need not remand the case a second time.

ORDER

The Referee's order dated August 31, 1982 is affirmed. Claimant's attorney is awarded a fee of $500 for services rendered on Board review, to be paid by the SAIF Corporation.

ROBERT RINCK, Claimant
Doblie & Francesconi, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0295M
September 23, 1983
Own Motion Order on Reconsideration

The Board issued its Own Motion Order and Own Motion Determination herein on May 16, 1983. The SAIF Corporation thereafter requested that it be allowed an "offset" for amounts previously paid in another claim, to be set-off against the amounts ordered paid by the Board's Own Motion Order herein. Claimant has expressed his opposition to SAIF's request in reliance upon the Board's decision in Gary W. Brill, 34 Van Natta 489, 490 (1982), wherein the Board held that an overpayment on one claim cannot be offset against benefits due on another claim. See also Roy J. Fenton, 34 Van Natta 1686 (1982).

Claimant was originally injured in 1972. His aggravation rights expired in early 1977. In February 1982 claimant's condition worsened and he filed a claim with SAIF. Claimant worked for the Transportation Department (Highway Division) during this entire period.

When claimant filed his claim for benefits in February of 1982, the SAIF Corporation established a new claim file (D 567369) and commenced payment of interim compensation benefits from March 18, 1982, through September 3, 1982, on which date it issued a denial, alleging that claimant's current difficulties were attributable to his prior industrial injury (Claim No. C 348573).

The Board's Own Motion Order of May 16, 1983, ordered payment of temporary total disability benefits in connection with claimant's own motion claim, said payments to commence February 19, 1982, through and including August 17, 1982. The relief which SAIF seeks is an order allowing it to offset the interim compensation payments made in processing claimant's "new claim" against the temporary disability benefits ordered paid by the Board's Own Motion Order.

Brill and Fenton are inapposite to the extent that SAIF seeks to offset interim time loss paid in Claim No. D 567369 against the temporary disability benefits ordered paid by the Board's Own Motion Order. The case which appears to come closest to addressing the issue is the Court of Appeals' decision in Petshow v. Portland Bottling Co., 62 Or App 614, 619 (1983), wherein the court held that the claimant was not entitled to retain interim compensation payments and temporary total disability benefits for the same period of time. Because SAIF processed Claim No. D 567369 and paid claimant interim compensation for a period that overlaps the period for which the Board granted temporary total disability benefits, it is not required to make a "double payment" for the same period of temporary disability.

Accordingly, SAIF is entitled to offset interim compensation paid in Claim No. D 567369 against the temporary disability benefits awarded by the Board's Own Motion Order, to the extent that the respective time periods for each overlap.

SAIF is not permitted, however, to offset any of the interim compensation paid in Claim No. D 577369 against the permanent disability awarded by the Board's Own Motion Order. To allow an offset of this nature would violate the rule announced by Gary W. Brill, supra, and is not permissible.

IT IS SO ORDERED.

MICHAEL T. SIMKOVIC, Claimant (Deceased)
Galton, et al., Claimant's Attorneys
Moscato & Meyers, Defense Attorneys

WCB 83-06258
September 23, 1983
Order Denying Motion to Dismiss

The insurer requests review of Referee Braverman's order which directed it to pay claimant's beneficiaries death benefits in accordance with a May 18, 1983 "Determination Order", pay an additional amount as a penalty, and further ordered payment of an attorney's fee for the insurer's unreasonable conduct. Claimant has moved to dismiss the insurer's request for Board review, contending that the Referee's order is not a final order and, therefore, presently not reviewable by the Board.

Claimant's motion to dismiss is denied, with leave to renew it in claimant's respondent's brief.

IT IS SO ORDERED.

BERNIE HINZMAN, Claimant
Pozzi, Wilson, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 83-0097M
September 26, 1983
Own Motion Order on Further Reconsideration

The Board issued its Own Motion Order and Own Motion Determination herein on April 29, 1983, granting claimant additional compensation for temporary total disability. Claimant's attorney was allowed a fee payable out of claimant's award as a percentage thereof. Thereafter, claimant's attorney requested reconsideration of the Board's order, contending that he was entitled to a fee payable by the SAIF Corporation in addition to claimant's compensation rather than a fee payable out of claimant's award. By order of May 31, 1983, the Board adhered to its original order allowing counsel a fee payable out of claimant's compensation. Claimant's attorney has again requested that the Board modify its order to provide for an insurer-paid fee.

OAR 438-47-070 is the administrative rule governing attorney fees in own motion proceedings before the Board:

> "(1) If a proceeding is commenced pursuant to ORS 656.278(1) on the Board's own motion because of a request from the State

> Accident Insurance Fund, an employer or its insurer and compensation previously awarded is not reduced or is increased, the Board, in accordance with ORS 656.382(2), shall allow claimant's attorney a reasonable fee payable by the party requesting the proceeding in addition to compensation.
>
> "(2) If a proceeding is initiated on the Board's own motion because of a request from a claimant and an increase in compensation is awarded, the Board shall approve for claimant's attorney a reasonable fee payable out of any increase awarded by the Board."

This rule was promulgated by the Board in 1979.

In support of his contention that the SAIF Corporation should be required to pay a fee in addition to claimant's compensation, counsel states:

> "It makes no sense to me that your rule would follow ORS 656.382(2) when the own motion jurisdiction is triggered by a request from the employer or its insurance carrier, and then fail to follow ORS 656.382(1) when the claimant is required, by a recalcitrant insurance company, to request the Board's own motion intervention."

Counsel's argument thus seems to be premised upon the theory that an insurer or self-insured employer that refuses to voluntarily pay own motion benefits should be penalized under the statutory provisions which provide for imposition of a penalty-associated attorney's fee where the employer/insurer refuses or otherwise unreasonably resists payment of compensation. See also ORS 656.262(9).

The 1981 legislature amended the own motion statute to provide in clear terms that the insurer or self-insured employer has authority to voluntarily pay own motion benefits, without the need to obtain an order from the Board directing that such payment be made. ORS 656.278(4). See also ORS 656.018(4). The fact that employers/insurers have authority to voluntarily pay own motion benefits, when deemed appropriate, does not change the fact that own motion relief is discretionary in nature and not compensation to which the claimant is entitled as a matter of right. It is highly questionable, therefore, whether the employer/insurer can be subject to a penalty/attorney fee for declining to grant this discretionary remedy, where there is no right which has been violated. There would appear to be no basis, therefore, for imposition of a penalty or an associated attorney's fee in an own motion proceeding. The exception might be an instance in which the employer/insurer fails or refuses to comply with the terms of an order issued by the Board pursuant to ORS 656.278.

Neither do we agree with counsel's suggestion that, because the employer/insurer has declined to voluntarily pay benefits pursuant to ORS 656.278(4), the act of submitting the matter to the Board amounts to an employer/insurer request for own motion relief. The mere fact that employers and their insurers have statutory authority to pay benefits after a claimant's aggravation rights have expired does not transform the claimant's request for benefits into the employer/insurer's request for own motion relief if the employer or insurer does not deem it appropriate to pay benefits and, therefore, submits the claim to the Board. Nor does the Board's present practice and policy of requiring employers/insurers initially to decide whether or not to voluntarily pay benefits transform the request for own motion relief into one arising under subsection (1) rather than subsection (2) of OAR 438-47-070. The request for relief is the claimant's request for additional compensation; it is not the employer/insurer's request that compensation previously awarded be disallowed or reduced.

ORDER

On reconsideration of the Board's prior orders dated April 29, 1983 and May 31, 1983, the Board adheres thereto.

LEROY KOCIEMBA, Claimant
Charles Tauman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-06016
September 26, 1983
Order on Remand

On review of the Board's Order on Review dated May 27, 1982, and Order on Reconsideration dated June 8, 1982, the court reversed those orders insofar as the Board failed to award claimant's attorney a reasonable attorney's fee for service on Board review. The case has been remanded for such an award.

Now, therefore, those portions of the above referenced Board orders failing to award claimant's attorney a fee are vacated, and claimant's attorney is awarded $500 as a reasonable attorney's fee for services on Board review.

IT IS SO ORDERED.

PAULA E. BEYER, Claimant
Ferris Boothe, Claimant's Attorney
Moomaw, Miller & Reel, Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-05964
September 27, 1983
Order on Reconsideration

Claimant requested review of the Presiding Referee's order dismissing her request for hearing for failure to prosecute. We found that claimant's request for hearing properly was dismissed. 35 Van Natta 698 (1983). After issuance of our Order on Review, dated May 24, 1983, the Board was contacted by an attorney, who requested in claimant's behalf that we reconsider our Order on Review. Claimant had not been represented on Board review, and no brief had been filed. In order to allow claimant's new attorney

an opportunity to make some investigation, we abated our Order on Review by an order dated June 23, 1983. 35 Van Natta 815 (1983).

The Board subsequently was advised by the attorney who had requested reconsideration in claimant's behalf that their office would not be representing claimant. Counsel's letter notifying the Board of this fact contains the statement that: "If you have not heard from claimant by July 13th, I believe you can consider the matter closed."

Nothing further has been heard from claimant in this regard. We, therefore, must assume that she does not intend to proceed further.

ORDER

On reconsideration of the Board's order dated May 24, 1983, the Board adheres to its former order, which hereby is reaffirmed and republished.

JEFFREY P. SOFICH, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-07072
September 27, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Fink's order which set aside its denial of claimant's aggravation claim; found SAIF's denial unreasonable and, therefore, imposed a penalty; and imposed an additional penalty as a percentage of a medical bill which the Referee found had not been paid in a timely fashion.

We reverse that portion of the Referee's order which found that SAIF's denial was unreasonable and imposed a penalty. We agree that claimant has established by a preponderance of the evidence that his injury-related condition has worsened since the last award of compensation; however, we do not find that this record supports the Referee's conclusion that after receipt of Dr. Kemple's December 15, 1982 report it was unreasonable for SAIF to refuse to rescind its denial. We, therefore, find that the Referee's imposition of a penalty was inappropriate.

With regard to the issue concerning timeliness of SAIF's payment of the medical bill for services rendered in September and October of 1982, on the basis of the testimony of SAIF's claims examiner, we find that payment was not timely. An insurer is required to pay or deny a bill for medical services within 60 days. Billie J. Eubanks, 35 Van Natta 131, 135 (1983). The claims examiner testified that the medical bill in question was received on November 18, 1982 and that it was not paid until January 28, 1983. By our calculation, SAIF's payment was late under the rule of Eubanks; accordingly, the Referee's imposition of a penalty was appropriate.

We affirm and adopt the Referee's order on the merits of the aggravation claim.

ORDER

The Referee's order dated February 23, 1983 is reversed in part. That portion which imposed a penalty for SAIF's unreasonable denial is reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $650 as a reasonable attorney's fee for services on Board review, to be paid by the SAIF Corporation.

VERLIN A. BELCHER, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-11612
September 28, 1983
Order of Dismissal

The SAIF Corporation requested review of Referee Mulder's orders which, inter alia, awarded claimant compensation for permanent total disability, ordered SAIF to pay for recommended psychiatric/psychological treatment, and declined to enforce the provisions of a prior Referee's order (which at the time was before the Board on review) directing SAIF to purchase a particular automobile for claimant's use. SAIF now has advised the Board that it desires to withdraw its request for review. Claimant has moved the Board for remand to Referee Mulder for reconsideration of the portions of his orders declining to enforce the provisions of the prior Referee's order. We recently affirmed the prior Referee's order. Verlin A. Belcher, 35 Van Natta ___ (June 28, 1983).

On the same date that SAIF filed its request for Board review of Referee Mulder's order, claimant's attorney filed with the Referee a second request for reconsideration on the issue of enforcement of the prior Referee's order, attaching to the request a copy of the Board's Order on Review. The Referee declined to reconsider because of SAIF's request for review. Claimant filed no cross-request for Board review of those portions of Referee Mulder's orders declining to enforce the provisions of the prior Referee's order. Well past the period for cross-requesting review, indeed, on the same date that SAIF notified the Board that it intended to withdraw its request for review, claimant requested that the Board remand to the Referee in order to allow the Referee to reconsider his order.

We recently have discussed the practical reasons for filing a cross-request for Board review, when the respondent believes that he or she is aggrieved by a Referee's order.

> "The primary purpose for filing a cross-request for review is to maintain control over the Board's jurisdiction. A respondent who has failed to cross-request Board review and who raises an issue in its respondent's brief is at the mercy of an appellant who, upon recognizing the fact that a potentially
>
> meritorious argument has been raised in respondent's brief, or for any other reason, withdraws the request for Board review. If the respondent had cross-requested review, the Board would retain jurisdiction over the cross-request. If the respondent had not

cross-requested review, there would be nothing to retain jurisdiction over and the respondent would lose the opportunity to have the issue raised in its brief reviewed." Jimmie Parkerson, 35 Van Natta 1247, (August 30, 1983).

Claimant's request for remand is based upon the allegation that SAIF requested review of Referee Mulder's orders solely for the purpose of depriving the Referee of jurisdiction to consider claimant's request for reconsideration. Assuming for the sake of discussion the truth of this allegation, claimant's proper remedy was to cross-request Board review of those portions of the Referee's orders that he believed to be erroneous. Claimant failed to timely cross-request review. See generally Jimmie Parkerson, supra.

In view of SAIF's withdrawal of its request for Board review, we are left with no choice but to deny claimant's motion and dismiss this proceeding.

ORDER

The SAIF Corporation's request for review of Referee Mulder's orders dated June 3, 1983 and June 29, 1983, now having been withdrawn, hereby is dismissed, and those orders are final by operation of law.

WALTER DETHLEFS, Claimant
Bloom, et al., Claimant's Attorneys
David Horne, Defense Attorney

WCB 79-04604
September 28, 1983
Order on Remand

On review of the Board's order dated June 19, 1981 the Court of Appeals reversed the Board's order and remanded with instructions to "accept and pay benefits for the vasomotor rhinitis and the related headaches." 55 Or App 873 (1982). On review of the Court of Appeals' decision, the Supreme Court affirmed and remanded to the Board for further proceedings. The Supreme Court's final order now has issued.

We are advised by the parties to this proceeding that this claim has been processed to the point that the issues of temporary and permanent disability presently are pending before the Hearings Division in WCB Case No. 80-07914. Considering the facts and circumstances presented herein, we deem it appropriate to remand this case to the Referee for an appropriate disposition.

ORDER

The Board's Order on Review dated June 19, 1981 is vacated, and this case is remanded to the Hearings Division for further proceedings.

RICHARD L. FOLKENBERG, Claimant
Steven Pickens, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-07457
September 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Peterson's order overturning its denial of claimant's knee condition. Compensability is the only issue on review.

On June 18, 1982 claimant was walking across the floor of the garage in which he worked as a mechanic when he suddenly felt a tearing sensation in his left knee. He was diagnosed as having a tear of the medial meniscus of the left knee. Surgery was performed to correct the problem. SAIF denied compensability of the claim on the basis that:

> "Insufficient evidence exists to support your contention that this condition is in any way the result of your work activities on or about June 18, 1982."

The Referee overturned the denial. He said:

> "When walking is a part of a worker's job, as it was here, the risk of injury from the walking is a risk of the job. The claimant need not show that his injury was precipitated by an activity that he engaged in only during his work: Hubble v. SAIF, 56 Or App 154 (1982)."

We disagree with the Referee's analysis. Hubble involved a case in which the claimant's job required five to six hours per day on his feet. The court noted at the time of the fall claimant was walking fast because he had a number of projects to inspect that day. The court felt there was sufficient work connection between claimant's activity and his injury to make it compensable. In this case, there is no evidence claimant's job required significant walking. We do not believe that merely because a claimant is required to walk occasionally on the job that walking, in and of itself, can be considered a risk of employment.

In Mackay v. SAIF, 60 Or App 536 (1983), the claimant disembarked from the school bus she was driving. She started walking across the parking lot when her leg gave out. The court distinguished the case from Hubble.

> "Unlike Hubble v. SAIF, supra, there was no medical evidence that claimant's knee buckled as a result of a risk of her employment."

The court seems to be saying that occasional walking is not a risk of employment.

We believe that this case is best analyzed in terms of whether

claimant's fall was caused by idiopathic factors or was truly an unexplained fall. The Court of Appeals discussed idiopathic versus truly unexplained falls in Mackay v. SAIF, supra.

> "We recently adopted Professor Larson's analyis of unexplained falls. Phil A. Livesley Co. v. Russ, [60 Or App 292 (1982)]. There we held that a claimant will have carried the burden of proof of a 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." 60 Or App at 539.

See also discussion in Peter J. Russ, 33 Van Natta 509 (1981), aff'd 60 Or App 292 (1982).

In Russ, the claimant's doctor stated that claimant reported there was no evidence of preexisting disease which would explain claimant's fall. The Board and the court felt that such evidence was sufficient to eliminate all idiopathic factors of causation. However, in Mackay, the court declined to find that claimant's fall was unexplained because:

> "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." Mackay v. SAIF, supra at 539.

The evidence in this case indicates, likewise, an equal possibility that the cause of claimant's fall was a preexisting (i.e., idiopathic) problem or that it was connected to claimant's employment. His treating physician's report is equivocal at best:

> "A meniscus may be torn just by an abnormal step or a twist on a knee. The patient reported that this happened to him while he was walking, while he was on the job. In looking at the meniscus with an arthroscope, it is impossible to tell if there was a preexisting small tear that was merely enlarged by his activity on the job. If his job includes a lot of squatting down or twisting on his knee, it could contribute to his torn meniscus."

Dr. Norton, the only other physician who voiced an opinion, stated: "It was probably happenstance that it occurred at work."

Based on this evidence, we cannot affirmatively conclude that claimant has proven that his fall was connected to a risk of his employment. It is equally possible that it was caused by idiopathic factors. Accordingly, we reverse.

ORDER

The Referee's order dated February 24, 1983 is reversed. The denial of August 3, 1982 is reinstated.

GEORGE A. FULGHAM, Claimant (Deceased)
David Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-09355
September 28, 1983
Order on Remand

On review of the Board's order dated September 30, 1982, the Court of Appeals reversed the Board's order and remanded for a hearing.

Now, therefore, the above noted Board order is vacated and this case is remanded to the Hearings Division for further proceedings.

IT IS SO ORDERED.

BETTY J. HOWERTON, Claimant
Zafiratos & Roman, Claimant's Attorneys
Macdonald, et al., Defense Attorneys

WCB 81-05697
September 28, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee St. Martin's order which awarded claimant 240° for 75% unscheduled low back disability, an increase of 144° or 45% over that previously awarded by Determination Order.

In 1979 claimant was working in a nursing home as a nurse's aide when a patient in an electric wheelchair ran into her and knocked her down. Claimant's left hip and low back were injured. A laminectomy and partial discectomy at L5-S1 was performed in April 1980. She improved for a short time after the operation, but in June 1980 awoke with a start one night, resulting in pain that was worse than it had been prior to the surgery. Orthopaedic Consultants rate claimant's impairment in the mildly moderate category. Claimant has been retrained to sedentary work as a nurse's aid dispensing medications.

Applying the guidelines found in OAR 436-65-600 et seq. results in the following analysis. We assign claimant's impairment a +30 based on Orthopaedic Consultant's mildly moderate rating. Claimant's age yields a +9. Her work experience at her previous job required several months training, so we assign a +3 for work experience. Claimant's previous work was in the heavy range, and we conclude that she now is confined to light work; therefore, we assign a +10 for adaptability. All other categories yield a zero factor. After combining these factors and rounding to the nearest five, we reach a 45% disability rating.

Considering the forty-five percent disability rating we reach applying the guidelines and comparing this case with other similar cases, we conclude that claimant is entitled to a 45% unscheduled disability award rather than the 30% awarded by the Determination Order or the 75% awarded by the Referee.

ORDER

The Referee's order dated January 17, 1983 is modified. In addition to the 96° for 30% unscheduled permanent partial disability awarded by the Determination Order dated July 7, 1981, claimant is awarded 48° or 15%, for a total award of 144° for a 45% unscheduled permanent partial disability for injury to her low back and left hip. Claimant's attorney's fee shall be adjusted accordingly.

LAWRENCE M. SULLIVAN, Claimant
Kenneth D. Peterson, Claimant's Attorney
Kottkamp & O'Rourke, Attorneys

WCB 81-06349
September 28, 1983
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Danner's order which set aside its partial denial or aggravation denial of claimant's back condition and set aside the April 28, 1981 Determination Order as premature.

Claimant fell at work in September 1980. His most significant injury was to his left knee and thus most medical attention was devoted to this area. Claimant's claim was accepted and knee surgery was performed by Dr. Corbett. On March 31, 1981 Dr. Corbett declared claimant medically stationary. In reliance on that finding, the April 28, 1981 Determination Order closed the claim with an award of temporary total disability from September 9, 1980 to March 31, 1981 and compensation equal to 22.5° of scheduled permanent partial disability for a 15% loss of the left leg (knee).

On July 10, 1981 the insurer, responding in part to a letter that is not in the record, wrote claimant as follows:

> "We are in receipt of a letter from your attorney, wanting to reopen your claim for problems with your back, ribs and arms, which he claims you injured in your fall of September 18, 1980. Also by telephone calls from you, you have also requested that your claim be reopened for back problems.
>
> * * *
>
> "Your claim was originally accepted and you underwent knee surgery, from which you have recovered, and an appropriate Determination Order has been issued with appropriate permanent partial disability awarded.
>
> "This is to advise you that we are respectfully denying responsibility for your back problems and circulation loss under the Workers' Compensation Laws, as we do not feel that these problems resulted from your original injury and did not arise out of nor in the course and scope of your employment.

"This partial denial does not affect your original knee injury and cracked rib injury, which is still in an accepted state."

(Although the procedural question of whether this should be viewed as a partial denial or an aggravation claim denial could make substantive difference, the parties do not appear to raise any procedural question.)

I

It is extremely unclear what upper torso problems are being claimed to be compensable and what upper torso problems are being denied, except that all parties agree that claimant sustained a cracked rib injury at the time of his September 1980 fall and apparently agree that it healed without any permanent impairment.

On the one hand, if the question is whether claimant fell on his back in September 1980, we would answer that question in the affirmative. Claimant and a witness so testified. The 801 form claimant executed about a week later referred to a back injury. And the 827 form Dr. Ortiz executed about the same time refers to a back injury.

On the other hand, a compensable injury is defined as an injury "requiring medical services or resulting in disability." ORS 656.005(8)(a). Claimant clearly sustained a compensable knee injury under this definition, and virtually all of the medical reports focus exclusively on that knee injury. The few and fleeting references to claimant's back include findings of no orthopedic or neurologic involvement as a result of the September 1980 injury (except for the cracked rib); we thus assume that claimant's upper torso injury at that time was a soft tissue injury.

Proceeding on that understanding, we find no medical evidence that claimant's soft tissue back injury required medical services within the meaning of ORS 656.005(8)(a). Dr. Corbett, who provided most of claimant's treatment, reported on March 31, 1981 that claimant's "problems with his right shoulder and neck" were being "treated by Dr. Brandt." Dr. Corbett repeated on October 19, 1981: "We have not had direct care of this problem in this office." There are only two documents from Dr. Brandt in the record. The first recites claimant's history of low back pain since his at-work fall and the impression: "History of apparent soft tissue back injury." The second is a form with handwritten entries that we find mostly illegible. Neither describes any treatment of claimant's back provided by Dr. Brandt.

There are other ambiguities in the record. Drs. Corbett and Smith refer to the possibility that some portion of claimant's back problems are related to preexisting vascular problems. Dr. Hendricks suggests the possibility of carpal tunnel syndrome. Dr. Gehling finds x-ray evidence of mild right shoulder osteoarthritic change. We do not understand claimant to contend that any of these possible upper body conditions are compensable consequences of his knee injury; we do understand the doctors to be suggesting that these conditions may be producing some of claimant's "back" pain.

The question of whether claimant's back injury was disabling is likewise obscured by the fact that most medical attention focused on his knee injury or other, noncompensable, problems. However, interpreting Dr. Ortiz's September 24, 1980 chart note in the light most favorable to claimant, it appears that the doctor felt that claimant was unable to work for about a week after his at-work fall due to the combination injury to his leg, cracked rib and injury to his back/head. We think it follows that the insurer's partial denial -- insofar as it denies that claimant sustained any disabling injury to this back -- has to be set aside. Disability due to claimant's soft tissue back injury may have been brief and may have been minor, but we conclude that there was at least some temporary disability.

II

What we have already said regarding the partial denial issue disposes of parts of the premature closure issue.

The Referee concluded there was a premature closure for two reasons: (1) Claimant's injury-related back condition was not stationary at the time of the April 28, 1981 Determination Order; and (2) claimant's knee condition worsened within one year of the Determination Order, "thus warranting reopening without the necessity of a formal aggravation claim."

We disagree with the Referee on both points. It is, of course, claimant's burden to prove that he was not medically stationary when the Determination Order was published. Medically stationary "means that no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). Since this record does not contain any medical evidence of any treatment of claimant's soft tissue back injury, as stated above, obviously this record does not contain any medical evidence of a need for further treatment. While it is not necessary for the insurer to prove that claimant's injury-related back condition was stationary when the challenged Determination Order was issued, all indications in this record are to the effect that claimant's industrial back injury was rather minor and had completely resolved by that time.

The second reason stated by the Referee is inconsistent with our subsequent decision in Roy McFerran, Jr., 34 Van Natta 621 (1982), aff'd 60 Or App 786 (1982).

Finally, although it is not clear whether the Referee so found or claimant so argues, we reject any possibility that Dr. Corbett's opinion that claimant was medically stationary in March 1981, uncontroverted by any medical evidence, can be overcome by lay testimony. See Dennis Kurovsky, 35 Van Natta 58 (1983); Austin v. SAIF, 48 Or App 7 (1980).

III

Because of his finding that claimant's claim was prematurely closed, the Referee did not reach the question of extent of claimant's left leg disability. We remand to the Referee to do so.

ORDER

The Referee's order dated April 26, 1982 is affirmed in part and reversed in part. Those portions which set aside the insurer's partial denial of claimant's claim that he sustained a soft tissue back injury at the time of his September 1980 industrial accident are affirmed. Those portions of the Referee's order which set aside the April 28, 1981 Determination Order as premature are reversed. This case is remanded to the Referee for further proceedings consistent with this order.

ALMA M. BERRY, Claimant
Cash Perrine, Claimant's Attorney
Minturn, et al., Defense Attorneys

WCB 82-09397
September 29, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Williver's order and amended order which apparently set aside SAIF's denial of claimant's aggravation claim. SAIF also requests "clarification" of the second amended order in this case which was issued by Referee Daughtry on March 30, 1981.

Claimant was employed as a maid for the Thunderbird Hotel in Bend on October 25, 1980 when she sustained a compensable injury to her low back and left heel. Claimant was examined by Dr. Tuft on October 30, 1980 who diagnosed an Achilles strain of the left leg and possible sciatic neuritis. X-rays taken in December 1980 revealed degenerative changes in claimant's lumbar spine and a grade I spondylolisthesis at L5-S1. Claimant was treated with pain medication and continued working. SAIF accepted this claim as a nondisabling injury.

In March 1981 claimant consulted Drs. Newby and Bernson. Dr. Newby reported on March 4, 1981 that claimant had been doing quite well and working on a full-time basis, but that she had experienced an acute worsening of low back pain. Dr. Newby found that claimant had limitations in back motion and treated her with additional pain medications. Claimant also received chiropractic treatments from Dr. Hathaway.

On March 24, 1981 Dr. Newby reported that claimant had a "complete resolution of her symptoms" as a result of her chiropractic treatment and that she was "quite satisfied." Dr. Newby released claimant to return to work with no limitations. On April 15, 1981 Dr. Newby confirmed that claimant had been unable to work from March 4 through March 24, 1981. Dr. Hathaway subsequently issued several somewhat confused reports concerning when claimant became medically stationary. Nevertheless, claimant returned to work on March 25, 1981.

When claimant missed work in March 1981, SAIF reclassified her claim as disabling and paid appropriate benefits for temporary total disability. SAIF then, pursuant to ORS 656.268(3), issued notice of claim closure on May 27, 1981.

Nothing further was heard of claimant from a medical standpoint until she was examined by Dr. Garrett on April 16, 1982 with complaints of shortness of breath. Dr. Garrett suspected diabetes. On April 27, 1982 claimant was hospitalized by Dr. Garrett for problems unrelated to her industrial injury (as noted by Dr. Bernson in his July 21, 1982 report). Dr. Garrett's discharge summary lists thirteen different diagnoses, including arteriosclerotic heart disease, diabetes mellitus, hyperlipidemia and hypothyroidism. In conjunction with her hospitalization, Dr. Bernson ordered a myelogram to rule out the possibility of a herniated disc as the explanation for claimant's intermittent back pain. The myelogram was performed on May 4, 1982 and revealed a spondylolisthesis at L5-S1 with no evidence of a herniated disc. Claimant was discharged from the hospital on May 5, 1982.

On July 21, 1982 Dr. Bernson issued a report summarizing claimant's history and back treatment. He reported that, when he examined claimant in March 1982, he suspected a possible herniated disc, but before he could proceed with a myelogram, claimant was admitted to the hospital for unrelated problems. Because claimant was already in the hospital, Dr. Bernson then decided to proceed with the myelogram, which revealed nothing other than the spondylolisthesis, which he felt may have been aggravated by her industrial injury. Dr. Bernson further reported that he reexamined claimant on May 12, 1982, recommended exercises and weight loss and suggested that she obtain work requiring no repetitive bending or lifting of over 35 to 40 pounds.

On November 5, 1982 SAIF denied that claimant had sustained an aggravation of her 1980 industrial injury.

The matter proceeded to hearing on December 13, 1982. The issues were apparently premature closure in relation to the May 27, 1981 notice of closure, aggravation in relation to claimant's 1982 hospitalization and possibly penalties and attorney fees.

In a very succinct order, the Referee found that claimant was hospitalized in 1982 for back pain due to her industrial injury and ordered that SAIF's May 1981 notice of closure be set aside. On January 25, 1983 SAIF requested the Referee to clarify his order. On January 27, 1983 an amended order issued correcting certain portions of the original order. The amended order stated that it was SAIF's November 1982 denial which was set aside rather than its 1981 notice of closure. On February 15, 1983 SAIF requested Board review. On March 30, 1983 a second amended order issued attempting to further clarify the original order.

SAIF first argues that, if it was the intent of the Referee to find a premature closure in relation to the May 1981 notice of closure, he was without jurisdiction to do so. We agree. ORS 656.268 provides that a party has one year from the date of the notice of claim closure in which to request the Evaluation Division to issue a Determination Order and provides that the notice of closure inform the claimant of his or her rights in that regard. The notice of closure issued by SAIF in May 1981 appears to contain all of the required information. There is no indication that there was a request submitted to the Evaluation Division for a Determination Order within one year of date of the issuance of that notice. Claimant no longer has any basis to contest the notice of closure.

Even assuming, arguendo, that we have jurisdiction over any issue relevant to the notice of closure, we would still find that the claim was closed correctly. Dr. Newby released claimant to return to her regular work on March 24, 1981 with no restrictions and claimant, in fact, returned to work the following day, Dr. Hathaway's reports notwithstanding.

SAIF also argues that claimant suffered no aggravation of her industrial injury. We agree. As Dr. Bernson makes clear in his report of July 21, 1982, claimant's hospitalization in April 1982 was due to conditions unrelated to her industrial injury, and the myelogram was performed incidental to this unrelated hospitalization. Although there was some indications that claimant was experiencing additional back pain prior to her hospitalization, Dr. Garrett's chart notes indicate that when he examined her on May 12, 1982 following her discharge from the hospital, she was experiencing "very little" back pain, and that her main problem involved the left foot. Dr. Bernson also examined claimant on May 12, 1982. He assumed claimant's claim had been closed in 1981, and seemingly finds no objective change in claimant's condition since then. See Oakley v. SAIF, 63 Or App 433 (1983). Although claimant is entitled to medical benefits for her injury-related conditions pursuant to ORS 656.245, we do not believe that the evidence is sufficient to establish that she suffered a worsening of her 1980 industrial back/foot injury since May 27, 1981.

Since we have concluded that the evidence does not establish an aggravation, it is unnecessary for us to address SAIF's third issue which relates to the appropriate beginning dates for temporary total disability benefits. For the same reasons, it is unnecessary for us to discuss the validity or non-validity of the March 30, 1983 second amended order. Our reversal of the Referee's order and first amended order renders moot any dispute relative to the second amended order.

Although the issue of penalties was raised in claimant's request for hearing, we are uncertain that any evidence was presented at the hearing relative to that issue. In any event, we do not understand penalties to be an issue raised on this review.

ORDER

The Referee's orders dated January 17, 1983 and January 27, 1983 are reversed. SAIF's November 5, 1982 aggravation claim denial is reinstated and affirmed.

WALTER B. HENRY, Claimant
Cheney & Kelley, Attorneys

WCB 82-01554
September 29, 1983
Order on Review

Claimant requests review of Referee Pferdner's order which, pursuant to ORS 656.245, ordered the employer to pay claimant's injury-related medical expenses incurred prior to November 4, 1982, ordered the employer to pay claimant a 25% penalty on all such unpaid medical expenses and awarded claimant's attorney a fee of $500.

As it would appear that claimant prevailed on all issues sub-

mitted to the Referee, and we have received no brief from claimant in relation to this review, we are uncertain just what disagreements claimant has with the Referee's order. In any event, we conclude that we are without jurisdiction to review the Referee's order.

The Referee's order in this matter issued on November 4, 1982. By letter postmarked December 3, 1982, claimant requested Board review. In his request for review, claimant stated that "All parties will be notified . . ." The request for review was acknowledged by the Board on December 8, 1982.

On February 28, 1983 the employer moved the request for review be dismissed as claimant had failed to mail it a copy of the request. ORS 656.295(2). On the basis of our decisions in Barbara Rupp, 30 Van Natta 556 (1981), and Michael J. King, 33 Van Natta 636 (1981), we initially denied the motion.

Subsequent to our denial of the employer's motion but prior to our review of the case on the merits, the Court of Appeals issued its decision in Argonaut Insurance v. King, 63 Or App 847 (1983). The court stated that ORS 656.295 requires that statutory notice of the request for review be mailed or actual notice be received within the statutory 30 day period for requesting Board review, and that failure to do so is fatal to the appeal.

King is dispositive here. Claimant failed to mail a copy of his request for review to the employer, and the employer had no actual notice of the request within the statutory period. That being the case, claimant's request for review must be dismissed. Edward Hanson, 35 Van Natta 1107 (July 26, 1982).

ORDER

Claimant's request for Board review is dismissed for failure to comply with ORS 656.295(2).

ANDREW L. MARTIN, Claimant
Pozzi, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 82-05091 & 82-10013
September 29, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer (EBI) requests review of Referee Braverman's order which found claimant permanently and totally disabled. Claimant cross-requests review of that portion of the order which denied claimant's hearing loss claim and accompanying penalty and attorney fees for the insurer's alleged unreasonable denial.

Claimant is 64 years old. At the time of his injury, June 2, 1980, he was employed as a plant laborer for a food processing plant. He injured his left shoulder while throwing a piece of lumber. The injury was diagnosed as a left rotator cuff tear. Initially treatment was conservative, but soon after surgery was performed. A post-surgical arthrogram found the rotator cuff still torn, but further surgery was deferred.

Dr. Zimmerman, his treating physician, found claimant's condition to be permanently impaired. The doctor found a "general

attrition of the cuff." He felt that claimant had severe pain from the left arm disability, was totally disabled and could not return to work. The doctor stated that his opinion was also based on non-medical factors, i.e., claimant's age of 64, his third grade education and his inability to read or write.

Orthopaedic Consultants found claimant's physical impairment to be "mildly moderate." They felt claimant could not return to his former work. Whether or not he could pursue another occupation with his third grade education was questionable, but the Consultants advised vocational assistance in order to make a determination.

A Determination Order issued June 10, 1981 granting claimant an award of compensation equal to 60% unscheduled disability. The Referee overturned the Determination Order and found claimant permanently and totally disabled as of the date of the hearing, January 11, 1983.

We disagree with the Referee's award and reverse. For the reasons stated below, we affirm the Determination Order's award of 60%.

Claimant testified that he had virtually no use of his left arm "in terms of weight." He stated that he could not reach with his left arm more than a few inches from his body. Claimant further testified that his arm was usually in a sling, although he drove a pickup truck with a 4-5 speed transmission. He stated that due to the pain he could do nothing with his left arm. His wife and son substantially corroborated this statement. Claimant went on to testify that he did assist his son in his metal scrap business but did little, and then only light lifting.

Claimant's testimony and the credibility of his "histories" furnished to his orthopedists, which formed the basis for their reports, were severely impeached by surveillance films (Exhibits 33A-F). One set was taken July 17-18, 1981 and the other set was taken December 14, 15 and 17, 1982.

The films demonstrate that claimant can do the following activities involving the use of his left arm, sans sling:

1. Open and close a car door;
2. Open and close a screen door to his house;
3. Pull large metal objects, including what appears to be a cement mixer, out of the bed of a pickup truck;
4. Load and unload scrap metal from the bed of a pickup truck, not only from the tailgate, but also over the sides;
5. Lift a large piece of scrap metal over his head, using both arms, and place the metal in the bed of a pickup truck;
6. Carry large pieces of scrap metal by holding them in his left hand;
7. Lift himself onto the bed of a pickup truck by grasping a piece of metal in his left hand;
8. Drive a car and a pickup truck;
9. Put on a jacket and extend his left arm behind his back to reach the left sleeve of the jacket.

These films do more than "markedly contradict" claimant's testimony, as the Referee stated in his order. They taint the very foundation of the orthopedist's reports and recommendations. Finally, the films depict the range of activities claimant is able to perfirm.

There is no question that claimant has some physical impairment. He has some loss in motion of the left shoulder, including pain, and loss of strength. All medical reports agree in this assessment. However, it should be noted that the examining physicians did not have the benefit of viewing the surveillance films so their impairment analyses must be measured accordingly. Further, claimant is 64 years old, has a third grade education, is functionally illiterate and has a significant hearing loss. Without question, claimant has a lack of marketable skills.

These factors result in the conclusion that claimant is significantly disabled. However, we are unable to find that claimant is permanently and totally disabled, considering the surveillance films, the medical reports and claimant's testimony, together with the pertinent social/vocational factors.

In reaching this conclusion, we take particular note of the fact that claimant failed to cooperate when vocational assistance was offered. We also note that claimant's diligence regarding further physical therapy was questioned by the Orthopaedic Consultants. These instances speak to the degree of motivation to return to work that claimant has exhibited. Finally, claimant's lack of interest in vocational assistance or retraining is documented in his testimony.

We find that claimant's physical limitations are not so severe as to amount to a finding of permanent total disability, even when analyzed in conjunction with his unfavorable social/vocational factors. Claimant's limitations concern his left arm, not his right arm. He has no limitations in sitting, standing or walking. The surveillance films demonstrate claimant's vitality and the abilities that he does possess.

Considering claimant's relative lack of education and training, his functional illiteracy, his hearing loss, his age, the guidelines in OAR 436-65-600, et seq., and comparing this case to similar cases, we find that he is entitled to an award for 60% unscheduled permanent partial disability.

The Board affirms and adopts that portion of the Referee's order denying claimant's hearing loss claim.

ORDER

The Referee's order dated February 28, 1983 is affirmed in part and reversed in part. Those portions of the order concerning the denial of claimant's hearing loss claim are affirmed. Those portions awarding permanent total disability are reversed. The Determination Order dated June 10, 1981, which awarded 192° for a 60% unscheduled permanent partial disability is affirmed.

GEORGIA J. MUSICK, Claimant
Kenneth D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-07120
September 29, 1983
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Leahy's order which affirmed a Determination Order awarding claimant 48° for 15% unscheduled permanent partial disability. The issue is extent of disability, including permanent total disability.

Claimant is a 39 year old psychiatric aide who compensably injured her low back on August 9, 1980. Dr. Achari performed a hemilaminectomy at L4 and an excision of the L5/S1 disc in March 1981. A second exploratory surgery performed by Dr. Achari in August 1981 resulted in removal of scar tissue at the previous surgical site.

In July 1982 Dr. Achari found claimant medically stationary and stated, "I would rate her permanent partial disability to be between 15-20% of whole body." Claimant argued to the Referee that Dr. Achari meant impairment, not disability. The Referee noted that claimant had sufficient time to clarify Dr. Achari's opinion of her disability and had failed to do so. The Referee was unwilling to second guess the doctor. Because we are uncertain of what Dr. Achari meant, we agree with the Referee and decline to rely on Dr. Achari's "disability rating."

We disagree with the Referee's award of 15% permanent disability, however. Our analysis begins with applying the guidelines in OAR 436-65-600 et seq. Claimant is unable to return to her work as a psychiatric aide. Based on claimant's medical findings and physical limitations, we assign a factor of +15 for impairment. Claimant's age of 39 yields a factor of 0 and her ninth grade education a factor of +7. We assign a +3 for work experience based on an SVP of 3. Because claimant formerly performed medium level work and now is restricted to light work, we assign a +5 for adaptability. We assign a factor of 0 for mental capacity, for emotional and psychological findings and for labor market findings.

Combining these factors as provided in the rules and rounding to the nearest 5 yields a disability rating of 25%. Comparing that finding with other similar cases, we conclude that an award of 25% permanent disability is appropriate in this case. Accordingly, we reverse the Referee and increase claimant's permanent disability award.

ORDER

The Referee's order dated March 16, 1983 is reversed. In addition to the 48° for 15% unscheduled permanent partial disability awarded by the Determination Order dated August 30, 1982, claimant is awarded 32° or 10%, for a total award of 80° for a 25% unscheduled permanent partial disability. Claimant's attorney is allowed 25% of the increased compensation awarded claimant, not to exceed $3,000.

WILLIAM F. BREDVOLD, Claimant
Bloom, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-07495
September 30, 1983
Order on Review (Remanding)

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee St. Martin's order which dismissed his request for hearing in relation to a March 16, 1982 Determination Order. Claimant requests that the Referee's order of dismissal be reversed and the matter remanded for a hearing on the merits.

The facts are not in dispute. On August 19, 1982 the Board received claimant's request for hearing in relation to a March 16, 1982 Determination Order which awarded claimant no benefits for permanent disability. At the same time claimant submitted an application to schedule a hearing, by which claimant indicated that he was then prepared for hearing. Claimant's hearing request and application for hearing were acknowledged by the Board on August 23, 1982.

On January 4, 1983 the Board received a letter from claimant's attorney indicating that he had lost contact with his client and requesting that the matter be put in inactive status. The letter indicates that a copy was sent to the SAIF Corporation. Despite our receipt of this letter, Board staff issued a notice of hearing on January 11, 1983, indicating that the matter was set for hearing on February 18, 1983. On January 13, 1983 claimant's attorney again wrote to the Board inquiring why a hearing had been scheduled after he had requested that the matter be set over until he could determine if his client would be available for hearing. SAIF was apparently copied with this letter also.

Despite having received no objection from SAIF, the Referee dismissed claimant's request for hearing on January 17, 1983. On February 4, 1983 claimant's attorney requested the Referee withdraw his order of dismissal. The Referee refused. Claimant then requested Board review.

We conclude that the Referee did err in dismissing claimant's request for hearing. Although the Board's rules of practice and procedure contain no reference to an application to schedule a hearing, it has long been the practice of the Board to schedule hearing dates only upon receipt of and in reliance on such an application that certifies that the party is prepared and ready to proceed with a hearing. This long-standing custom has probably acquired the same legal status as formally adopted rules of practice and procedure. See Fulgham v. SAIF, 63 Or App 731 (1983).

In this case, prior to the time the notice of hearing was issued, claimant's attorney wrote to this agency indicating that: (1) Circumstances had changed since August 1982 when he indicated he was prepared for hearing; and (2) that he was not currently prepared to proceed to hearing at that time. In effect, claimant's attorney's letter was a withdrawal of his application to schedule a hearing. Just as we schedule hearings upon receipt of and in reliance on the certification of readiness in an application to

schedule, we believe that the process of setting a hearing date should be suspended upon receipt of notification that circumstances have changed, and that a party is no longer prepared to proceed to hearing.

OAR 436-83-310 provides: "A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions a delay of more than 90 days without good cause." (Emphasis added.) We believe that, under this rule, the dismissal of claimant's request for hearing was clearly premature. We find it difficult to understand how claimant could have delayed a hearing when this agency had not even had an opportunity to schedule a hearing at the time claimant indicated he was withdrawing his application for a hearing date. Moreover, the actual hearing date had not even arrived before the Referee dismissed the matter. How could claimant be said to have caused delay in such circumstances?

Alternatively, even though no hearing had been set at the time of claimant's January 3, 1983 letter, that letter could be viewed as a request for postponement. Whether so viewed or considered under the anti-delay provisions of OAR 436-83-310, the question is the same: Whether claimant showed "good cause" for the delay or for a postponement. In the context of this case, which involved an August 1982 hearing request and a question arising in January 1983 about possible delay of the hearing, we believe that claimant's attorney's January 3, 1983 letter indicating that he had at least temporarily lost contact with his client established good cause, at least for an initial postponement of his hearing. We do not mean to imply that a loss-of-contact excuse would justify an extensive delay. We only conclude that an attorney's loss of contact with his or her client, which occurred less than five months after the hearing request was filed, with no indication of prior lack of alacrity in proceeding to hearing, was then good cause to delay the proceedings for some reasonable length of time.

Unquestionably, the Referee expressed valid concerns when he indicated in his order that a party requesting a hearing has certain obligations, one of which is to cooperate with this agency in processing his request for hearing. Nevertheless, we believe that there can be legitimate and beyond-the-control-of-anybody reasons for loss of attorney-client contact. We, therefore, conclude that dismissal in this case was premature.

ORDER

The Referee's order dated January 17, 1983 is reversed. This matter is remanded to the Hearings Division for the setting of a new hearing date upon receipt of a new application to schedule a hearing.

JAMES A. GUSE, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Rankin, et al., Defense Attorneys

WCB 81-06833 & 81-11397
September 30, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Howell's order which upheld denials of claimant's occupational disease claim for hearing loss issued by the employer, which has been self-insured since 1979, and by the SAIF Corporation, which provided insurance until 1979. The issues are compensability and, if the claim is found compensable, responsibility between the employer and SAIF.

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

There is considerable circumstantial evidence that claimant's work as a police officer exposed him to potentially injurious noise levels, primarily in firearms practice and testing. We think, however, that questions of the existence and causation of noise-induced hearing loss requires expert evidence.

The experts involved here are Dr. Ediger, Ph.D., who offers a conclusory opinion that claimant's work caused some hearing loss, and Dr. Conway, Board certified otolaryngological specialist, who offers a rather detailed opinion that claimant's work was not the major cause of his hearing loss. As the Referee noted, the expertise advantage has to go to Dr. Conway.

Claimant argues on review that the reasons Dr. Conway advanced to explain his opinion are inconsistent with the doctor's conclusion. Claimant focuses primarily on one passage in Dr. Conway's deposition in which the doctor explains that claimant's hearing test results are not consistent with a noise-induced hearing loss. Claimant interprets this testimony as involving a comparison of the results of his hearing tests in 1959, 1976, 1978 and 1980, and all of claimant's argument is built on the foundation of that interpretation of the testimony. On the contrary, we understand that testimony to involve solely an analysis of the 1980 test results; so claimant's argument falls because its foundation is incorrect. Furthermore, even if medical opinion had been offered based on a comparison of the test results over a 21 year period, Dr. Conway persuasively testified to the effect that the differences in claimant's hearing test results are not great enough to be diagnostically significant given the differences in testers, lack of precise calibration, etc.

ORDER

The Referee's order dated November 15, 1982 is affirmed.

CRAIG B. PALEN, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys
Atherly, et al., Attorneys

WCB 81-08240 & 82-03717
September 30, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation, on behalf of Flying Scotsman, Inc., requests review of Referee Shebley's order which set aside its denial of claimant's left carpal tunnel syndrome claim. SAIF also appears as a respondent herein, separately represented, on behalf of another potentially responsible employer, Don Hamm Logging. The issues are compensability and employer/insurer responsibility.

I

In September 1979 claimant sustained a compensable laceration to his left arm, just above the elbow, while working for Flying Scotsman. That claim was accepted, processed and closed by Determination Order dated November 2, 1979 with an award for about a week of time loss. Claimant returned to work with Flying Scotsman. Claimant testified that about a month after returning to work he began to be awakened at night with pain/numbness in his left hand/forearm. However, claimant continued to work at Flying Scotsman without missing time, without seeking medical attention for that pain/numbness condition and without contesting the Determination Order which had awarded no permanent disability. Claimant's employment with Flying Scotsman ended sometime toward the end of 1979.

Claimant worked for Don Hamm Logging during the summer of 1980 as a timber faller, operating a chain saw an average of six to seven hours per day. Claimant testified that this work increased the pain and numbness in his left hand/forearm. But claimant apparently continued to work without missing time or seeking medical attention for this condition.

Also, between claimant's September 1979 laceration injury and May of 1981, claimant worked brief periods of time for Smoky Mountain Logging, Sillar Brothers Aviation, Inc. and Dennis Gourney Fence Construction, none of which are parties to this proceeding. In addition, claimant returned to work with Flying Scotsman for four days in April 1981.

In May 1981, apparently at a time when he was between jobs, claimant first consulted Dr. Brazer for pain, numbness and loss of strength in his left hand. Dr. Brazer referred claimant to Dr. Bernstein who in turn referred claimant to Dr. Nathan. These doctors offer a variety of opinions on the nature and cause of claimant's left hand condition.

In about 1972 claimant had sustained a nonindustrial puncture wound to his left wrist when he put his left hand through a glass door. At that time, according to Dr. Bernstein, a piece of glass went "directly through the carpal tunnel on the left." Dr. Bernstein's June 4, 1981 report seems to suggest that the 1972 nonindustrial injury is the most likely explanation for claimant's 1981 left forearm symptoms:

> "The most striking finding is a reduction of the left median nerve sensory and palmar

amplitudes. This suggests a prominent axonal lesion, such as might be seen with a glass cut injury. The patient was discussed with Professor John Roth at the University, director of the EMG lab, who felt that laceration injury is a strong possibility in this gentleman, with a retained glass fragment. He recommended exploration, and I would concur with this."

Dr. Nathan found the situation to be more complex. He reported three diagnoses:

(1) "Status nearly 20 years post laceration, volar aspect, left wrist, with partial injury, median nerve." (This refers to claimant's 1972 nonindustrial injury.)

(2) "Status nearly two years post laceration, distal lateral aspect, left upper arm, with sensory involvement, radial nerve." (This refers to claimant's 1979 Flying Scotsman/SAIF industrial injury.)

(3) "Current symptoms of numbness, median nerve distribution, left."

Dr. Nathan went on to suggest that in addition to the possibility of a foreign body being present in claimant's left wrist from the 1972 nonindustrial injury, "resultant scar tissue from [that] injury" could be causing claimant's 1981 left forearm problems. Dr. Nathan then stated: "It seems to me most probable that [claimant's] current median impairment is a continuation of the [1972 nonindustrial injury]."

At this point, matters appear to be fairly straightforward. Nerve damage, if any, at the time of claimant's 1979 Flying Scotsman/SAIF injury was to the radial nerve. Claimant's 1981 symptoms involve the median nerve distribution. And Drs. Bernstein and Nathan seem to agree that the most likely explanation of the 1981 median nerve symptoms relates back in some way to claimant's 1972 nonindustrial injury.

But matters do not remain simple. In the same report quoted above, Dr. Nathan proceeded to opine and explain:

"[Claimant] informs me that the occurrence of numbness in his left hand began to occur about 1 1/2 years ago, and this he describes as being specifically separate from that [prior] numbness which he has in his long and little finger [as a consequence of the 1972 nonindustrial injury]. It would seem to me, therefore, that this [new and different] numbness is associated with his chainsaw work at that time with Don Hamm Logging, as it did not appear prior to that time. I do not feel that the underlying

median nerve pathology is related to his employment, but it would be reasonable to assume that his symptoms are related to his employment. In this regard, then, I would recommend that this come under his industrial insurance."

Also, Dr. Bernstein expressed what seems to be somewhat similar reasoning in his report dated March 2, 1982:

"[Claimant] actually has two diagnosed conditions. The first involves an underlying left sided axonal nerve lesion, which is probably the result of his glass cut injury at age twenty, and the second is a probable superimposed carpal tunnel syndrome. The first condition is, of course, unrelated to his employment, but the second condition is. The interaction of these two problems is exceedingly complex, and I must admit that I do not know which of these conditions constitutes the major contributing factor here.

* * *

"Even if his original laceration injury at age twenty is the major source of his median nerve dysfunction, his carpal tunnel syndrome, which is occupationally related, probably did significantly worsen this pre-existing condition."

That is all of the relevant medical evidence. In summary, Drs. Bernstein and Nathan seem to start off in agreement that claimant's current median nerve dysfunction is most likely a consequence of his 1972 nonindustrial injury. However, in various terms of possibility/probability, and in various terms of symptomatic/pathological connection, Drs. Bernstein and Nathan also suggest some causal link between claimant's median nerve dysfunction and his recent employment activity.

II

As we understand this case, claimant is making three alternative claims: (1) That his 1981 median nerve problems are an aggravation of his 1979 Flying Scotsman/SAIF left arm laceration injury; (2) that his 1981 median nerve problems are an occupational disease for which Flying Scotsman/SAIF should be responsible; (3) that his 1981 median nerve problems are an occupational disease for which Don Hamm Logging/SAIF should be responsible.

The Referee's order can be interpreted as finding this claim compensable on the first of these theories, i.e., aggravation. What the Referee actually did was to set aside SAIF's denial on behalf of Flying Scotsman dated July 13, 1981. That denial is rather clearly a denial of an aggravation claim:

"This is to reaffirm our acceptance of responsibility for your industrial injury of September 7, 1979 which resulted in a deep

> laceration on your left upper arm. Medical expenses and time-loss compensation directly related to this accident and this condition will be paid. However, . . . we find that we are unable to accept responsibility for your current condition, numbness to hands and fingers. Medical information in file shows no causal relationship to your original injury."

To the extent that the Referee may have found an aggravation of claimant's 1979 Flying Scotsman/SAIF injury, we disagree. The current claim is for some form of median nerve dysfunction. There is absolutely no medical evidence linking the current left median nerve problem to the 1979 left arm laceration. As the Referee noted, there was lay testimony that "approximately one month after his 1979 industrial injury" claimant "began experiencing the classical signs of carpal tunnel syndrome in his left hand and forearm." However, no medical opinion suggests any causal link between the former and the latter. The only suggestion of any possible nerve injury in 1979 comes from Dr. Nathan, and he suggests radial nerve injury, not median nerve injury. Claimant's current left forearm problems are not an aggravation of his 1979 left upper arm injury.

III

The remaining possibility is occupational disease. We first note that the precise nature of claimant's left forearm problem is unclear. It has been referred to generally as median nerve dysfunction and specifically as carpal tunnel syndrome. Dr. Bernstein opines that there are two distinct conditions, but we are not sure that we understand the distinction that he draws between a 1972 median nerve injury and a 1981 carpal tunnel syndrome, which is a median nerve condition. Identification of the problem is, of course, relevant in assessing causation.

Whatever the nature of the problem, the question is whether claimant has proven that work activity was the major cause of a pathological worsening of the underlying condition. Weller v. Union Carbide, 288 Or 79 (1979); SAIF v. Gygi, 55 Or App 570 (1981). The underlying condition here in issue involves prior, nonindustrial injury to the median nerve when a piece of glass cut through the carpal tunnel area, possibly resulting in a retained foreign body in or around the median nerve and/or possibly resulting in scar tissue on or around the median nerve. It is far from clear that it is even possible to have a pathological change in a retained-foreign-body condition. We understand Dr. Nathan to find, at most, a symptomatic change, which we think is considerably more plausible, given the nature of the underlying condition here in issue.

The only possible evidence to the contrary is the opinion expressed in Dr. Bernstein's March 2, 1982 report. We find those opinions to be long on conclusions and short on explanation and, without explanation, impossible to understand. This is especially true because Dr. Bernstein's prior, June 4, 1981 report rather clearly indicates that claimant's current left forearm problem is a result of claimant's 1972 nonindustrial injury. It is possible,

of course, for a doctor's assessment to change based on further investigation, but that cannot be the explanation for the differences in Dr. Bernstein's June 1981 and March 1982 reports because the latter recites that the doctor has "not seen [claimant] since I referred him to Dr. Nathan."

Moreover, and most importantly, even if we were to accept Dr. Bernstein's apparent but unexplained opinion of pathological change in his latter report, there would still remain the question of major work causation. The most that Dr. Bernstein says is that the worsening of claimant's condition is "related" to his employment. Although no "magic words" are required, we do not think that Dr. Bernstein or any other doctor has said anything that can fairly support an inference of work activity being the major cause of any pathological worsening of claimant's left forearm condition. Claimant has, therefore, not established the compensability of his condition on an occupational disease theory.

IV

If we had found the claim compensable and thus reached the issue of employer/insurer responsibility, we would agree with the Referee's conclusion on this point. Although some of the details of claimant's employment history are rather vague in this record, apparently claimant last worked for Flying Scotsman in April 1981 before first seeking medical attention for his left forearm condition in May 1981. It would thus appear that claimant's employment with Flying Scotsman, albeit brief, was the last injurious exposure.

ORDER

The Referee's order dated July 29, 1982 is reversed. The denial of the SAIF Corporation on behalf of Flying Scotsman, Inc. of claimant's claim for aggravation of his September 1979 injury is reinstated and affirmed. In addition, SAIF's denials on behalf of all employers herein of claimant's occupational disease claims are affirmed.

DAVID A. SMITH, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07700, 81-11441 & 81-11442
September 30, 1983
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Mongrain's order which: (1) Upheld the SAIF Corporation's partial denial of claimant's headaches, viral enteritis and gastrointestinal distress, finding that these conditions were not related to claimant's 1981 low back injury; (2) found that the February 4, 1982 Determination Order did not prematurely close claimant's back injury claim; (3) found that claimant had not established permanent disability caused by his back injury, thus affirming the Determination Order on this point too; and (4) declined to assess a penalty or award associated attorney fees because of SAIF's allegedly unreasonable conduct.

The Board affirms and adopts the order of the Referee with the following clarification and qualification. SAIF's partial denial specifically denied the compensability of claimant's emergency room treatment on three specific dates. We understand the Referee's order to have upheld the denial as to this specific treatment, and we affirm with that understanding. The partial denial also generally denied the compensability of "any emergency room visits for which the doctors have documented that you were seeking pain medications." The Referee found this latter portion of the partial denial to be "meaningless" because it is not "specific enough to effectively deny anything." The problem is not lack of specificity; the problem is that, generally speaking and here, there cannot be a denial of future medical services. See Gary E. Freshner, 35 Van Natta 528 (1983); Anita Gilliam, 35 Van Natta 377 (1983); Patricia M. Dees, 35 Van Natta 120 (1983). We sympathize with SAIF's concerns about claimant's repeated emergency room solicitations of pain medication given the indications of a propensity to abuse such medications, but nevertheless it is not possible to issue a "blanket" denial of all future medical services of this nature.

ORDER

The Referee's order dated December 7, 1982 is affirmed.

VERLIN A. BELCHER, Claimant
Hansen & Wobbrock, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-07997
June 28, 1983
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of those portions of Referee Pferdner's order which ordered it to furnish claimant with an automobile meeting the specifications indicated as being necessary by Dr. Ward and assessed a penalty against SAIF in the amount of 10% of the lowest bid on the automobile. SAIF contends that this was error.

We adopt the Referee's findings of fact as our own, and further we affirm and adopt his order subject to the following qualification. The Referee stated that he ". . . [did] not accept Dr. Ward's designation of an automobile as a prosthetic appliance other than in the broadest sense." We believe that with regard to paraplegics (and possibly quadraplegics), Dr. Ward's definition of "prosthetic applicance" is reasonable.

ORDER

The Referee's order dated December 20, 1982 is affirmed. Claimant's attorney is awarded $500 as an attorney's fee for services before the Board, payable by the SAIF Corporation.

WORKERS' COMPENSATION CASES

Decided in the Oregon Supreme Court:

Decided in the Oregon Court of Appeals:

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
Walter J. Dethlefs, Claimant.

DETHLEFS,
Respondent on Review,

v.

HYSTER COMPANY,
Petitioner on Review.

(WCB 79-4604, CA A 21593, SC 28490)

In Banc*

On Review from the Court of Appeals.**

Argued and submitted June 8, 1982.

David O. Horne, Beaverton, argued the cause and filed the briefs for petitioner on review.

Richard A. Sly, Bloom, Marandas & Sly, Portland, argued the cause and filed the briefs for respondent on review.

Evohl F. Malagon and Malagon, Velure & Yates, Eugene, filed a brief amicus curiae for Oregon Workers Compensation Attorneys Association.

Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, filed a brief amicus curiae for Association of Workers' Compensation Defense Attorneys.

LENT, C. J.

Affirmed and remanded to the Workers' Compensation Board.

---

* Denecke, C. J. retired June 30, 1982. Tanzer, J. resigned December 31, 1982.

** Judicial Review from Workers' Compensation Board. 55 Or App 873, 640 P2d 639 (1982).

LENT, C. J.

This case is concerned with a claim for compensation under the Workers' Compensation Law for rhinitis and asserted sequelae. Two kinds of rhinitis are involved: allergic rhinitis and vasomotor rhinitis. The Court of Appeals found, and we therefore accept under the rule of *Sahnow v. Fireman's Fund Ins. Co.*, 260 Or 564, 491 P2d 997 (1971), that the two kinds of rhinitis are defined differently. Allergic rhinitis is a

> "pale boggy swelling of nasal mucosa associated with sneezing and watery discharge, attributable to hypersensitivity to foreign substances."

Vasomotor rhinitis is

> "congestion of nasal mucosa *without* infection or *allergy*." (Emphasis added.)

Dethlefs v. Hyster Co., 55 Or App 873, 876, 640 P2d 639 (1982). The Court of Appeals, reversing the Workers' Compensation Board (Board), held that the claim was to be accepted and "benefits" were to be paid to claimant for his vasomotor rhinitis and related headaches.

We allowed review to determine initially whether the Court of Appeals has inconsistently interpreted the text of ORS 656.802(1)(a)[1] and, if so, to arrive at an interpretation to be applied henceforth. ORS 656.802(1)(a) provides:

> "(1) As used in ORS 656.802 to 656.824, 'occupational disease' means:
>
> "(a) Any disease or infection which arises out of and in the scope of employment, and *to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein.*" (Emphasis added.)

It is the emphasized part of the statute to which the Board, purporting to apply a rule from *Thompson v. SAIF*, 51 Or App 395, 625 P2d 1348 (1981), gave an interpretation that caused us to believe clarification was necessary.

The facts and the changing positions taken by the employer in resisting this claim make it difficult to state anything other than dictum. The record disclosed the following history:

On December 1, 1978, claimant filed with the defendant a Form 801,[2] describing as the nature of his injury or disease "Dust. & Poll. Allergy." Somewhat more particularly, he gave the following description: "Dust & Poll. ect. [sic] I have headaches & shortness of breath. Sometimes vomiting."

On December 6, 1978, the employer's insurer, in appropriate spaces on Form 801, stated that the "injury" happened during the course of employment and that the claim was accepted as being for a nondisabling injury. The employer left blank space # 60, which provides: "If you doubt validity of the claim state reason."

By letter dated April 10, 1979, the employer's insurer wrote to the claimant about his "recent claim":

> "We must notify you that we will be unable to accept your claim under our coverage. Our denial is based on the fact that it does not appear your condition was aggravated or arose out of and in the course of employment, either by accident or occupational disease, within the meaning of the Oregon Workers' Compensation Law."

[1] We now perceive no necessity to address that question.

[2] This is the prescribed form for filing a claim for compensation under the Workers' Compensation Law. It contains 60 spaces to be completed, some by the claimant and some by the employer or insurer, to yield rather concisely much pertinent information about the claim and the employer's response thereto.

On May 29, 1979, claimant requested a hearing to "protest denial of April 10, 1979." In a letter to the Board dated June 7, 1979, the employer's insurer's attorney stated "that the denial of April 10, 1979 is correct and should be affirmed." The employer's insurer, by letter dated January 21, 1980, took another position:

> "We are now amending our earlier denial and stating that we do not feel that your disability in relating to the occurrence of November 30, caused any temporary disability and/or permanent partial disability relating to the incident * * *."[3]

Hearing before the referee commenced on January 28, 1980, and the employer's insurer's counsel, referring to the letter of January 21, stated:

> "[W]e were amending the prior denial, stating we do not feel this is related to the occurrence which caused him to receive the temporary total disability and permanent partial disability, therefore, we deny benefits in relationship to any temporary total disability and permanent partial disability."

On June 27, 1980, the referee, in his opinion and order, stated:

> "This is an appeal from the denial of claimant's claim and the only issue is whether or not claimant's headaches, nausea, vomiting, shortness of breath, dizziness, allergic rhinitis and vasomotor rhinitis are causally related to exposure to dust, smoke, fumes, pollutants, iron dioxide and particulate matter at work."

The referee found that claimant's allergic rhinitis, arteriosclerosis and "labrynthian" disease were not causally related to his employment. The referee found that claimant's:

> "employment was *a substantial contributing cause* to his vasomotor rhinitis and that the vasomotor rhinitis was a substantial contributing cause of claimant's headaches." (Emphasis added.)

The referee accordingly ordered that "the claim of vasomotor rhinitis and headaches" be remanded to defendant for acceptance and payment of "benefits" pursuant to law. The referee opined that there had been a permanent change in claimant's condition that was causally related to his employment, that his vasomotor rhinitis and headaches were compensable and "that neither of defendant's denials can be sustained."

The employer requested Board review, ORS 656.295, asserting "that the denials issued by" the employer were correct. In its brief on Board review, the employer wrote:

> "The employer and carrier *do not contend* that the vasomotor rhinitis or irritative rhinitis is not related to the Claimant's employment, but that its relationship resulted in only the need for medical treatment but no time loss or permanent disability.
>
> "* * * * *

[3] The meaning of the letter is a little hard to discern because it essentially states that claimant's "disability [did not cause] any * * * disability."

> "In summary, the employer and carrier are *not contending that Claimant did not sustain an occupational disease* by the inhalation of smoke at work however, that exposure at most required medical treatment, but no temporary total disability nor any permanent change in the Claimant's condition." (Emphasis added.)

In its order on review, dated June 19, 1981, the Board specifically agreed with the referee's finding of fact that claimant's employment was a substantial contributing cause of his vasomotor rhinitis and headaches, but interpreted the law to be that "substantial contributing cause" was not the proper test of compensability for occupational disease. The Board interpreted *Thompson v. SAIF,* 51 Or App 395, 625 P2d 1348 (1981), to stand for the rule that "the proper test is whether the disease was caused solely by the work environment." The Board found that claimant's "rhinitis" was not caused solely by his work environment but, rather, "both on-work and off-work exposures contribute to that condition." The Board ordered:

> "The Referee's order dated June 17, 1980 is reversed and the employer's denial is reinstated."

In its opinion, the Court of Appeals acknowledged that the Board's decision was based upon the Board's interpetation of *Thompson v. SAIF, supra,* but never expressly stated whether that interpretation was accurate.[4] Rather, the Court of Appeals quoted from its decision in *SAIF v. Gygi,* 55 Or App 570, 639 P2d 655 (1982), *rev den* 292 Or 815 (1982), not yet decided at the time the Board acted herein:

> "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, is *the major contributing cause* of the disability, then compensation is warranted." (Emphasis added.)

55 Or App at 877. Upon the authority of *Gygi,* the Court of Appeals held that the Board had erred in ruling that the claimant must show that his disease was caused solely by the work environment. Applying the rule of *Gygi* to the evidence, the

Court found that claimant had established that his employment was the major contributing cause of his vasomotor rhinitis and headaches. The Court found that the claimant had failed to establish that his allergic rhinitis, arteriosclerosis and "labyrinth" disease were causally related to his employment. The Court remanded the cause for acceptance and payment of "benefits" for the vasomotor rhinitis condition and related headaches.

At the outset of this opinion, we noted that an issue of law is difficult to reach other than as dictum. We say that because neither the Board nor the Court of Appeals dealt with

[4] *Thompson v. SAIF,* 51 Or App 395, 625 P2d 1348 (1981), was decided by the Court of Appeals panel of Richardson, P. J., and Thornton and Buttler, Judges. The case at bar was before three judges, two of whom were Richardson and Thornton.

the case as it was actually presented by the issue joined upon the record before the administrative agency. Both dealt with the case as if the employer had never conceded that claimant had sustained a compensable occupational disease. The employer did so concede, both to the referee and to the Board. The employer, by the letter of January 21, 1980, by the opening statement to the referee and by the brief to the Board on review, specifically and expressly conceded that the claimant had sustained an occupational disease and was entitled to medical services. Medical services are included in the term "compensation." ORS 656.005(9). In other words, the employer conceded that this claimant had sustained a "non-disabling compensable injury," which is defined as an injury which requires medical services only. ORS 656.005(8)(c).[5] The employer, in so many words, told the Board that the employer was only challenging any finding that the claimant had sustained any disability, temporary or permanent. In its brief to the Board, the employer stated:

> "The Board should be advised that this case was originally denied on April 10, 1979, and that denial was based on the proposition that the Claimant's condition was not aggravated or arose out of and in the course of employment, either by accident or occupational disease. Subsequently thereto, on January 21, 1980, the employer and carrier amended the previous denial stating that Claimant's occupation did not cause any temporary total disability and/or any permanent partial disability. By the language of this amended denial *it is clear*

> *that the employer and carrier was accepting a claim for medical benefits as a result of Claimant's exposure at work but that the exposure at work didn't cause any temporary total disability or any permanent partial disability. This* amended *denial cannot be construed as a denial in the alternative but as the sole denial which was the subject of hearing and now the subject of this appeal.* [Emphasis added.]
>
> "The issues before the Board on this appeal are whether or not Claimant suffered any temporary total disability as a result of his exposure at work and in the event that there was no temporary total disability due the Claimant whether or not he had any permanent partial disability as a result of Claimant's exposure. The Referee committed reversible error when he found that Claimant not only sustained a temporary total disability but also had a permanent change in his condition."

Despite the fact that there was no issue as to compensability of this claim, the Board decided that the rule of law under *Thompson v. SAIF, supra,* was that the "work environment" must be the sole cause of the disease for it to be compensable. Upon its review of the evidence, the Board then proceeded to ignore the fact that it was dealing with two kinds of rhinitis. The term "allergic rhinitis" is never mentioned in the Board's Order on Review, despite the overwhelming evidence that claimant suffered from both allergic rhinitis and vasomotor rhinitis. In this respect, the Board wrote:

---

[5] An occupational disease is considered an injury under the Workers' Compensation Law except as may be provided otherwise in the Occupational Disease Law. ORS 656.804. *Weller v. Union Carbide,* 288 Or 27, 31, 602 P2d 259.

"Claimant does not, and on this record could not, argue his rhinitis is caused solely by his work environment. Based on tests one doctor found claimant 'quite strikingly' allergic to such things as house dust and freshly-mown grass. It is impossible to separate the effects of on-work and off-work exposure in causing claimant's condition. But it is inescapable that both on-work and off-work exposures contribute to that condition. Under *Thompson,* this is not enough for the condition to be compensable."

The Board thereupon ordered that the referee's order be reversed and that "the employer's denial is reinstated." What denial? The answer must be the denial that the employer had expressly disavowed making. To say the least, the Board's treatment is puzzling.

The claimant then sought judicial review, ORS 656.298, and the employer, quite understandably, caught the

lateral pass tossed by the Board, took off down the sidelines and asserted the position that claimant had sustained no occupational disease. In briefing the case for the court, the employer seemed to take the position that the Board was correct on the law but that some of its language in the decision was unfortunate.

Amici curiae briefs were filed in the Court of Appeals, one by the Oregon Workers Compensation Attorneys Association and one by the Association of Workers' Compensation Defense Attorneys. The claimants' Bar's brief traced the history of occupational disease legislation in Oregon and drew the correct conclusion that over the years the legislature had considerably broadened the coverage. *Accord, James v. SAIF,* 290 Or 343, 624 P2d 565 (1981). The brief discussed the *Thompson* and *James* decisions and from them would draw, as being correct, the rule applied by the referee in the cause at bar, i.e., that the claim is compensable if a worker suffers from a disease, and "on-the-job" exposure is a "material" contributing cause of the disease or aggravation of an underlying condition.

In its amicus brief, the defense Bar criticized both the referee and the Board as having applied incorrect tests. The brief argues that the referee's test of "substantial contributing cause" flies in the face of the text of the statute and that the Board's test of "sole" causation is more restrictive than either the text of the statute or the decisions of the courts require. Amicus, based upon the text of the statute and upon the decisions in *James* and *Thompson,* suggested the following as the correct analysis:

"1. Where the finder of fact cannot determine from the evidence whether or not the work environment was a cause of the disease condition, the claimant has clearly not carried the burden of proving compensability.

"2. Where the weight of the medical evidence establishes that exposures both on and off the job bore some causal relationship to the workers' condition, the claimant can carry the required burden if the evidence also establishes two additional elements:

"a. The off-the-job exposure is substantially different in some way that is *significant in light of the causative mechanism of the particular disease.* [Emphasis added.] This will normally require medical evidence.

"b. The on-the-job exposure is of a kind which the worker does not *ordinarily* [original emphasis] encounter anywhere but on the job. This will normally be a matter for lay testimony."

Amicus then urged the Court of Appeals to review the evidence *de novo* in the light of the suggested test.

The suggested analysis is seductive. It appears to take account, on a step-by-step basis, of the factors statutorily required to be established to present a compensable claim under the Occupational Disease Law. It is flawed, however, by imprecision in terminology. It speaks of "disease condition" and "condition," while the statute refers to a "disease or infection."[6] The difference in terminology prevents one from tracking the words of the statute in the process of analysis.

The statutory text requires for compensability that a disease meet two requirements: (1) The *disease* must arise out of and in the scope of employment, and (2) the *disease* must be one to which the employe is not ordinarily subjected or exposed other than during a period of regular actual employment "therein."[7] As usual, our task is to seek to discern legislative intent.

It is apparent that given the broad range of "disease" or "infection" with which claims under the Occupational Disease Law may be concerned, administrative and judicial holdings concerning a particular claim may not be transferrable to the subject matter of other claims. In other words, as the emphasized language from amicus' brief recognizes, decisional language appropriate to the issue of compensability of a particular disease may not be relevant to another disease and different circumstances. See, *James v. SAIF, supra,* 290 Or at 351.

It should also be kept in mind that a disease or infection may give rise to a compensable claim for injury rather than

for occupational disease.[8] In such cases, the second requirement, that concerning exposure, is not applicable. *James v. SAIF, supra,* 290 Or at 348.

---

[6] Those words bear the judicial gloss of our decisions in *Beaudry v. Winchester Plywood Co.*, 255 Or 503, 469 P2d 25 (1970), and *Weller v. Union Carbide, supra.*

[7] We do not understand to what "therein" refers or how that word adds to the sentence.

[8] For a discussion of cases concerning the compensabilty of disease prior to the enactment of the Occupational Disease Law in 1943, see Lafky, *Compensability of Occupational Disease Under Oregon Workmen's Compensation Law,* 2 Willamette L. J. 16 (1962) and Lent, *Compensability of Non-occupational Disease,* 2 Willamette L. J. 24 (1962).

A claim may be for a non-infectious disease, such as a neurosis or other mental illness, as in *James*. A claim could be for an infectious disease, such as brucellosis contracted by a veterinarian whose vocation required contact with farm animals that did not occur off the job. A claim may be made for a disease of unknown causation. A claim may be made for a disease due to an employe's hypersensitivity to particular proteins. As in this case, a claim may be made for a vasomotor rhinitis from exposure to certain chemicals and particulates. We do not pretend that these examples are exclusive, for we may be sure that a case will arise that does not fit neatly into any of these categories.

It is medically accepted that a mental illness such as a neurosis may result from a kind of stress found both in the work place and at home. It may be that the worker is subject ordinarily to that kind of stress both on and off the job. Implicit in our decision in *James v. SAIF, supra,* is that one must then look either to the degree or to the quantum of stress on the job as compared to that off the job to resolve the issue of compensability.

As we noted in *James,* it is essentially the same analysis we applied in *Beaudry v. Winchester Plywood Co.,* 255 Or 503, 469 P2d 25 (1970). There the worker's pre-existing bursitis was aggravated. There the evidence from claimant's doctor was that although claimant's physical activities off the job could aggravate his bursitis, his "most traumatizing activity" was vibration encountered at his work station. We held that this evidence would support a finding that the aggravation of the bursitis was the result of a "situation" to which claimant was not ordinarily exposed or subjected other than in the course of his regular employment. Id., 255 Or at 515.

The analysis employed in *Beaudry* and *James* is not appropriate to the claim of a worker who suffers an indivisible disease that is the result of two *kinds* of causative agents, both ordinarily encountered, causative agent "A" on the job and causative agent "B" off the job, where either alone would have produced the same disease. The *text* of the statute does not provide a clear answer as to compensability. Did the legislature intend that this hypothetical claimant not be compensated because the disease he suffered was in part actually caused by agent "B"? Did the legislature intend that he should be compensated because the disease he suffered was in part actually caused by agent "A" and he did not encounter agent "A" at all except on the job? The *language* of ORS 656.802(1)(a) permits both questions to be answered in the affirmative. The general policy of the legislature as expressed in ORS 656.012[9] may be summarized as requiring industry to bear the costs of injury or disease to workers, just as industry must do with respect to damage to machinery, and to avoid "common law" litigation by

granting to employers immunity against liability for "compensable injuries," ORS 656.018.[10] We believe it to be in accordance with that policy to construe the language of the

subsection so as to bar compensability if causative agent "B" plays other than a minor part in producing the indivisible disease. To express it conversely, we conclude that if a causative agent at the work place and a causative agent away from the work place are different in kind and concur to cause an indivisible disease which requires medical services or causes disability, a claim therefor is compensable if the causative agent at the work place is the major cause of the disease.

We turn to the disposition of this particular case. The Court of Appeals found that this claimant's rhinitis was not an indivisible disease. That court found that the disease was divisible into vasomotor rhinitis and allergic rhinitis. There was evidence that claimant's vasomotor rhinitis and resulting headaches were caused by airborne pollutants at his work place. There was some opinion evidence that sources such as automobile exhaust fumes, which anyone may encounter, contain pollutants which could produce an "irritative" or vasomotor rhinitis. The Court of Appeals found as fact that the causative agents at the work place were "the major contributing cause" of the vasomotor rhinitis and resulting headaches.[11]

The claim for vasomotor rhinitis and related headaches is compensable, just as the employer (at the administrative stage) conceded, and the claimant is entitled to compensation by way of medical services for his vasomotor rhinitis and related headaches. Whether he has been disabled thereby, either temporarily or permanently, is a matter now to be reached in the administration and management of this claim in the manner specified by law.

Affirmed and remanded to the Workers' Compensation Board for further proceedings.

[9] ORS 656.012 provides:

"(1) The Legislative Assembly finds that:

"(a) The performance of various industrial enterprises necessary to the enrichment and economic well-being of all the citizens of this state will inevitably involve injury to some of the workers employed in those enterprises; and

"(b) The method provided by the common law for compensating injured workers involves long and costly litigation, without commensurate benefit to either the injured workers or the employers, and often requires the taxpayer to provide expensive care and support for the injured workers and their dependents.

"(2) In consequence of these findings, the objectives of the Workers' Compensation Law are declared to be as follows:

"(a) To provide, regardless of fault, sure, prompt and complete medical treatment for injured workers and fair, adequate and reasonable income benefits to injured workers and their dependents;

"(b) To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable;

"(c) To restore the injured worker physically and economically to a self-sufficient status in an expeditious manner and to the greatest extent practicable; and

"(d) To encourage maximum employer implementation of accident study, analysis and prevention programs to reduce the economic loss and human suffering caused by industrial accidents."

[10] It is arguable that an action for damages may be maintained against an employer of the worker if a disease or injury is not "compensable."

[11] On the other hand, the Court of Appeals found that claimant's allergic rhinitis was not caused by factors to which he was exposed at the work place. Although that court made no specific finding, inherent in its decision that the allergic rhinitis is not compensable is a finding that the claimant was ordinarily exposed away from work to house dust, house dust mites, new mown grass and other stimuli which produced his allergic response and the symptoms thereof encompassed in the diagnosis of allergic rhinitis.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
Charles Maddox, Claimant.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Petitioner on Review,

v.

MADDOX,
Respondent on Review.

(CA A23313, SC 29212)

In Banc

On review from the Court of Appeals.*

Argued and submitted April 7, 1983.

Darrell E. Bewley, Appellate Counsel for State Accident Insurance Fund, Salem, argued the cause and filed the briefs for petitioner on review.

Linda C. Love, Salem, argued the cause for respondent on review. With her on the briefs was Rolf Olson, P.C., Salem.

ROBERTS, J.

The Court of Appeals decision is affirmed.

* Judicial Review from Workers' Compensation Board. (No. 79-09937) 60 Or App 507, 655 P2d 214 (1982).

ROBERTS, J.

This workers' compensation case presents the question whether the compensability of a claim must be determined finally before the extent of disability may be litigated. Specifically, SAIF Corporation asks this court to determine whether the Workers' Compensation Board and its referees have jurisdiction to enter orders rating extent of disability where the condition of claimant previously has been found to be compensable but that issue is the subject of a pending appeal.

This case has been in litigation since May, 1977.[1] Because of the protracted litigation the issue of compensability

[1] As set out in the Court of Appeals opinion:

"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.

had not been ultimately determined until after claimant had begun the process of, and received an award for, his extent of disability. A summary of the procedure can be briefly stated. The referee and the Board originally found claimant's condition to be compensable. That was appealed through the Court of Appeals to this court. We remanded and the Board then found the condition not to be compensable. In the meantime claimant appealed from a determination order which did not grant an award of permanent disability. The referee made an award of permanent total disability but the Board reversed the referee because it had already determined on remand the claim was not compensable. Also meanwhile, SAIF had filed a motion with the Board to dismiss claimant's request for a hearing on the extent of disability contending the referee did not have jurisdiction to consider extent of disability while the

---

"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)."

December 8, 1982: Court of Appeals holds the Board and referee had jurisdiction to decide extent of disability.

compensability issue was still pending on appeal. The Board denied SAIF's motion. Claimant appealed the denial of compensation and the Court of Appeals reversed and remanded for reinstatement of the referee's order. 59 Or App 508, 651 P2d 180 (1982). SAIF separately appealed the Board's denial of its motion and the Court of Appeals affirmed, remanding the case for review by the Board on the extent of disability question.

The Board by letter to the parties stated that no action would be taken until the issue raised by SAIF is finally resolved. Thus, a determination by the Board of claimant's extent of disability awaits our decision on whether the referee had jurisdiction to decide the extent of disability issue when compensability had not been finally adjudicated.

SAIF argues that ORS chapter 19 applies to workers' compensation proceedings when a case has been appealed to the Court of Appeals from the Board level. SAIF's position is that under ORS chapter 19[2] once an appeal has been taken, "the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court or defeat the right of the appellants to prosecute the appeal with effect." *State v. Jackson,* 228 Or 371, 382, 365 P2d 294 (1961). SAIF maintains that a determination of extent of disability "affects" the appeal of compensability although it fails to demonstrate how the compensability appeal is affected except to point out that SAIF was required to pay permanent total disability after the referee decided in favor of claimant on the extent of disability and continued to pay until the Board reversed the referee.[3]

Our examination of ORS chapter 19 satisfies us that it has no application to appeals from administrative tribunals.

Throughout ORS chapter 19 reference is made to appeals from the trial courts, never to appeals from an administrative agency. The workers' compensation statutory scheme contains its own provisions governing appeals. ORS 656.298, for example, specifically instructs litigants how to process an appeal to the Court of Appeals and sets forth the scope of that court's review.

---

[2] SAIF sets out in its brief only ORS 19.033(1) which provides:

> "When the notice of appeal has been served and filed as provided in ORS 19.023, 19.026 and 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, subject to a determination under ORS 2.520, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law."

and ORS 19.190(1) which provides:

> "The decision of the court to which the appeal is made shall be entered in the journal, and the cause remitted by mandate to the court below for further proceedings as therein directed. If a new trial is ordered, upon the receipt of the mandate by the clerk of the court below, the decision and order shall be entered in the journal and thereafter the cause shall be deemed pending and for trial in such court, according to the directions of the court to which the appeal is made. If a new trial is not ordered, upon the receipt of the mandate by such clerk, a judgment or decree shall be entered in the journal and docketed in pursuance of the direction of the court to which the appeal is made, in like manner and with like effect as if the same was given in the court below."

[3] The Court of Appeals ordered the reinstatement of the referee's order pending Board review on remand. We assume claimant is being paid permanent total disability while this case is on review.

In rejecting SAIF's argument that ORS chapter 19 applies to appeals from the Workers' Compensation Board we conclude that ORS 656.313 is controlling on the issue raised in this case. At the time of claimant's claim of disability, 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."[4]

SAIF contends this provision only requires the insurer to commence processing the claim whether or not an appeal is taken. According to SAIF this entails the following:

> "1. Payment of time loss until claimant is medically stationary.
>
> "2. Gathering medical information to determine the extent of the disability, if any.
>
> "3. Providing medical care and treatment to claimant.
>
> "4. Presentation of medical and other information to closing and evaluation when it appears that claimant is medically stationary.
>
> "5. And of course, the insurer must then pay any amount awarded under the Determination Order."

SAIF's position is that once these requirements have been complied with, ORS 656.313(1) has no further application because its purpose has been met, *i.e.*, "the insurer has been prevented from withholding funds from a claimant through a lengthy appeal period and thus starving him into accepting a settlement in order to provide for himself and his family." At

argument SAIF stated its position to be that after a determination order on extent of disability, the referee and Board must forestall all further consideration until compensability has been finally determined.

We do not read ORS 656.313(1) to be so restrictive, particularly in light of amendments which have been made by the legislature while this case has been winding its way through the courts and back through the administrative process. In 1979 the legislature added subsections 3 and 4 to the statute. Subsection 3 is not pertinent here, but subsection 4 provides:

> "(4) Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services."[5]

The statutes set out in subsection (4) to which "compensation" applies includes ORS 656.204, payment for death resulting from accidental injury; ORS 656.206, payment for permanent

---

[4] ORS 656.313(1) presently provides:

"Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant."

total disability; ORS 656.208, payment for death occuring during the payment of permanent total disability; ORS 656.210, payment for temporary total disability; ORS 656.212, payment for temporary partial disability; and ORS 656.214, payment for permanent partial disability.

While subsection (4) of the statute was not in existence at the time of claimant's initial claim, it was in effect when claimant requested a hearing on the extent of disability. We cannot ignore it, for it clarifies the intent of the legislature to include within the "compensation" that shall not be stayed under subsection (1) awards determining the extent of disability. By providing that payment of disability in any degree shall not be stayed, the legislature must have necessarily intended that a determination of extent of disability would not be stayed pending an appeal of compensability, for that would effectively defeat the purpose of subsection (1). We so hold.

The Court of Appeals is affirmed.

IN THE COURT OF APPEALS:
ADAMS v. SAIF CORPORATION

David T. Adams, Claimant — WCB 80-05781
Michael N. Gutzler, Petitioner's Attorney — June 22, 1983
Darrell E. Bewley, Respondent's Attorney — CA A25840
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

In this workers' compensation case, claimant sought additional medical services pursuant to ORS 656.245. He appeals from the Workers' Compensation Board affirmance of the referee's opinion affirming SAIF's denial and refusing to award a penalty or an attorney fee.

Claimant sustained an initial injury to his low back on February 7, 1974. After one visit to the doctor for that injury, he was determined to be medically stationary and needed no further treatment. He was released to return to his regular job with the only restriction being to "avoid heavy labor." During the ensuing period of over five years, he submitted no claims for further medical treatment relating to his back injury. On June 16, 1979, claimant was holding the tongue of a boat trailer when he experienced back pain. He sought treatment from Dr. Ronning, who submitted a Form 827 in which claimant's injury was described as resulting from "removing battery from automobile." No mention was made of the incident involving the boat trailer. The only other report submitted by Dr. Ronning is dated September 6, 1979, in which he says:

> "Mr. Adams was moving a boat on June 16, 1979 which caused strain to his lower back and a reaggravation of symptoms of a previous injury."

The report does not define further the "previous injury." We hold that claimant failed to submit sufficient evidence to establish that his back condition in 1979 was causally related to his work-related injury in 1974. We therefore affirm the Board's order denying compensability.

SAIF concedes that it erred in not issuing a denial when it initially received the claim for benefits under ORS 656.245 and that its failure to do so is a proper basis for the assessment of a penalty and an attorney fee. Because the Board affirmed the referee's order that there was no legal basis for those assessments, we remand the case to the Board.

Affirmed in part; reversed in part, and remanded for a determination of the amount of the penalty and attorney fees.

IN THE COURT OF APPEALS:
JAMESON v. SAIF CORPORATION

William R. Jameson, Claimant — WCB 81-01724
Allan H. Coons, Petitioner's Attorney — CA A26372
Darrell E. Bewley, Respondent's Attorney — June 22, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

Claimant appeals from an order of the Workers' Compensation Board, which reversed the referee and held that claimant's back condition was not compensable. We reverse.

On October 10, 1979, claimant was employed by a company, then insured by SAIF, when he stepped into a hole, tripped, fell against the trunk of a tree with his right shoulder, lost his footing and rolled for some distance down a steep incline. He was treated initially for injury to his right shoulder. On his second visit to the doctor, five days after the incident, claimant began to complain about pain in his low back. Prior to his industrial injury, claimant had had no back problems. He was treated conservatively for his low-back condition for quite some time. During a laminectomy, it was discovered that claimant had a small lipoma in his back, which was then removed. When his symptoms did not subside, a second surgical procedure was performed, at which time it was discovered that claimant had a large lipoma in his back, perhaps the result of incomplete removal of the first lipoma. SAIF has denied the claim for the lipoma in claimant's back. The referee found the condition compensable, but the Board reversed, affirming SAIF's denial.

The medical evidence is ambiguous and inconsistent as to whether the accident aggravated claimant's lipoma or merely aggravated claimant's symptoms. SAIF argues that under the rule enunciated in *Weller v. Union Carbide*, 288 Or 27, 602 P2d 259 (1979), and by this court in *Cooper v. SAIF*, 54 Or App 659, 635 P2d 1067 (1981), *rev den* 292 Or 356 (1982), claimant does not have a compensable disability, because the accident merely increased claimant's symptoms without worsening what SAIF contends is the underlying disease. We believe SAIF's argument misses two essential points: first, claimant's disability is the result of an accident and not an occupational disease, so *Weller* does not apply; and, second, the underlying cause of the disability is not the lipoma itself, but pressure on the nerve roots which causes the disabling pain in his injured back. It is undisputed that claimant had no back pain of any kind prior to the job-related accident. It is also undisputed that claimant suffered onset of pain after, and as a direct result of, the accident.

Although each of the doctors expresses a different theory, and each theory is couched in terms of possibilities rather than probabilities, the totality of the medical evidence

establishes that the work-related accident caused claimant's preexisting lipoma to increase the pressure on claimant's nerve roots, thereby causing symptoms of low back pain requiring treatment. Pressure on nerve roots was materially worsened by claimant's accident and is, therefore, compensable.

Reversed and remanded for reinstatement of the referee's order.

IN THE COURT OF APPEALS:
KOCIEMBA v. SAIF CORPORATION

Leroy Kociemba, Claimant — WCB 81-06016
Charles S. Tauman, Petitioner's Attorney — CA A25163
Darrell E. Bewley, Respondent's Attorney — June 22, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

Claimant appeals from an order of the Workers' Compensation Board, which affirmed the referee's finding of compensability, reversed the referee's finding of permanent total disability, refused to award attorney fees on Board review and remanded the case to SAIF. We affirm in part, reverse in part and remand to the Board for further proceedings.

Stated briefly, in 1965 claimant sustained a severe injury to his left leg in a job-related accident for which SAIF accepted responsibility. Later, he developed osteomyelitis in his leg as a direct result of that injury. Still later, he developed a disabling low-back condition and a peptic ulcer, both of which he claimed to be related to his leg injury. SAIF denied the compensability of both of those conditions at the time of the hearing involved in this appeal. The referee found that both claimant's low-back condition and his peptic ulcer were causally related to his 1965 compensable injury. Although the referee found that the ulcer condition was not medically stationary, he awarded claimant permanent total disability, based on his left leg injury, his back condition and the ulcer.

The Board, on SAIF's appeal, affirmed compensability of the back and ulcer and agreed that claimant's ulcer condition was not medically stationary. Notwithstanding the latter finding, which, standing alone, was a sufficient basis for refusing to determine the extent of claimant's disability, the Board rendered what appears to be an extended advisory opinion that claimant would not be entitled to an award of permanent total disability, because his refusal to undergo recommended medical treatment (amputation of his left leg)

was unreasonable.[1] *See Clemons v. Roseburg Lumber Co.*, 34 Or App 135, 578 P2d 429 (1978). That issue was not before the

Board, and it acknowledged that in its conclusion when it stated that it would abstain from rating claimant's disability, which "will be the concern of the Evaluation Division once claimant becomes fully stationary from all of his compensable conditions." Given that conclusion, the Board properly reversed the referee's disability award and remanded the claim to SAIF for payment of medical benefits for all of claimant's compensable conditions and for payment of time loss benefits.

Both SAIF and claimant agree that it was error for the Board and the referee to address the issue of the extent of claimant's disability after it was established that his ulcer condition was not medically stationary. As indicated above, we agree with the parties' concession and hold that the extent of disability was not properly before the referee or the Board. Although the Board reached that conclusion, it purported to decide that claimant should not be awarded permanent total disability because of his unreasonable refusal to accept recommended medical treatment. That issue was not before the Board either. We affirm the Board's order on compensability and its ultimate disposition in remanding the case to SAIF.

Claimant's second assignment of error is based on the Board's refusal to award him attorney fees on Board review. At the time of the hearing, SAIF had denied compensability of claimant's low-back condition and ulcer. The referee held that those conditions were compensable. SAIF requested Board review of the referee's order in its entirety. Although the Board reversed a portion of the referee's order, it affirmed that portion reversing SAIF's denials for the low-back and ulcer conditions. Under ORS 656.386(1), payment of attorney fees by the insurer is authorized when a claimant successfully challenges a denial and finally prevails in a review by the Board. The Board erred in refusing to award attorney fees in this case.

We affirm the Board's finding of compensability of claimant's back and ulcer conditions, its reversal of the referee's premature determination of the extent of disability and its remand of the case to SAIF; we reverse the denial of attorney fees for services on Board review.

Affirmed in part; reversed in part, and remanded to Board to fix the amount of attorney fees for claimant on Board review.

---

[1] The Board stated that, given the history of claimant's difficulties with his leg, "amputation does not appear an 'extreme' medical alternative." In *Clemons v. Roseburg Lumber Co.*, 34 Or App 135, 578 P2d 429 (1978), we stated:

> "* * * The relevant inquiry is whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment. Such a determinaton must be based upon all relevant factors, including the worker's present physical and psychological condition, the degree of pain accompanying and following his treatment, the risks posed by the treatment and the likelihood that it would significantly reduce the worker's disability. * * *" 34 Or App at 139.

IN THE COURT OF APPEALS:
CHIAPUZIO v. SAIF CORPORATION

Douglas S. Chiapuzio, Claimant — WCB 80-01301
Samuel A. Hall, Jr., Petitioner's Attorney — CA A26187
Donna M. Parton, Respondent's Attorney — June 22, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

ROSSMAN, J.

Claimant appeals from a decision of the Workers' Compensation Board that reversed the referee's order and reinstated SAIF's denial. Simply put, the issue to be decided is whether the finger of causation for claimant's back condition points more to his "on-the-job" activities as a mill worker *or* more to his "off-the-job" activities as a basketball player. We hold that claimant has met his burden of proving that he has sustained an occupational disease and reverse.

In April, 1979, claimant, while a student at Lewis and Clark College, was working out with weights when he began to notice back pain. Claimant saw his father, who is a physician, for this condition on June 12, 1979. Sometime in mid-June, 1979, he began working for Coos Head Timber Company on the "swede chain." This job required him to sort and pull timber consisting of two by fours, two by sixes, two by tens, and some four by sixes and four by eights, all ranging up to 20 feet in length. After three days, he was transferred to the "green chain," which required him to pull very large timbers ranging in dimensions from three by 12, to six by 24 and up to 30 feet long. After a couple of days on the green chain, he was transferred back to the swede chain, where he continued to work through July, 1979. In August, 1979, he was transferred to the lathe mill which involved substantially lighter work. Claimant left work on August 24 to return to school.

Concurrent with his employment in early July, 1979, claimant began playing in a summer basketball program. He played for periods of one to two hours, three or four times per week. This continued for approximately two weeks before he quit playing basketball on the advice of Dr. Holbert. On July 19, 1979, he was seen by the doctor, who reported that he was doing better and advised him to continue to avoid the summer basketball program. On July 30, 1979, Dr. Holbert again saw him and recommended that he quit doing heavy lifting. On August 13, 1979, the doctor noted that he was somewhat better now that he was doing lighter work at the lathe mill. On September 9, 1979, Dr. Holbert again saw claimant and noted that he had become worse. His condition continued to deteriorate until December, 1979, when he had a laminectomy.

Only two medical opinions have been submitted on the issue of causation. The first is that of Dr. Schostal, who merely states that it is reasonable to assume that claimant's injury is work related. The second opinion is given in the

reports and deposition of Dr. Holbert, the treating physician. He states that both claimant's playing basketball and his lifting at work were aggravating factors in his back condition. He further states: "I think probably the lifting was a greater factor." We find that this meets claimant's burden of proving that his back condition is an occupational disease. *SAIF v. Gygi*, 55 Or App 570, 639 P2d 655 (1982).

Reversed and remanded for reinstatement of the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Pamela Harrington, Claimant

and

In the Matter of the Complying Status of Frank A. Leonetti, Jr. and Lorraine A. Leonetti, dba Dip N Donut Restaurant, Employer.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,

v.

HARRINGTON et al,
Respondents.

(81-03142; CA A26003)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 18, 1983.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause and filed the brief for petitioner.

Michael D. Reynolds, Assistant Attorney General, Salem, waived appearance for Workers Compensation Department.

No appearance for respondents.

Before Richardson, Presiding Judge, and Van Hoomissen and Newman, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

The issue in this workers' compensation case is whether the Leonettis, doing business as Dip N Donut Restaurant are noncomplying employers. The referee held that SAIF

was the insurer and consequently that the Leonettis were complying employers. The Workers' Compensation Board adopted the referee's opinion.

The facts underlying the issue are not disputed. Frank Leonetti owned and operated a business as a sole proprietor known as Leonetti Food Service. Commencing June 15, 1979, that business entered into an agreement with SAIF for workers' compensation coverage. SAIF filed a guaranty contract, SAIF No. 398084, with the Workers' Compensation Department pursuant to ORS 656.419. Subsequently, the Leonettis jointly purchased the Dip N Donut Restaurant. In March, 1980, the Leonettis contacted SAIF regarding coverage for the restaurant. SAIF sent an application and advised them that the restaurant business could be added to the existing policy covering the food service business if the ownership was identical, *i.e.*, a sole proprietorship of Frank Leonetti. SAIF explained that, if the restaurant business was under different ownership, a new policy would have to be issued with additional fees.

There followed a series of telephone conferences between SAIF employes and the Leonettis or their employes regarding an appropriate application for coverage of the restaurant business. No proper application was received, and no fee was paid for coverage of the restaurant business. However, in late March, 1980, during the time that the discussions were going on, SAIF filed a guaranty contract with the Department to provide coverage for the Dip N Donut Restaurant. The contract listed the business as a partnership and included the same SAIF number as the guaranty contract for the food service business. SAIF asserted that the guaranty contract was filed due to a clerical error. The Department sent the Leonettis a letter notifying them that a guaranty contract for the restaurant had been filed and included a notice of compliance for the restaurant business.

On May 31, 1980, SAIF sent a notice of termination of coverage of the food service business to Frank Leonetti because

the required renewal fee had not been paid. The notice designated the employer as Leonetti Food Service and contained SAIF's number used in the previously filed guaranty contracts for both businesses. The notice contained no reference to the guaranty contract for the Dip N Donut Restaurant. The termination was to be effective on June 30, 1980. The Department received a copy of the termination notice and sent an additional notice to Frank Leonetti and indicated his obligation to provide coverage for the food service business.

An employe of the Dip N Donut Restaurant was injured on July 28, 1980. She filed a claim that was ultimately denied by SAIF on the ground that SAIF did not provide coverage for the restaurant employes. SAIF requested that the Department designate the restaurant as a noncomplying employer and process the claim under ORS 656.576 *et seq.* When the Department declined that request, SAIF requested a hearing on the status of the restaurant business and appeals the adverse ruling.

Although SAIF made a number of contentions at the hearing, it advances only one argument in this appeal. SAIF contends that it entered into a single contract of insurance to cover Frank Leonetti as a sole proprietor of Leonetti Food Service and the Dip N Donut Restaurant. The guaranty contracts separately filed were under the same policy number. It argues that the termination of that single policy prior to the employe's injury clearly shows there was no coverage for the claim. In essence, SAIF argues that it cancelled the policy number 398084 and not just the guaranty contract relating to the food service business.

ORS 656.419, relating to guaranty contracts, sets forth what they must contain including an agreement by the insurer to pay all compensation imposed on the employer designated. That statute provides in part:

"* * * * *

"(5) Coverage of an employer under a guaranty contract continues until canceled or terminated as provided by ORS 656.423 or 656.427."

Pursuant to ORS 656.427, to terminate coverage an insurer must notify the employer and the Department.

SAIF filed two separate guaranty contracts; one covering Leonetti Food Service as a sole proprietorship and one covering Dip N Donut Restaurant as a partnership. The termination notice submitted by SAIF in May, 1980, by its terms related only to the guaranty contract for Leonetti Food Service. That notice did not operate to cancel coverage under the other separate guaranty contract for the restaurant. SAIF presented testimony that a business under different ownership could not be included in another contract of insurance. The guaranty contracts were for separate businesses under separate ownerships. A termination notice which clearly indicated cancellation of coverage for a designated business does not operate to cancel the guaranty contract for the other distinct business. Although SAIF may have considered that its contracts with the two Leonetti businesses had been terminated, a guaranty contract remains in effect until terminated pursuant to statute. ORS 656.419 controls the liability of a carrier filing a guaranty contract for an employer, and liability is not terminated until that contract is cancelled pursuant to statute. If the contract of insurance between the carrier and the employer is terminated, the guaranty contract must also be terminated to relieve the carrier of responsibility to cover the risk. The guaranty contract covering Dip N Donut Restaurant was not terminated prior to the employe's injury.

Affirmed.

IN THE COURT OF APPEALS:
DAY v. SAIF CORPORATION

Marquetta Day, Claimant — WCB 81-06456
David C. Force, Petitioner's Attorney — CA A25900
Donna M. Parton, Respondent's Attorney — July 6, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

Claimant appeals from an order of the Workers' Compensation Board, which reversed the opinion and order of the referee and granted SAIF's motion to dismiss. We affirm.

Claimant's bilateral carpal tunnel syndrome was accepted as compensable by SAIF. Workers' compensation benefits were provided between November, 1978, and January 14, 1980. A determination order was issued on December 14, 1979, closing the claim and awarding claimant time loss benefits and permanent partial disability. There was no appeal from that order. On January 14, 1980, SAIF denied responsibility in total for claimant's carpal tunnel syndrome on the basis of a report from Dr. Emori, dated December 14, 1979, in which the doctor stated that he believed that the syndrome was not relted to her work activities. Claimant requested a hearing, following which the referee issued his opinion and order on May 14, 1981, overturning the denial. The referee stated:

> "(1) Claimant's claim for bilateral carpal tunnel syndrome resulting from compensable injuries from her employment at Glendale Plywood Company is remanded to the SAIF Corporation for reacceptance of her claim and for payment of all workers' compensation benefits to which she is entitled including, but not limited to, medical services which have not yet been provided or paid for and the permanent partial disability awards previously granted to her."

On May 29, 1981, SAIF submitted an "Insurer's Report" (Form 1502) to the Workers' Compensation Department, which contained a comment that it was submitted for administrative purposes only and that the referee's order required only that the claim be accepted. On June 25, 1981, SAIF notified claimant's counsel that it did not intend to reopen the claim. Claimant requested a hearing based on SAIF's unreasonable refusal, resistance or delay in complying with the first order, contending that the order required reopening the claim notwithstanding the final determination order. On March 12, 1982, a second referee issued an "Opinion and Order on Motion," denying SAIF's motion to dismiss and ordering that the claim be remanded for closure. SAIF requested Board review of that order. In its order on review

issued August 30, 1982, the Board reversed the second referee's order and noted:

"* * * [The first] [r]eferee['s] order did not order the claim reopened, but reaccepted, and an order of reacceptance is not to be confused with or equated to an order to reopen a claim."

The sole issue before the first referee was the propriety of SAIF's denial. Claimant does not contend that she filed an appeal from the December 14, 1979, determination order. Neither does she argue that her condition had worsened, nor does she refer to any evidence submitted to the referee that could have established that fact. In the first opinion and order, the referee properly decided only the issue before him, *i.e.*, the propriety of SAIF's denial. That order overturned the denial and remanded the claim to SAIF for reacceptance and for payment of all worker's compensation benefits to which claimant was entitled.

Because a full and final determination order, based on all of the available evidence, had already been entered, there was no need either for a reopening of the claim or a second determination order. The Board correctly determined that the first referee's opinion and order was only intended to order SAIF to re-accept the claim. SAIF did that, and we affirm the Board's granting of SAIF's motion to dismiss.

Affirmed.

IN THE COURT OF APPEALS:
FULGHAM v. SAIF CORPORATION

George A. Fulgham, Claimant — WCB 79-09355
David C. Force, Petitioner's Attorney — CA A26244
Darrell E. Bewley, Respondent's Attorney — July 6, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

Claimant[1] appeals from an order of the Workers' Compensation Board (Board) affirming the presiding referee's dismissal of claimant's request for hearing for want of prosecution. We reverse.

The facts relevant to this appeal are not in dispute. On October 29, 1979, claimant filed, *pro se,* a request for hearing, contesting the denial of his claim for compensation. On January 16, 1980, an Ontario lawyer, Bentz, notified the Board that he would be representing claimant at the hearing. The Board notified the parties on March 6, 1980, of a pretrial conference set for April 2, 1980, in Ontario; however, SAIF notified the Board on March 19 that it would be too inconvenient for any of its attorneys or representatives to attend a settlement conference in Ontario, and requested that a hearing be set in Bend.

[1] During the course of this appeal, claimant died. His wife has been substituted as a party under ORS 656.204 and ORS 656.218.

On March 21, 1980, claimant's Ontario attorney filed an application to schedule a hearing and on May 19, 1980, a notice of substitution of attorneys was filed indicating that claimant was represented by Cash Perrine, an attorney in Bend. On May 20, 1981, the presiding referee ordered claimant to show cause why his request for hearing should not be dismissed for his failure to apply for a hearing date. Claimant's Bend attorney filed a separate application to schedule the hearing on June 3, 1981. Although no hearing was scheduled, the order to show cause was vacated on July 2, because the Board's long-established practice had been to treat a request for a hearing date as an adequate response to an order to show cause.

On July 20, 1981, claimant's Bend counsel moved the Board for authorization to take the deposition of a witness. That motion was granted on September 8. Meanwhile, on July 30, the presiding referee mistakenly ordered claimant's former counsel, Bentz, to attend a settlement conference. Bentz immediately notified the presiding referee of the error. Nonetheless, the presiding referee sent a letter, dated August 19, to Bentz advising him that he should respond to the motion for deposition as an adverse party to claimant.

On August 21, claimant's Bend attorney wrote the Board requesting a telephone settlement conference as an apparent substitution for the one that Bentz had been mistakenly ordered to attend. Bentz wrote to the presiding referee on August 28, asking him to stop sending notices and correspondence to him rather than to claimant and his current counsel in Bend.

On January 28, 1982, a notice of hearing to be held in Ontario was issued and sent to claimant. SAIF moved to postpone that hearing and to have it reset in Bend, where all of the parties were located. On February 22, 1982, that postponement was granted.

At an unspecified, but later, date the Board sent someone (the record does not disclose whom), a notice that claimant would be ordered to show cause why his request for hearing should not be dismissed for failure to prosecute, unless claimant filed a third application to schedule a hearing by March 24, 1982. Apparently no third application to schedule was filed, and on April 26, 1982, a show cause order was issued. Claimant's attorney thereupon filed an application to schedule a hearing.

He was notified on June 9, 1982, that filing an application to schedule a hearing was an inadequate response to the show cause order and was given 15 days to respond further. Claimant's attorney failed to file any further documents, and on July 16, the presiding referee dismissed the request for hearing for failure to prosecute. The Board affirmed.

In its order of dismissal, the Board relied on OAR 436-83-310, which provides:

"A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions delay of more than 90 days without good cause."

That rule is conceded to have been validly adopted pursuant to the Administrative Procedures Act; however, there are no other rules setting forth the procedure by which the rule is to be effectuated. The prior practice of the Board in issuing orders to show cause why a case should not be dismissed, and in accepting a request for a hearing date as complying with that order, are procedures for carrying out the validly adopted rule. Although the validity of the former procedures is not before us,

they describe "the procedure or practice requirements of an agency," ORS 183.310(8),[2] and constitute rules under the APA. However, in the absence of a judicial declaration of invalidity, the procedures were binding on the Board until repealed or amended according to procedures required by the APA. *See Burke v. Children's Services Division,* 288 Or 533, 538, 607 P2d 141 (1980).[3]

Here, the Board attempted to change its long-standing procedures for enforcing the valid rule by publishing in its publication, "Case News and Notes," a statement[4] announcing

[2]ORS 183.310(8) provides:

" 'Rule' means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

"(a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interests of the public:

"(A) Between agencies, or their officers or their employes; or

"(B) Within an agency, between its officers or between employes.

"(b) Action by agencies directed to other agencies or other units of government which do not substantially affect the interests of the public.

"(c) Declaratory rulings issued pursuant to ORS 183.410 or 305.105.

"(d) Intra-agency memoranda.

"(e) Executive orders of the Governor.

"(f) Rules of conduct for persons committed to the physical and legal custody of the Corrections Division of the Department of Human Resources, the violation of which will not result in:

"(A) Placement in segregation or isolation status in excess of seven days.

"(B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

"(C) Disciplinary procedures adopted pursuant to ORS 421.180."

[3]In *Burke v. Children's Services Division, supra,* 288 Or at 538, the court said:

"It is true that a rule may be declared by a court to be invalid if it was adopted without the proper procedures. * * * *In the absence of such a declaration,* however, it remains an effective statement of existing practice or policy, *binding on the agency, until repealed according to procedures required by the Administrative Procedures Act. An agency may not rely on its own procedural failures to avoid the necessity of compliance with its rules."* (Emphasis supplied.)

[4]The statement in "Case News and Notes" was:

"When requests for hearing have been pending a long time without apparent action, the Hearings Division now issues Order to Show Cause why the request

the change in its practice and stating that, with respect to orders to show cause issued after April 1, 1982, an application to schedule would not be regarded as a sufficient response to the order. In *Burke v. Public Welfare Div.*, 31 Or App 161, 165, 570 P2d 87 (1977), we distinquished those agency pronouncements that need not be promulgated as a rule to be valid and those that do require promulgation under the APA. We stated:

> "The distinction between *Wehrman* [*v. Public Welfare Div.*, 24 Or App 141, 544 P2d 606, *rev den* (1976)] and *Clark* [*v. Pub. Wel. Div.*, 27 Or App 473, 556 P2d 722 (1976)] seems to be that in the former case the unpromulgated directive explained what was necessarily required by the existing rules, whereas in the latter case the directive was a policy-based interpretation of choice of an existing rule which could have been otherwise construed. The principle which emerges from these two cases is that an agency's pronouncement of how a validly promulgated rule operates in a specific context need not itself be promulgated as a rule *if the existing rule necessarily requires the result set forth in that pronouncement.* There is no reason to require the formalities of rulemaking whenever an agency undertakes to explain the necessary requirements of an existing rule. However, *the interpretive amplification or refinement of an existing rule is a new exercise of agency discretion and must be promulgated as a rule under the APA* to be valid." (Emphasis supplied.)

There is nothing in OAR 436-83-310 that requires any particular procedure to effectuate it; either the former or "new" procedure, or some different method, could be used to carry it out. Because the former procedure is not challenged and has not been judicially invalidated, we view the procedure outlined in the Board's periodical as being "the interpretive amplification or refinement of an existing rule," a new exercise of agency discretion requiring promulgation as a rule under the APA in order to be valid.

Claimant fulfilled the requirements of the former procedures in responding to the order to show cause. Furthermore, if we examine the case under OAR 436-83-310, there is no evidence that claimant was responsible for the delays in obtaining a hearing in this case. Rather, all of the delays appear to have been attributable to mistakes on the part of the Board or to requests for postponement by SAIF. In either case, the Board erred in dismissing claimant's request for hearing for want of prosecution.

Reversed and remanded for hearing before a referee.

---

should not be dismissed as abandoned. The policy in the past was that an Application to Schedule for Hearing was a sufficient response to the Show Cause Order. The Show Cause Order would be vacated, and the case would be sent to the Docketing Section.

"Effective for Show Cause Orders issued after April 1, 1982, an Application to Schedule will no longer be regarded as a sufficient response to a Show Cause Order. After a Show Cause Order has been issued, the request for hearing will be dismissed unless good cause not to do so is shown notwithstanding submission of an Application to Schedule."

IN THE COURT OF APPEALS:
FRAME v. CROWN ZELLERBACH

William J. Frame, Claimant — WCB 80-07617
Robert K. Udziela, Attorney for Petitioner-Cross-Respondent — CA A24057
J.P. Graff, Attorney for Respondent-Cross-Petitioner — July 6, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

ROSSMAN, J.

Claimant appeals from an order of the Workers' Compensation Board denying authorization for a program of rehabilitation. Employer cross-appeals from the Board's order awarding claimant 40 percent permanent partial disability. We affirm the Board's order of permanent partial disability and reverse as to the program of rehabilitation.

Claimant was working on the green chain at Crown Zellerbach on August 2, 1978, when he slipped and fell, injuring his back. A determination order was issued in 1978 awarding time loss but no permanent partial disability. Claimant returned to work and, in February, 1979, reinjured his back. Following surgery, he again returned to work but suffered a recurrence of his symptoms. His doctor suggested a change in occupation. In March, 1980, claimant was released for work which did not require repetitive heavy lifting or bending. In June, 1980, he was examined at Orthopaedic Consultants, which found him to be medically stationary and in need of vocational assistance. In July, 1980, a determination order issued awarding 20 percent unscheduled low back disability.

In June, 1980, a vocational rehabilitation evaluation was started, and in July, 1980, claimant was referred for employment reentry assistance. Ingram & Associates was the assigned vendor, and it determined that claimant had transferrable skills and experience and began to assist him in finding employment. The Field Services Division then decided that claimant was not eligible for an authorized training program. Thereafter, in December, 1980, Ingram & Associates closed its file.

After a hearing, the referee found that claimant was eligible for a work skills improvement program which Field Services Division has authority to provide. Claimant was awarded 30 percent permanent partial disability. The Board reversed the referee's finding that claimant was eligible for a work skills improvement program and increased the permanent partial disability award to 40 percent. The main issue is whether claimant is a vocationally handicapped worker eligible for vocational rehabilitation in an authorized training program.

The administrative rule that governs this determination, OAR 436-61-004(4) (as amended effective February 1, 1978), provides:

"Vocationally handicapped worker means a worker who is unable to return to his regular employment because of permanent residuals of an occupational injury or disease, and who has no other skills, aptitudes or abilities which would enable him to return to *gainful employment.*" (Emphasis supplied.)

The evidence is clear that claimant is unable to return to his regular employment on the green chain because of permanent residuals of the 1978 occupational injury to his back. He cannot do repetitive heavy lifting or bending due to his low back injury. Employer contends, however, that claimant has other skills, aptitudes or abilities which would enable him to return to gainful employment, making retraining unnecessary. Employer also maintains that, because claimant can obtain work paying the minimum wage, he is gainfully employable and not eligible for retraining.

Claimant is 42 years old and has a high school education. He worked for Boeing Aircraft from 1961 to 1969 as a drafter. The skills he developed at that job well over 14 years ago are the skills pointed to by employer to show his employability with transferrable skills. The state of the art has changed since 1969 when claimant was laid off by Boeing. The referee found that there was little evidence of claimant's *current* ability to use the skills he learned at Boeing. In fact, Ingram & Associates never measured his current skill ability in blueprint reading and in the use of measuring devices.

Employer's other contention is that claimant possesses skills and abilities sufficient to allow him to obtain gainful employment. This is obvious, employer maintains, from test results showing claimant to have "generally average" abilities together with employment offers to entry-level positions paying minimum wages.

The purpose of the workers' compensation legislation is to "restore the injured worker as soon as possible and as near as possible to a condition of self support and maintenance as an able-bodied worker." ORS 656.268(1). Workers' compensation was developed not just to compensate a worker who has been injured on the job, but also to enable the worker to reenter the

job market and become employed again in a position as near as possible in pay and status to the one the claimant has been forced by injury to leave. There are no specific guidelines to determine what "as near as possible" means; it must be determined on a case-by-case basis. Gainful employment, in the light of the intent of the workers' compensation statutes (and the regulations of the Department), must bear a reasonable relationship to an individual's experience and background, including prior earnings. For example, it would be unrealistic to expect that a worker could be seen as having been restored to employment "as near as possible" to his or her former employment if he was formerly a diesel mechanic and is now working at a fast food restaurant because that was the only job he could get without retraining.

There is no requirement that a worker who has been

offered *any* job paying *something*, even minimum wage, is gainfully employable and therefore ineligible for retraining. This is especially true where a worker has held a job paying substantially more than the minimum wage. It would be unreasonable to require a worker who has gained experience over the years and worked his or her way up to a responsible, well-paying position to start over at a job paying the minimum wage after being injured on the job. Here, the minimum wage jobs claimant can get pay less than one-third of his preinjury earnings and much less than he would be earning now if he had not been injured. While it may not be possible to retrain claimant so that he can reenter the job market and become employed at the same pay he would now be making if he had not been injured, it is possible, after retraining, for his earnings at a new job to be reasonably *comparable*.

Orthopaedic Consultants found that claimant was in need of vocational assistance. The referee agreed, and so do we. Claimant should have a fair opportunity to be treated in the manner outlined by the workers' compensation statutes. We hold that he is entitled to a program of rehabilitation.

Affirmed in part; reversed in part; and remanded to admit claimant to an authorized training program.

IN THE COURT OF APPEALS:
ARGONAUT INSURANCE CO. v. KING

Michael J. King, Claimant — WCB 80-07413
Deborah S. MacMillan, Petitioner's Attorney — CA A23997
Charles S. Tauman, Respondent's Attorney — July 13, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

WARREN, J.

Argonaut Insurance Companies (Argonaut) appeals from an order of the Workers' Compensation Board directing it to accept King's claim for compensation. Argonaut asserts that the Board erred in two respects: (1) failing to grant its motion to dismiss the request for review on the ground that claimant did not mail the request to all parties within 30 days of the referee's order, as required by ORS 656.295(2), and (2) deciding that claimant suffered a "compensable injury" under ORS 656.005(8)(a). We discuss only the first issue and reverse.

The facts pertaining to the procedural issue are undisputed. Argonaut denied the claim, because it believed claimant's injury was not sufficiently work related to be compensable. On June 17, 1981, the referee entered an order affirming Argonaut's denial. By letter dated July 16, 1980, claimant requested that the Board review the referee's order. Claimant failed to send a copy of the request for review to Argonaut. On July 20, 1981, the Board received claimant's request. On receipt of a request for review, the Board's usual

practice is to mail a letter acknowledging its receipt of the request to all parties, including the insurer, within 48 hours. Although the record does not show when the Board's acknowledgment letter was sent, Argonaut moved to dismiss the request on July 24, 1981. Argonaut argued that, under *Albiar v. Silvercrest Industries,* 30 Or App 281, 566 P2d 1217 (1977), the Board was required to dismiss the request for review, because claimant failed to comply with ORS 656.295(2).[1]

ORS 656.289(3) provides, in part:

> "The order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295. * * *"

ORS 656.295 provides, in part:

> "(1) The request for review by the board of an order of a referee need only state that the party requests a review of the order.

> "(2) The requests for review shall be mailed to the board and copies of the request shall be mailed to all parties to the proceeding before the referee."

It is undisputed that claimant's request for review was timely, because it was mailed on the 30th day after the referee issued his order, and that claimant never sent copies of the request to the other parties. It is apparent from the record that Argonaut received actual notice of the request within four days of the Board's receipt of the request. The issue, therefore, is whether the Board lacked jurisdiction to review solely because he failed to send copies to Argonaut, which received actual notice of the request between 34 and 38 days after the referee's order.

We addressed this issue under facts indistinguishable from those here in *Albiar v. Silvercrest Industries, supra.* In *Albiar,* the claimant mailed his request for review to the Board 27 days after the referee's order. The other parties received actual notice when they received the Board's acknowledgment of the request 33 days after the order. They received copies of claimant's request four months after the order. We said:

> "* * * [T]his court has been liberal in the application of statutory notice requirements in the context of workers' compensation. *See, Nollen v. SAIF,* 23 Or App 420, 542 P2d 932 (1975), Sup Ct *review denied* (1976); *Schneider v. Emanuel Hospital,* 20 Or App 599, 532 P2d 1146, Sup Ct *review denied* (1975); *Stevens v. SAIF,* 20 Or App 412, 531 P2d 921 (1975); *Murphy v. SAIF,* 13 Or App 105, 508 P2d 227 (1973). * * *" 30 Or App at 283.

We noted, however, that our liberal interpretation of notice requirements was not unlimited, quoting *Nollen v. SAIF,* 23 Or App 420, 542 P2d 932 (1975), *rev den* (1976), which quoted Larson:

---

[1] Argonaut also argued below that the request for review should be dismissed, because claimant did not file his request within 30 days, as required by ORS 656.289(3). Argonaut did not renew this argument on appeal.

> " ' "* * * The whole idea is to get away from cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. On the other hand, as every lawyer knows, there is a point beyond which the sweeping-aside of 'technicalities' cannot go, since evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case. * * *" 3 Larson, [Workmen's Compensation Law 2, §78.10 (1973)].' 23 Or App at 423." 30 Or App at 284.

Applying Larson's rationale, we distinguished the four cases we had cited and affirmed the Board's dismissal of the claimant's request for review:

> "The previous cases construing notice requirements in the Workers' Compensation Act all involved actual notice which was timely. In this case, however, the notice to the parties of the Request for Board Review was not mailed by the party requesting review and, more significantly, was not effected within the statutory period. We conclude that the time within which notice of the Request is required to be given is 'an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case.' *Nollen v. SAIF, supra,* at 423." 30 Or App at 284.[2]

In the four cases cited in *Albiar,* we held that a party's failure to comply strictly with the notice requirements of the Workers' Compensation Act did not preclude the reviewing body (the referee in *Murphy,* the circuit court in *Stevens* and the Board in *Schneider* and *Nollen*) from exercising jurisdiction in the absence of prejudice to the other parties. Those cases are distinguishable from *Albiar. Schneider* and *Nollen*

---

[2] The Board declined to follow *Albiar v. Silvercrest Industries, Inc.,* 30 Or App 281, 566 P2d 1217 (1977), saying, in part:

> "We are concerned that the Court of Appeals' decision in *Albiar* was not made with complete understanding of Board procedures. Upon receipt of a request for review, the Board sends a computer-generated letter acknowledging the request to all parties—the claimant, the employer, the insurance carrier, if any, and all attorneys of record. This acknowledgment letter is usually mailed within 24 to 48 hours of our receipt of a request for review and, since the acknowledgement letters started being computer-generated earlier this year, in no case has it taken more than seven days for the acknowledgment letter to be mailed. Thus, if the party requesting review does not serve copies of the request on the opposite parties, the Board's acknowledgment letter supplies actual notice of the request for review.
>
> "* * * * *
>
> "Given the Board's almost instantaneous response to a request for review with an acknowledgment being sent to all parties, the parties' interest in knowledge of finality can be further compromised for a few more days if knowledge of the request for review comes from the Board rather than from the requestor. We simply cannot agree with the *Albiar* court that this possible additional delay of up to a few days amounts to 'an irreducible hardcore of necessary function' that comes even close to outweighing 'the thwarting of the protective functions of the act.' 3 Larson, supra, § 78.10."

If *Albiar* is wrong, it is for this court or the Supreme Court to say so.

involved the failure to comply with notice requirements in the sense that the party requesting review did not send notice to the other parties but instead sent timely notice to a person or entity in privity with the party. In *Stevens,* timely notice failed to include a statement of reasons why relief should be granted, but the claimant briefed and created a record on the only issue relating to compensability. *Murphy* involved failure of SAIF to give the claimant notice that a portion of his aggravation claim was denied and his right to request a hearing, but the claimant in fact obtained a hearing and presented evidence on the issue. In each case, the court held that the notice, although defective, was sufficient in the absence of prejudice.

Argonaut does not argue that it was prejudiced, and we conclude that it was not. It received actual notice that claimant had requested Board review within four days of the Board's receipt of the request. Argonaut had time to file a motion to dismiss the request and, after the Board denied the motion, there is no evidence that it did not have time to prepare for the Board's review on the merits.

Claimant argues that we should not follow *Albiar,* because it departed from the four cases referred to in it which held that strict compliance with notice requirements was not fatal to the jurisdiction of the reviewing board or court in the absence of prejudice. While it is true that *Albiar* did not discuss the question of prejudice, it is also true that only *Albiar* involved receipt of actual notice of the request for review *after* the statutory time for giving notice had expired. We conclude that *Albiar* is correct and that, when actual notice of a request for review is received after the time for giving notice has expired, prejudice is not a relevant consideration. *See Ransom v. U.S. National Bank,* 10 Or App 158, 499 P2d 1374 (1972).[3]

We hold that compliance with ORS 656.295 requires that statutory notice of the request for review be mailed or actual notice be received within the statutory period. To hold otherwise would mean that if a request for review was made

within 30 days, actual notice, whenever received, would be sufficient unless the party entitled to notice could show prejudice.

Reversed.

[3] *Albiar* has been the law of Oregon for five years. Had the legislature disagreed with our decision, it has had ample opportunity to register its disagreement. It has not.

IN THE COURT OF APPEALS:
NELSON v. EBI COMPANIES

Patricia R. Nelson, Claimant — WCB 81-1037
Richard W. Condon, Petitioner's Attorney — CA A25536
James N. Westwood, Respondent's Attorney — July 27, 1983
Before Gillette, Presiding Judge, and Warden and Young, Judges

GILLETTE, P. J.

Claimant appeals from an order of the Workers' Compensation Board that reversed a referee's order awarding her 25 percent unscheduled permanent partial disability and reinstated a determination order that awarded her only 5 percent unscheduled disability. The Board held that claimant's failure to continue a weight loss program recommended by her physicians was keeping her from recovering from her injury as fully as she otherwise would and downrated her degree of permanent partial disability accordingly. We affirm.

Claimant is a 30-year old certified nurse's aid who sustained a lower back injury on June 18, 1979, when, in the course of her employment at a convalescent center, she attempted to grab a patient who fell while being moved from a wheelchair to a bed. Claimant is 5'4" tall and, at the time of injury, weighed 300 pounds.

Dr. Stellflug, a chiropractic physician, initially treated claimant on June 20, 1979. He diagnosed acute lumbar and cervical strains and, in his report of August 10, 1979, noted that her obesity was prolonging her healing time. He referred her to Dr. Todd, an orthopedic surgeon, for evaluation. Dr. Todd's evaluation report concluded that claimant had sustained an acute low back strain and that "her only source of help" was weight reduction.

In February, 1980, Dr. Stellflug referred claimant to Dr. Lautenbach, an internist. Dr. Lautenbach's March 7, 1980, report confirmed the earlier diagnoses, noted that she was suffering from anxiety depression and acknowledged that her healing process was hindered by her excessive weight. Dr. Pasquesi examined claimant for evaluation on March 17, 1980, at the request of respondent. At that time she weighed 290 pounds. Dr. Pasquesi found no objective cause for her symptoms "other than obesity and a large abdomen." He did note, however, that her subjective symptoms were consistent with lumbosacral instability.

Apparently because of Dr. Pasquesi's report, respondent requested further information from Dr. Todd, who stated in a report dated June 27, 1980, that claimant had "concrete radiographic evidence of degenerative disc disease

* * *" and that she was "seriously working on a weight control program." In April, 1980, Dr. Todd had arranged for an endocrinological evaluation by Dr. Bouma. In his September 15,

1980, report Dr. Todd stated that Dr. Bouma had found claimant to be euthyroid, nondiabetic and not suffering from Cushing's Syndrome; *i.e.*, he found no physiological cause for her obesity.[1]

In October, 1980, claimant once again consulted with Dr. Lautenbach, who placed her on a 1,000 calorie per day diet and medication. On March 11, 1981, Dr. Lautenbach reported that claimant had achieved a 37 and one-half pound weight loss. However, on July 21, 1981, prior to the hearing, Dr. Lautenbach signed a statement, prepared by respondent, that no further progress had been seen in claimant's weight loss for two or three months, that she had lost any enthusiasm to proceed further with the weight loss program and that her weight problem was completely within her control.[2]

The Determination Order found that claimant had a 30 percent, unscheduled disability but awarded her only 5 percent, because the Evaluation Division believed that most of her disability was attributable to voluntary obesity.[3] Claimant requested a hearing. The referee found that claimant's excessive weight significantly contributed to her overall disability. He found, however, that her overall disability was probably in excess of 30 percent and rated disability due to the injury at 25 percent. He also found that claimant had not wilfully dis-

---

[1] There is no report from Dr. Bouma in the record.

[2] The letter from respondent to Dr. Lautenbach, including his response, reads:

"Dear Dr. Lautenbach:

"I understand your opinion in this matter to be as follows: that you have treated the claimant for some time regarding her weight problem.

"The weight loss program for claimant in your opinion is not working. The claimant has reduced her weight from 137 kilograms to 119 kilograms through the initial portion of the program, but no further progress has been noted in the last two or three months. You are not aware that there has been any weight gain either. It is your opinion that the claimant has lost any enthusiasm or desire to proceed further with the weight loss program.

"You have not heard any complaints from Mrs. Nelson regarding her low back in the last several months. It is your opinion that the low back problem is minimal at best.

"Because of the claimant's overweight state, she is more inclined to have repetitive back injuries and will always have such injuries throughout her life due to her weight problem. If she lost 100 pounds, she would probably have fewer back complaints.

"Her overweight problem is completely within her control and is entirely voluntary. Her weight loss is entirely a matter of willpower and desire and is not caused by involuntary factors.

"If you agree with the foregoing, would you please signify below.

"__X__ Yes, the foregoing is correct.

"_____ No, the foregoing is not correct."

[3] The Determination Order, issued on January 30, 1981, stated:

"The Evaluation Division finds your permanent partial disability to be 96 degrees for 30 percent unscheduled disability resulting from injury to your low back. However, as you have failed to follow medical advice in weight loss, which reasonably could have been expected to reduce your disability, the Department, pursuant to ORS 656.325(4), finds your award of compensation should be reduced."

As will appear, *post*, the statute relied on in the determination order was inappropriate.

obeyed her doctor's orders and that she had shown that she had tried to lose weight.

The Board reversed the referee and reinstated the Determination Order, concluding that, "although claimant made some effort to lose weight, considering all the factors, it was not a reasonable effort." In reaching its conclusion, the Board reasoned as follows:

> "Resolution of the parties' contentions requires a discussion of two fundamental but potentially inconsistent principles of workers compensation law. The first is that the employer takes the worker as he finds him; the second is that an injured worker has a duty to mitigate his or her damages. The principle that the employer takes the worker as he finds him is recognized in that a worker is entitled to compensation for the disabling effects of a pre-existing, nonindustrial condition, provided that the pre-existing condition and work activity combined to produce temporary or permanent disability or required medical services, and the work activity were [sic] a material contributing cause. *Hoffman v. Bumble Bee Company*, 15 Or App 253 (1973). The principle that an injured party has a duty to mitigate damages is recognized in that a worker is not entitled to an award of permanent disability to the extent that the worker unreasonably refuses treatment for a pre-existing condition where such treatment would reduce the extent of disability of the compensable condition. *Brecht v. SAIF*, 12 Or App 615 (1973); *Wilson v. Gilchrist Lumber Co.*, 6 Or App 104 (1971)."

The Board then applied these principles to the rating of disability of a compensable injury affected by obesity and concluded:

> "(1) A worker is entitled to compensation when work activity interacts with obesity to cause an injury which results in permanent disability, provided that work activity was a material contributing cause for the injury; but (2) a worker is not entitled to compensation for disability attributable to obesity to the extent that (a) the evidence establishes that weight loss would reduce or eliminate the degree of disability, and (b) it is within the voluntary control of the worker to follow such medical advice and lose weight, and (c) the worker has not made a reasonable effort to follow such medical advice. We further conclude that, where a case involves the rating of disability and the issue is raised, the burden of proof is on the claimant to show that he or she did not unreasonably fail to follow the medical advice to lose weight."

This court has had occasion to address an analogous problem. In *Clemons v. Roseburg Lumber Co.*, 34 Or App 135, 137-38, 578 P2d 429 (1978), we identified

> "* * * two threads running through our cases dealing with the effect upon compensation of unreasonable refusal to submit to medical treatment which might promote recovery and expedite reintegration into the labor market: one relating to proof and the other to restoration. The first emphasizes the burden upon the worker to prove the extent of disability. * * * The other line of cases treats refusal of available treatment as a negative factor in determining extent of compensable incapacity." (Citations omitted.)

We stated in *Clemons* that the rationale for reduction of benefits when treatment is unreasonably refused is that an employer should not be held responsible for the full extent of a claimant's permanent disability if there is significant likelihood that such disability is partly attributable to the claimant's unreasonable rejection of appropriate treatment. *Clemons* also identified the corollary objective of the Workers' Compensation Act to favor restoration of the worker over compensation for permanent loss. *Clemons v. Roseburg Lumber Co., supra,* 34 Or App at 138.

Clemons differed from the present case in that it involved a claimant's refusal to submit to a *surgical* procedure. Pursuant to her employer's request, the Board had authorized suspension of benefits. A determination order was then issued, terminating the claimant's temporary total disability payments and awarding an amount equal to 10 percent unscheduled permanent partial disability. On review, the Board agreed that the claimant's disability exceeded 10 percent but refused to increase the award, because it reasoned that the employer should not be penalized for the claimant's refusal to mitigate her injury. We reversed and held that, under the facts of that case, the claimant was not required to submit to a recommended surgical procedure. *Clemons v. Roseburg Lumber Co., supra,* 34 Or App at 140. Citing 1 Larson, Workmen's Compensation Law, §13.22 at 3-398 (1978), we stated that the test for determining whether a permanent disability award should be adjusted because of the claimant's refusal to submit to recommended treatment was "reasonableness":

> "* * * The relevant inquiry is whether, if compensation were not an issue, an ordinarily prudent and reasonable person would submit to the recommended treatment. Such a determination must be based upon all relevant factors, including the worker's present physical and psychological condition, the degree of pain accompanying and following his treatment, the risks posed by the treatment and the likelihood that it would significantly reduce the worker's disability. *Grant v. State Industrial Acc. Com.*, 102 Or at 45; *see* 1 Larson, Workmen's Compensation Law, supra." 34 Or App at 139.

In the present case, the Board took note of ORS 656.325(4), enacted subsequent to the events giving rise to *Clemons*,[4] which provides an analogous rule:

> "When the employer of an injured worker, or the employer's insurer determines that the injured worker has failed to follow medical advice from the attending physician or has failed to participate in or complete physical restoration or vocational rehabilitation programs prescribed for the worker

---

[4] "Subsequent to the events of this case, the legislature * * * amended ORS 656.325, adding [subsection (4)] * * *. This provision is inapplicable to the case at bar and we do not decide whether this addition to the statute changed the principles set forth herein or merely codified existing law." *Clemons v. Roseburg Lumber Co., supra,* 34 Or App at 139, n 2.

> pursuant to ORS 656.001 to 656.794, the employer or insurer may petition the director for reduction of any benefits awarded the worker. Notwithstanding any other provision of ORS 656.001 to 656.794, if the director finds that the worker has failed to accept treatment as provided in this subsection, the director may reduce any benefits awarded the worker by such amount as the director considers appropriate."

The Board, while correctly realizing that it could not apply ORS 656.325(4) "directly" under the circumstances of this case, analogized that statute to common law principles pertaining to the duty of one who has suffered personal injury to minimize his damage:[5]

> "None of the provisions of ORS 656.325 directly pertain to the issue in this case. Subsections (1) and (2) of that statute authorize suspension or reduction of temporary disability payments under various circumstances. Subsections (3) and (4) presume that a claimant has received an award of permanent disability. The issue here is rating of extent of permanent disability. We understand ORS 656.325 to be an application to specific circumstances of the general principles, applicable to the circumstances of this case, that an injured party has a duty to mitigate damages and that the worker's compensation system is generally not liable for pre-existing, nonindustrial conditions."

We agree with this analysis, which we think is consistent with our holding in *Clemons.*

Applying the principle of an obligation to not refuse unreasonably to take steps which will minimize the extent of disability to the facts of this case, we agree with the Board's disposition. This record shows that claimant was able to lose weight for a while, but she eventually lost enthusiasm for her prescribed weight program. There is no indication in this record other than that she could have continued to lose weight, had she gone back to the regimen Dr. Lautenbach prescribed. There was no medical impediment to success, no severe pain or other contraindications; all that was required was an exercise of will. Her failure to make further efforts was unreasonable.

Affirmed.

---

[5] *See Zimmerman v. Ausland,* 266 Or 427, 513 P2d 1167 (1973).

WARDEN, J., dissenting.

The Board's opinion—adopted by the majority—is flawed in three primary respects: first, it blurs the distinction between claimant's burden of proof to show the extent of her disability with respondent's burden to show that claimant unreasonably failed to follow medical advice; second, it equates the question whether claimant failed to follow "medical advice" with the question whether she achieved a recommended "weight loss"; and third, it misapplies the "reasonableness" criteria of *Clemons v. Roseburg Lumber Company,* 34 Or App 135, 578 P2d 429 (1978). Accordingly, I dissent.

1. As a threshold matter, the majority errs in allocating the burden of proof to claimant on the issue of whether or not she "unreasonably failed to follow medical advice." The majority agrees with the Board's conclusion "that, where a case involves the rating of disability and the issue is raised, the burden of proof is on the claimant to show that he or she did not unreasonably fail to follow medical advice to lose weight."

Claimant weighed 300 pounds when she was hired. She did not exceed that weight at any time during her employment; respondent does not contend otherwise. Claimant is entitled to compensation for the disabling effects of her preexisting, nonindustrial condition, where that condition and her work combined to produce her disability. *See Hoffman v. Bumble Bee Company,* 15 Or App 253, 515 P2d 406 (1973). Her burden is to establish the extent of that disability. *Clemons v. Roseburg Lumber Company, supra,* 34 Or App at 137. In the present case, the referee determined that claimant's disability was "in excess of 30 percent." When respondent seeks to reduce claimant's disability award by contending that she "unreasonably failed to follow medical advice," that argument is in the nature of an affirmative defense and the burden of proof is properly allocated to respondent. *See Folmer Ice Cream Co. v. Workmen's Comp. App Bd.,* 17 Pa Cmwlth Ct 34, 330 A2d 584 (1975).

2. The linchpin of the majority's analysis is that claimant "unreasonably failed to follow medical advice" to lose weight. Respondent contends that the record overwhelmingly demonstrates that claimant had consistently been advised of the necessity of substantial weight loss. In fact, the record does

show that claimant was advised by Drs. Todd and Stellflug as early as June, 1979, to lose weight and that Dr. Todd had continually thereafter so advised claimant.

Respondent, however, cites nothing in the record to show that Drs. Todd or Stellflug prescribed any type of weight loss regimen for claimant. Indeed, Dr. Todd acknowledged in his November 21, 1980, report to respondent that he did "not engage in weight control programs, and, therefore, shall not pretend to monitor [claimant's]."

In this case of first impression, involving a reduction of an obese claimant's disability benefits for her alleged unreasonable failure to follow "medical advice," we need to examine carefully the Board's use of the term "medical advice." As acknowledged by the majority, the instant facts differ from *Clemons;* in that case the failure to follow medical advice involved a recommended surgical procedure. In *Clemons,* therefore, the surgery was the recommended corrective procedure, and there was no question as to the application of the term "medical advice."[1] In the present case, however, the ques-

[1]The majority notes that the Board correctly "analogized" ORS 656.325(4) to common law principles of mitigation that are applicable to the circumstances to this case. OAR 436-54-286 was promulgated pursuant to ORS 656.325 and defines failure to follow "medical advice" in subsection (1) as the failure to submit to "recommended surgical treatment" and in subsection (2) as the "failure of the worker to remain under a doctor's care, seek reasonable periodic examinations or participate in a treatment regimen."

tion is not so easily resolved. We may not simply examine the record to see how many times claimant was told to "lose weight." Weight loss should properly be viewed as an objective that—barring physical impediments—can be obtained by careful adherence to a prescribed weight loss regimen. It is the unreasonable failure to follow that prescribed regimen that provides the authority, if any, for a reduction of disability benefits.[2]

The record shows that claimant received medical advice on weight loss only from Dr. Lautenbach. From June, 1979, to February, 1980, claimant paid for Dr. Lautenbach's services herself. She testified at the hearing that, during this period of time, she could not afford to consult with Dr. Lautenbach on a regular basis. By February, 1980, respondent agreed to pay for Dr. Lautenbach's services. According to Dr. Lautenbach's October 10, 1980, report, however, claimant had seen him only twice during 1980. In that report, he stated that claimant "finally was beginning to realize the need for weight reduction." According to his March 11, 1981, report, claimant continued her therapy from October, 1980, to March, 1981, "as agreed upon." That therapy included a 1,000 calorie per day diet as well as prescribed diet pills. Additionally, claimant, at her own expense, attended Weight Watchers in early 1981. Significantly, it was during this period of time, October, 1980, to March, 1981, that claimant achieved a 37 and one-half pound weight loss.

The record establishes, therefore, that claimant received "medical advice" only from Dr. Lautenbach and that through March, 1981, claimant followed that advice "as agreed upon." The proper analysis, then, must focus on that period of time from April, 1981, to the date of the hearing, July, 1981—during which she lost an additional 2.2 pounds—to determine whether claimant unreasonably failed to follow Dr. Lautenbach's prescribed regimen for weight loss.

3. Reasonableness is a question of fact, *Clemons v. Roseburg Lumber Company, supra,* 34 Or App 139, *citing Grant v. State Industrial Acc. Com.,* 102 Or 26, 46, 201 P 438 (1921), taking into account the worker's perspective. *Clemons v. Roseburg Lumber Company, supra,* 34 Or App at 139. The only proof submitted by respondent with respect to the period of time at

---

[2]Compare, for example, *Folmer Ice Cream Co. v. Workmen's Comp. App. Bd., supra,* in which an obese claimant suffered a back injury that was inoperable due to her excessive weight. In that case, the claimant submitted to institutionalization in order to lose weight. During the two weeks she was hospitalized, her weight fell from 300 pounds to 279 pounds. However, a reversal occurred, and her weight increased to 289 pounds. She then left the hospital. The employer argued, *inter alia,* that the claimant's failure to lose the required amount of weight constituted unreasonable refusal to follow medical advice under Pennsylvania law. The court, adopting the reasoning of the Pennsylvania Workmen's Compensation Appeal Board, correctly distinguished weight loss as an objective from refusal of treatment:

> " '[I]n this case claimant did not refuse the weight reducing procedures of the employer. She pursued them and obviously they failed. * * * This is a case where claimant did not refuse treatment, but where the treatment did not achieve the desired results.' "

issue was the letter written by respondent and signed by Dr. Lautenbach. That letter is merely a series of conclusions that fails to provide *any* indicia of claimant's unreasonable failure to follow Dr. Lautenbach's advice. It clearly falls far short of the inquiry mandated by *Clemons*.

In summary, the majority first errs by burdening claimant—under the rubric of proving the extent of her disability—with what is in essence the task of disproving respondent's affirmative defense. Secondly, the majority misconstrues the term "medical advice." In so doing, it affirms the Board's reliance on instructions given by Dr. Todd to claimant to "lose weight," although Dr. Todd, by his own admission, was not qualified to advise claimant with respect to a weight loss regimen. And, finally, even if the letter of July 21, 1981, prepared by respondent and signed by Dr. Lautenbach, provides a colorable claim that claimant failed to follow "medical advice," it is devoid of any evidence whatsoever that claimant *unreasonably* failed to do so. Taking that letter at face value, the conclusion the majority draws from it, *i.e.*, that claimant, who in the nine preceding months had shed nearly 40 pounds, acted unreasonably because her doctor had noted no weight loss (or gain) in the last two or three of those months and had "lost enthusiasm" for the weight loss program, is itself unreasonable.

I therefore respectfully dissent.

IN THE COURT OF APPEALS:
PACIFIC MOTOR TRUCKING CO. v. YEAGER

Hope A. Yeager, Claimant — WCB 79-4381E
Jeffrey M. Batchelor, Petitioner's Attorney — CA A 23337
Edward C. Olson, Respondent's Attorney — July 27, 1983
Before Gillette, Presiding Judge, and Warden and Young, Judges

WARDEN, J.

Pacific Motor Trucking (PMT), a self-insured employer, petitions for review of an order of the Workers' Compensation Board affirming an order of a referee that affirmed two separate determination orders issued on the same date. One awarded claimant[1] permanent partial disability for 35 percent loss of use of the left leg and temporary total disability from March 2, 1976, through April 14, 1977, less time worked, for an injury to his left knee from an accident that occurred on November 1, 1974. The other awarded permanent total disability effective March 6, 1979, together with temporary total disability from April 15, 1977, through March 5, 1979, for injuries from an accident that occurred on April 15, 1977.

[1] We use the term "claimant" to mean the injured worker, who is now deceased. His wife has been substituted as claimant. *See* ORS 656.208.

Exercising our *de novo* review function, *see Hoag v. Duraflake,* 37 Or App 103, 585 P2d 1149, *rev den* 284 Or 521 (1978); *Bowman v. Oregon Transfer Co.,* 33 Or App 241, 576 P2d 27 (1978), we find that claimant has proved by a preponderance of the evidence that he is totally and permanently disabled. Two physicians and one vocational rehabilitation consultant came to this conclusion. There was evidence that his non-compensable infirmities were longstanding and pre-dated his employment at PMT. An employer takes an employe as he finds him. *Hill v. SAIF,* 38 Or App 13, 588 P2d 1287 (1979). The opinions of Dr. Van Osdel and Dr. Means as to claimant's demeanor and motivation do not adequately refute the unequivocal opinions of other experts about the extent of his disability.

PMT also challenges the award, affirmed by the referee and the Board, of permanent partial disability, contending that claimant is not entitled to that in addition to the award of permanent total disability. Claimant argues that PMT waived its right to contest this award when it did not request a hearing on that determination order but only sought review of the one that awarded permanent total disability.[2] However, claimant

requested a hearing on the permanent partial disability award. Because he did so, both awards were in issue before the referee. PMT appealed the referee's affirmance of both awards; therefore, the question of the permanent partial disability award was properly before the Board. Although the statute governing review of referees' orders specifically provides for appeals and cross-appeals, ORS 656.289(3), the statute governing requests for hearings on determination orders states only that "any party * * * may at any time request a hearing on any question concerning a claim." ORS 656.283(1). PMT is not barred from contesting the permanent partial disability award by its failure to request a hearing on the determination order.

Reaching the merits of the question whether awards for both permanent partial disability and permanent total disability may be made, we find ourselves constrained to examine what application, if any, ORS 656.222 has in this fact situation.[3] It 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."

We conclude that ORS 656.222 does not apply by its terms to this case, because at the time claimant's second acci-

[2] Claimant quotes a colloquy at the hearing in which he claims that PMT waived objection to the permanent partial disability award, if the award of permanent total disability were upheld. As we read it, that language is just as reasonably interpreted as a waiver by the claimant rather than PMT of a challenge to the permanent partial disability award.

[3] Neither party has referred us to ORS 656.222 in their briefs or arguments, but its language suggests that it could be applicable.

dent occurred, in 1977, he had not been paid or awarded any compensation for permanent disability on account of his 1974 injury and the record does not show that he was receiving compensation for temporary disability when the second accident occurred either. Presumably he was not, because he had returned to work at that time.

The fact, however, that ORS 656.222 does not apply does not require us to conclude that claimant is entitled to recover simultaneous awards for both permanent total disability and permanent partial disability. Employer has directed us to 2 Larson, Workmen's Compensation Law, 10-507, §59.41 (1982), and to *Cabe v. Skeens*, 422 SW2d 884 (Ky 1967). Larson states that the injured worker is not entitled to

simultaneous payments for more than one disability award and states the reasons for the rule:

> "There is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a man can be no more than totally disabled. The practical reason is that if he is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him to be disabled than to be well—a situation which compensation law always studiously avoids in order to prevent inducement to malingering." 2 Larson, Workmen's Compensation Law 10-507, §59.41 (1981). (Footnotes omitted.)

In *Cabe v. Skeens, supra*, the claimant injured his right ankle on November 10, 1964. He was off work until February 8, 1965. On July 26, 1965, he injured his left ankle and foot and was off work until October 11, 1965. He worked until November 1, 1965, when he was forced to quit working permanently because of silicosis. The employer did not dispute that the claimant had sustained some permanent partial disability to each ankle, that he was totally and permanently disabled from the silicosis and that the silicosis was compensable as an occupational disease. The three claims were consolidated for hearing (as were the two in the instant case). The court held that payments for the separate injuries could not be added together to run concurrently, when the combined payments would exceed the highest payment allowable, although it acknowledged that, if the compensation for the ankle disabilities had been fully paid before the permanent total disability payments commenced, the former would not be offset against the latter. *See also General Refractioner Co. v. Herron*, 566 SW2d 433 (Ky 1978) and *Wilkosz v. Symington Gould Corp.*, 14 NY 2d 739, 250 NYS 2d 297, 199 NE2d 387 (1964).

We accept the reasoning of these authorities and hold that an injured worker who is receiving payments for permanent total disability is not entitled to separate, additional payments for permanent partial disability.

The order of the Board is modified to delete the award of permanent partial disability payments and, as modified, is affirmed.

Kenneth E. Awmiller, Claimant — WCB 80-11632
Deborah S. MacMillan, Petitioner's Attorney — CA A25868
Lann D. Leslie, Respondent's Attorney — July 27, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

ROSSMAN, J.

Employer appeals from an order of the Workers' Compensation Board affirming the referee and holding employer responsible for a penalty and attorney fees for delay in submitting the claim to the Evaluation Division and for terminating temporary total disability payments without authorization from the Evaluation Division. We affirm.

Claimant injured his lower back on February 4, 1977, while working on the green chain. On July 11, 1977, he was released to work with restrictions of no prolonged standing and no lifting over ten pounds. On Dr. Robertson's recommendation, he was enrolled in a vocational rehabilitation program in business and management at Lane Community College. On April 7, 1978, Dr. Robertson, in a report to employer, noted that claimant's condition had not changed in several months and stated: "His back condition should remain stable as long as he takes care of himself." Employer was notified that the vocational rehabilitation program terminated in December, 1979. On completion of the program, claimant immediately took a job with a new employer as a lumber salesman. There is no record of employer's requesting claim closure. However, because the Evaluation Division notified employer on January 11, 1980, that a "current orthopedic examination" was required, we assume that a request was made. On February 1, 1980, Dr. Robertson reported that claimant was medically stationary and that his claim should be closed. Employer did not resubmit the claim for closure. On May 30, 1980, Dr. Robertson authorized time loss for claimant.

On August 22, 1980, Dr. Robertson recommended in a chart note that "he be released back to work on Mon. August 25." Based on this report and on its own interpretation of ORS 656.268(2), employer unilaterally terminated time loss payments as of August 25. Employer did not seek claim closure from the Evaluation Division until five months after this termination. Employer's attorney stated at the hearing: "There is no explanation for the delay in processing that claim from time of closure." The referee summarized his understanding of employer's position as follows:

> "* * * I understood defendant to say that there was, there was no defense for the delay in processing this case for closure.

> "Does the defense have any additional remarks at this time?"

Employer's attorney replied, "No additional." A determination order was finally issued on February 6, 1981, awarding

TTD and 10 percent permanent unscheduled disability. The referee awarded additional TTD from August 25, 1980, to February 6, 1981, and 25 percent of that TTD as a penalty, plus attorney fees.

ORS 656.268(2) states, in pertinent part:

> "When the injured worker's condition resulting from a disabling injury has become medically stationary, unless the injured workman is enrolled and actively engaged in an authorized program of vocational rehabilitation, the insurer or self-insured employer shall so notify the Evaluation Division, the worker, and employer, if any, and request the claim be examined and further compensation, if any, be determined. * * * If the attending physician has not approved the worker's return to the worker's regular employment, the insurer or self-insured employer must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

Two separate grounds were given by the referee and are relied on by claimant to support imposition of a penalty against employer under this statute.[1] The first is employer's failure to seek claim closure in a timely fashion. Under the provisions of ORS 656.268(2), claim closure must be sought by the employer when a claimant becomes medically stationary, unless the claimant is then enrolled in a vocational rehabilitation program, in which case closure must be sought as soon as the vocational rehabilitation program has been completed. The evidence in this case is that claimant was medically stationary before the termination of his vocational rehabilitation program. Employer was notified on December 14, 1979, that claimant had completed the program, yet no determination order was issued in this case until February 6, 1981. Employer offered no explanation or defense for the delay at the hearing.

Employer failed to process this claim as required by statute. The omission resulted in a delay of over a year in a determination of the extent of permanent partial disability. Employer unreasonably delayed payment of compensation and, therefore, claimant is entitled to a penalty and attorney fees under ORS 656.262(9).[2]

The second ground asserted in support of the imposition of the penalty is employer's unilateral termination of TTD. Employer argues that it was justified in terminating TTD, because it received a chart note from Dr. Robertson which stated: "Recommend he be released back to work on Mon. August 25," which constituted a release for return to "regular work," thus authorizing termination of TTD payments under ORS 656.268(2). Employer ignores the plain lan-

[1] The Board appears to have relied only on the second basis in affirming the referee.

[2] Claimant does not appeal the referee's failure to award a penalty for the delay in closure prior to termination of TTD. We make no finding as to whether such a penalty would have been appropriate.

guage of the statute. The statute does not authorize unilateral termination of TTD payments if the claimant returns to *any* type of work. Such termination is authorized only if the attending physician approves "the worker's return to the *worker's* regular employment." (Emphasis supplied.) ORS 656.268(2).[3] Unless the treating physician releases a claimant for return to the job that he held at the time of his injury, a claimant has not been released to return to *his* regular employment, and an employer may not unilaterally terminate time loss benefits but must submit the case for closure to the Evaluation Division.

The danger in allowing an employer unilaterally to terminate time loss is amply illustrated in this case. Claimant was not released to return to his former employment. It is

unclear what restrictions were placed on claimant's return to work, and employer made no effort to have the release clarified. Employer terminated time loss but failed to seek claim closure for over five months thereafter, thus terminating all of claimant's benefits without any review for a significant period of time. The referee and the Board properly awarded a penalty and attorney fees against employer.

Affirmed.

---

[3] Employer relies on OAR 436-65-004(15), which states:

" 'Regular' in reference to an occupation means fulfilling the requirements of the job day after day and for the full number of hours required; * * *"

and OAR 436-65-010(7), which states:

"A worker who has not been authorized by the worker's treating physician to return to regular employment shall be paid compensation until the determination order has been issued pursuant to ORS 656.268, unless the worker actually returned to work."

If employer is correct in its interpretation of these administrative rules, they establish a standard for unilateral termination of temporary total disability which is not authorized by the statute.

IN THE COURT OF APPEALS:
DREW v. WEYERHAEUSER COMPANY

Oscar Drew, Claimant — WCB 81-02811
Robert K. Udziela, Petitioner's Attorney — CA A25671
William McDaniel, Respondent's Attorney — July 27, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

ROSSMAN, J.

Claimant appeals from an order of the Workers' Compensation Board that reversed the opinion and order of the referee and held that claimant had failed to prove that his left knee condition was causally related to his industrial accident. We hold that claimant has met his burden of proof and reverse.

On March 18, 1978, claimant fell part way through a faulty catwalk, which was suspended 25 feet above the ground. He was able to avoid falling all the way by catching himself on a handrail. He was then assisted by another employe back onto

the catwalk. Employer accepted his claims for injuries to his back and right shoulder from the accident but denied the claim for injury to the left knee as not being causally related to the industrial accident.

The evidence which claimant presented connecting his left knee to the industrial accident is as follows: Elbert Jeans, the co-employe who assisted him after the accident, testified that, when he helped him through the hole in the catwalk, claimant stated: "he hurt his back and bumped his knee * * *." Immediately after the accident, claimant pulled up his pants leg and Jeans observed that his knee was hurt, the leg was chafed from four to five inches above the ankle part way up the leg and the knee was red. Jeans further stated that when claimant returned to work, he complained that the knee bothered him, and he observed that it bothered him by "the way he walked." Jeans had seen claimant step up leading with his left leg. When he put his weight on his left knee, "it was as if he had weights on his legs," and he fell against the wall. Jeans reported that claimant had a "definite limp" for 30 to 60 days after the accident and that he was still favoring his left leg when he retired.

On claimant's claim form, filed two days after the accident, he listed injury to his "back, rt. shoulder, lt. knee." The first mention of the left knee in a medical report is in Dr. Lindsay's chart note of June 6, 1978, nearly three months after the injury, in which he states:

> "* * * [Claimant] now says that he is having lots of pain in his left knee, down his left leg and to a certain extent in the left lower back area. He states that this portion was injured at the time of his original injury although I find nothing noted in the report to mention this. * * * He has lots of knee pain * * *."

Although the referee in the hearing on extent of disability did not award any permanent disability for his knee condition, he noted in his findings that claimant had sustained a left knee injury when he fell through the catwalk.

The medical evidence on causation consists of the reports of Dr. Bert and Dr. Lindsay. Although Dr. Lindsay did not make a specific finding on causation, he did note that he had been claimant's family doctor for a number of years and that he had always found him to be

> "* * * reliable and conscientious regarding his symptoms and follow-up of my instructions. I would have no reason to think that [claimant] is not being entirely truthful and candid about this particular injury and its relationship to his industrial accident."

Dr. Bert initially stated that it was "possible" the knee condition was causally related to the accident. In later reports, he stated:

> "I feel that, based upon reasonable medical probability, [claimant's] knee surgery was the result of the industrial injury at Weyerhaeuser on March 18, 1978. I feel this is true because the condition I discovered at the time of surgery in his knee, the osteochondritis and cartilage tear was definitely the result of trauma and historically this is this man's major trauma."

Dr. Bert noted that "[o]nce a small tear is initiated the tearing process generally does continue with everyday activities and it is possible that this could have happened in [claimant's] case."

The medical report of Dr. Bert, together with the nonmedical evidence establishing that claimant complained of a knee injury immediately after the accident, meets claimant's burden of proving by a preponderance of the evidence that his current knee condition is causally related to his compensable injury.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS:
MAKUCH v. SAIF CORPORATION

Ida M. Makuch, Claimant — WCB 81-04519
Rick Roll, Petitioner's Attorney — CA A26149
Darrell E. Bewley, Respondent's Attorney — August 3, 1983
Before Richardson, Presiding Judge, and Van Hoomisen and Newman, Judges

PER CURIAM.

In this workers' compensation case claimant appeals an order of the Workers' Compensation Board upholding SAIF's denial of payments for chiropractic treatment. We agree with the Board's analysis of the evidence and affirm.

Affirmed.

VAN HOOMISSEN, J., dissenting.

The issue is whether SAIF must pay for claimant's chiropractic treatments. I would agree with the referee and with dissenting Board member Lewis that claimant has sustained her burden of proof and that SAIF must pay.

In 1975, claimant sustained a compensable injury to her left arm, left shoulder, low back and left hip. She has had back pain off and on ever since. She was last seen by Dr. Gambee, her treating physician, in August, 1978. She did not receive any treatment for her back problem between August, 1978, and February, 1981.

In February, 1981, she developed pain in her low back. That problem progressed to spasms in her leg muscles. She consulted Dr. Smith, a chiropractor, who treated her with a good result within a short time.

In March, 1981, Orthopaedic Consultants examined claimant and concluded that there was no relationship between her low back problem and her 1975 injury.[1] They further concluded that chiropractic treatments were not indicated, but that she should be re-examined by Dr. Gambee. After reviewing his 1976 records, Dr. Gambee specifically stated that claimant's 1975 injury did involve her back.[2] He concurred that chiropractic treatments were not indicated, however. In April, 1981, SAIF denied responsibility for Dr. Smith's treatment on the ground that claimant's back condition did not arise out of her 1975 injury.

---

[1] The referee concluded that Orthopaedic Consultants misread Dr. Gambee's reports. I agree.

The referee concluded that claimant was entitled to receive treatment from Dr. Smith "regardless of the opinions of doctors from a different school." He stated:

> "As I view the case, the proof of the pudding is in the eating. This lady was in misery, she couldn't stand, she couldn't rest – nothing provided relief. She went to the chiropractor and received immediate relief. SAIF lacks authority to deny payment for the services of a chiropractor merely upon the recommendation of some M.D.'s. The Workers' Compensation Law provides a free choice of licensed physicians to injured workers.
>
> "* * * However, when SAIF checked with Dr. Gambee there was no equivocation on his part as to what caused this lady's low back problem – and the fact that there is causal connection to the industrial injury * * *. [Dr. Smith] is treating a logical and natural consequence of the industrial injury."

I concur with Board member Lewis, who found that the referee's analysis of the claim was well-reasoned. I would reverse and adopt the referee's opinion and order.

[2] The referee concluded that, having stipulated that claimant's 1979 award of additional compensation for permanent partial disability was for her "Back, left hip, left shoulder and arm," SAIF is unable to argue now that her back condition was *not* involved in her 1975 injury claim.

IN THE COURT OF APPEALS:
FREEMAN v. SAIF CORPORATION

Robert J. Freeman, Claimant — WCB 81-08124
Rebecca G. Orf, Petitioner's Attorney — CA A26498
Darrell E. Bewley, Respondent's Attorney — August 3, 1983
Before Gillette, Presiding Judge, and Warden and Young, Judges

PER CURIAM

In this workers' compensation case, that portion of the order of the Workers' Compensation Board reducing the referee's award of attorney fees from $750 to $400 is reversed, and the referee's award is reinstated. In all other respects, the order of the Board is affirmed.

Modified to reinstate referee's award of attorney fees; affirmed as modified.

Cite as 64 Or App 185 (1983)

IN THE COURT OF APPEALS:
AYRES v. CHRISTIAN LOGGING CO. et al

Frank E. Ayres, Claimant — WCB 81-07960
Evohl F. Malagon, Attorney for Petitioner-Cross-Respondent — CA A26412
Emil R. Berg, Attorney for Respondents-Cross-Petitioners — August 3, 1983
Before Gillette, Presiding Judge, and Warden and Young, Judges

PER CURIAM

This is a workers' compensation case in which claimant seeks reversal of a portion of a Workers' Compensation Board order that reduced a referee's award of permanent partial disability for binaural hearing loss. On *de novo* review, we reverse that portion of the Board's order and reinstate the referee's award. In all other respects, the Board's order is affirmed.

Referee's award of permanent partial disability for binaural hearing loss reinstated; order of Workers' Compensation Board otherwise affirmed.

Cite as:

64 Or App 187 (1983)

IN THE COURT OF APPEALS:
THOMAS v. SAIF CORPORATION

John R. Thomas, Claimant — WCB 80-10051
David C. Force, Petitioner's Attorney — CA A26077
Darrell E. Bewley, Respondent's Attorney — August 10, 1983
Before Buttler, Presiding Judge, and Warren and Rossman, Judges

BUTTLER, P. J.

Claimant appeals an order on review of the Workers' Compensation Board, which reversed the opinion and order of the referee, holding that the referee and the Board lacked jurisdiction to consider claimant's claim. Because we conclude that SAIF waived its right to assert any defects in claimant's request for hearing, we reverse and remand.

Claimant sustained an injury to his back on January 20, 1979. A determination order was issued on October 15, 1979, awarding claimant 10 percent unscheduled permanent partial disability. By a stipulated order of April 30, 1980, he was awarded an additional 10 percent permanent partial disability.

On June 2, 1980, Dr. Gilsdorf requested authorization from SAIF to perform a spinal fusion. SAIF sent claimant to Southern Oregon Medical Consultants, who stated on July 10, 1980, that they did not believe claimant would be helped by a spinal fusion. On August 12, 1980, SAIF denied his claim for aggravation. He did not file a request for hearing on that denial until November 6, 1980. On April 6, 1981, Dr. Gilsdorf performed a laminotomy and a fusion on claimant's back, and, as a

result, claimant's condition greatly improved. SAIF was notified of the surgery on April 30 by receipt of reports from Dr. Gilsdorf. On June 17, 1981, a hearing was held in response to claimant's November 6, 1980, request. At the hearing, his attorney stated:

> "There's a separate issue which has not been heretofore raised by Request for Hearing, but which I discussed with Mr. Nyburg prior to the hearing, which is essentially that the claimant has an alternative theory, it being that on or about February or March of 1981, the claimant's condition having continued to aggravate, that when he reported to Dr. Gilsdorf again on or about March of 1981 and was submitted to a further myelogram and a further surgery – excuse me, and a surgery, that that in and of itself constituted a separate aggravation claim. * * *"

SAIF raised no objection at the hearing to consideration of the latest aggravation claim. The hearing was continued through January 21, 1982, to allow the parties to take depositions. The referee found that claimant's request for hearing on the August

12, 1980, denial of his aggravation claim was not timely; however, he went on to find that claimant's latest aggravation claim had merit and ordered that that condition, which required surgery in April, 1981, be accepted.

SAIF requested Board review, and in its brief to the Board it argued only that claimant had failed to show a "medically verified worsening condition resulting from the January 1979 industrial injury." The Board, *sua sponte,* decided that claimant had not validly requested a hearing on his latest aggravation claim and that neither the referee nor the Board had jurisdiction to consider the claim.

SAIF argues the Board should be affirmed, relying on *Syphers v. K-M Logging, Inc.,* 51 Or App 769, 627 P2d 24, *rev den* 291 Or 151 (1981), in which we held that until a claim is accepted or denied, or until the period of time has run during which a carrier may do either, there is no question concerning the claim on which to base a request for hearing and that a request made during that period of time is premature and of no effect.

The aggravation claim in this case was made on April 30, 1981, when SAIF received Dr. Gilsdorf's report of the surgery. ORS 656.273(3).[1] SAIF does not contend otherwise. During the brief time between that report and the hearing requested on the denial of the first aggravation claim, SAIF neither accepted nor denied that claim, and claimant did not file a request for hearing on that claim. SAIF impliedly denied the second claim by making no objection to the referee's disposing of it during the hearing initially requested on the denial of the first aggravation claim. Claimant's request for hearing

[1] ORS 656.273(3) provides:

"A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation."

on the second claim was asserted orally at the commencement of that hearing, when his attorney stated that it was an issue.

Not only did SAIF fail to object to litigating that claim, it did not request a 60 day, or any, continuance within

which to decide whether to accept or deny the claim.[2] Rather, it proceeded to litigate the questions relating to that claim. Furthermore, the hearing was continued for six months after all testimony was concluded to permit additional evidence to be adduced by both parties.

Our holding in *Syphers* does not deprive the referee or Board of jurisdiction when the employer or insurer fails to object in any manner to proceeding with a hearing that is conducted as a result of a premature request. We held only that the employer has the absolute right to object and that, if it does so, the referee may not proceed with the hearing. *Syphers* is not applicable here.

If the Board is correct, both SAIF's right to accept or deny the claim and claimant's right to request a hearing on a *de facto* denial would have expired prior to the time when the hearing was closed. Because SAIF did not object to litigating the issues involved in the second aggravation claim or request a continuance to investigate that claim, claimant reasonably believed that he had perfected that claim and that he would not be foreclosed from a hearing by a later determination, after all of his rights had expired, that his request was premature. In *Syphers,* the employer raised the question; here, SAIF did not. SAIF's failure to object or to request a continuance constituted a denial of the claim and a valid waiver of all procedural errors relating to the litigation of the claim.

It follows that the Board erred as a matter of law in deciding, on its own motion, that neither it nor the referee had jurisdiction to decide the second aggravation claim.

Reversed and remanded for determination of the merits of the claim.

---

[2] If SAIF had objected to the procedure at the time of the hearing or had requested a continuance, it would have been a proper objection or request. However, if the proceeding had been dismissed or continued, claimant could have waited 60 days until the claim was accepted or denied and then validly requested a hearing if the claim was denied. SAIF's conduct here amounted to a *de facto* denial, and claimant was entitled to a hearing on that denial.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MOUNTAIN FIR LUMBER CO., INC.,
Appellant,

v.

EMPLOYEE BENEFITS INSURANCE CO.,
Respondent.

(No. A8005-02910, CA A22281)

In Banc.

Appeal from Circuit Court, Multnomah County.

Robert E. Jones, Judge.

Argued and submitted October 22, 1982; resubmitted in banc May 4, 1983.

G. Kenneth Shiroishi, Portland, argued the cause for appellant. With him on the briefs were Morrison, Dunn, Miller, Carney & Allen, Portland.

James N. Westwood, Portland, argued the cause for respondent. With him on the briefs were Fredric A. Yerke, Bruce A. Rubin, and Miller, Nash, Yerke, Wiener & Hager, Portland.

YOUNG, J.

Reversed and remanded.

Buttler, and Van Hoomissen, JJ, not participating.

Warden, J., dissenting.

YOUNG, J.

Plaintiff seeks damages for defendant's failure to comply with an alleged agreement for the rebate of workers' compensation insurance premiums. Plaintiff appeals following the dismissal of its first and second amended complaints on the ground that plaintiff failed to state facts sufficient to constitute a claim. ORCP 21A. Plaintiff alleged claims for breach of contract, fraud (deceit), reformation and breach of the contract as reformed. Defendant argues that there can be no contract action, because the rebate agreement is an illegal contract under ORS 746.035 and ORS 746.045, and that there can be no fraud action, because there is no right to rely on an illegal promise. We find that plaintiff's amended complaint states viable claims, and we reverse.

Regarding the contract claim, there are two distinct inquiries: first, is the agreement unlawful and, second, if unlawful, is it unenforceable? We find the agreement to be unlawful. Plaintiff entered into an agreement with defendant to secure workers' compensation coverage for a three year

period. Plaintiff claims that defendant breached an agreement to return to plaintiff a portion of its premiums according to a preestablished formula. Plaintiff alleged that the agreement, although not set forth in the policy, provided:

> "1. The cost to plaintiff of the described insurance coverage would be based upon a premium (to be called the 'earned premium') determined as the sum of:
>
> "a. 20.7 % of the Standard Premium.
>
> "b. Claims paid plus a reserve for open claims, multiplied by a Loss Conversion Factor of 1.10.
>
> "2. Any amount of premium paid by plaintiff to defendant in excess of the above determined earned premium would be returned to plaintiff.
>
> "3. Defendant would return amounts paid by plaintiff in excess of the earned premium one year after the specific policy year. A final computation and return of unearned premium would occur one year after the expiration of the hree year policy period."

The alleged agreement runs afoul of ORS 746.035 and 746.045. ORS 746.035 provides:

> "Except as otherwise expressly provided by the Insurance Code, no person shall permit, offer to make or make any contract of insurance, or agreement as to such contract, unless all agreements or understandings by way of inducement are plainly expressed in the policy issued thereon."

ORS 746.045 provides:

> "No person shall personally or otherwise offer, promise, allow, give, set off, pay or receive, directly or indirectly, any rebate of or rebate of part of the premium payable on an insurance policy or the agent's commission thereon, or earnings, profit, dividends or other benefit founded, arising, accruing or to accrue on or from the policy, or any other valuable consideration or inducement to or for insurance on any domestic risk, which is not specified in the policy." ORS 746.045.[1]

Because the alleged agreement is not specified in the policy, it is in violation of these statutes.[2]

---

[1] Subsequent to the parties' agreement, the Insurance Division promulgated OAR 836-80-125, which prohibits an agreement to declare a dividend according to a preestablished formula:

> "PROHIBITED REPRESENTATIONS REGARDING PARTICIPATION RIGHTS.
>
> "Prior to the declaration of a dividend, an insurer shall not represent, orally or in writing, that the insurer agrees or will agree:
>
> "(1) To pay a specified amount as a dividend; or
>
> "(2) To a formula that fixes, or to factors that fix or can be used to fix:
>
> "(a) The amount of a dividend;
>
> "(b) The percentage of premium that will be paid as a dividend; or
>
> "(c) The amount or percentage of premium to be retained by the insurer after payment of dividends."

[2] ORS 746.035 and ORS 746.045 do not prohibit dividends or rebates of insurance premiums. They only require that any such promises or agreements be expressed in the policy.

Enforceability is a more difficult question. In *Hendrix v. McKee,* 281 Or 123, 128 575 P2d 134 (1978), the court observed:

> "It is often stated that courts will not enforce 'illegal' contracts. This is an oversimplification of a legal principle, the application of which often involves construction of statutes

> and contractual provisions, delineation and balancing of public policies, and a difficult sorting and sifting process."[3]

Because it is the legislature's prohibition that makes the agreement unlawful, the inquiry into enforceability begins with legislative intent. This is particularly so in the case of a regulatory statute. The question becomes: Did the legislature intend that a rebate agreement be void and unenforceable? *Uhlmann v. Kin Daw,* 97 Or 681, 193 P 453 (1920), explained the approach:

> "* * * [U]pon finding a statute with either a penalty or a prohibition, or both, the court is not immediately debarred from further prosecuting an inquiry as to whether the agreement is void and unenforceable in a court of justice: *Harris v. Runnels,* 12 How 79, 84 (13 L Ed 901, * * *). The inquiry is as to the legislative intent, and that may be ascertained, not only by an examination of the express terms of the statute, but it may also be implied from the several provisions of the enactment. Of course, if a statute expressly declares that an agreement made in contravention of it is void, then the inquiry is at an end; but, in the absence of such a declaration, the court may take the statute by its four corners and carefully consider the terms of the statute, its object, the evil it was enacted to remedy, and the effect of holding agreements in violation of it void, for the purpose of ascertaining whether it was the legislative intent to make such agreements void; and if from all these considerations it is manifest that the lawmakers had no such intention, the ageements should be held to be legal contracts and enforceable as such. 97 Or at 689-90.[4] (Citations omitted.)

---

[3] Although it might have been sufficient in *Hendrix,* a case involving the social and moral overtones of gambling, to conclude that the agreement is contrary to public policy on its face and therefore void, such a response is not adequate when applied to statutes regulating insurance. What is required here is that difficult inquiry into enforceability based on a construction of the statutes and delineation of public policies.

[4] Professor Corbin states:

> "There are many varieties and degrees of 'illegality.' These varieties and degrees must be taken into account in determining the juristic effect of a transaction that involves some form of illegality. It is far from correct to say that an illegal bargain is necessarily 'void,' or that the law will grant no remedy and will always leave the parties to such a bargain where it finds them. Such general statements are indeed found in great number, faithfully reprinted in long columns of digest paragraphs; they render only a wearisome disservice when repeated with no reference to the facts of the cases in which they have been made. Before granting or refusing a remedy, the courts have always considered the degree by the offense [sic], the extent of public harm that may be involved, and the moral quality of the conduct of the parties in the light of the prevailing mores and standards of the community." 6A Corbin, Contracts § 1534 (1962).

In a case involving California's more stringent anti-rebate statutes, Cal. Ins. Code §§ 750, 751, 752, a California court put it this way:

> "* * * [T]he effect of illegality on the enforceability of an agreement depends on the facts and circumstances of the particular case including the kind and degree of illegality involved, the public policy or policies to be served, whether those public policies will best be served by enforcing the agreement or denying enforcement and the relative culpability and equities of the parties.
>
> "* * * * *

We find that the legislature did not intend to make a rebate agreement unenforceable.[5] The insurance statutes do not declare a rebate agreement void or unenforceable. *See* ORS 746.035; 746.045. Instead, the legislature has given the Commissioner broad powers of investigation and an array of sanctions, including cease and desist orders (ORS 731.252), suspension of certificates of authority (ORS 731.418; 731.426), revocation of certificates of authority (ORS 731.418), civil penalties, civil forfeitures and fines (ORS 731.988).[6] The statutory design is that the contract should remain enforceable, while the parties become subject to appropriate sanctions imposed by the commissioner. *Seal v. Polehn,* 52 Or App 389, 628 P2d 746, *rev den* 291 Or 368 (1981);[7] *Hall v. Metropolitan*

Co., 146 Or 32, 28 P2d 875 (1934). This view of the regulatory scheme permits greater flexibility in responding to violations.

By contrast, the refusal to enforce the contract would be a heavy-handed sanction, not provided by the legislature. It would be wielded, not by the commissioner, but by a court blind to the subtleties of insurance regulation and the nature of the particular violation. A policyholder, unschooled in the intricacies of insurance regulation, could be exploited by an unprincipled insurer, while the insurer would profit from its own

---

"Among the specific facts frequently considered by courts are whether the violation of law involved serious moral turpitude, whether the parties are not entirely in pari delicto, whether the adverse party would be unjustly enriched if enforcement were denied, whether the forfeiture resulting from denial of enforcement would be disproportionately harsh in proportion to the illegality and whether the purpose of the statute violated will best be served by enforcement or denial of enforcement." *Homestead Supplies, Inc. v. Exec. Life Ins. Co.,* 81 Cal App 3d 978, 147 Cal Rptr 22, 27-29 (1978). (Citation omitted.)

[5]The only pertinent legislative history is the repeal of the "policyholder penalty." Under prior statutes, a policyholder who received a rebate could be sanctioned by a proportionate reduction in insurance coverage. ORS 736.625, (repealed by Or Laws 1967, ch 359, § 704). Although the original draft of the proposed revision of the insurance code would have continued the penalty, *Preliminary Draft of the Advisory Committee on Insurance Law Revision,* Section 8-3 at 486 (Sept. 1966), during subsequent hearings of the Law Improvement Committee and Advisory Committee on Insurance Law Revision, the penalty was deleted. Insurance Law Revision Bulletin, Feb 23, 1967, at 8 ("Policyholder penalty deleted"). The existing statute was then enacted without the proportionate reduction in coverage for acceptance of a rebate. *See* Or Laws 1967, ch 359, §§ 570-571.

[6]*See also* ORS 731.232 (subpena power), ORS 731.236 (general powers), ORS 731.232 (enforcement generally), ORS 731.258 (enforcement through attorney general), ORS 731.288 (considering complaints before issuing license), ORS 731.296 (Commissioner's inquiries), ORS 731.300 (examination of persons transacting insurance) and ORS 731.308 (examination of books and records).

[7]A good example of the enforceability analysis is *Seal v. Polehn,* 52 Or App 389, 628 P2d 746, *rev den* 291 Or 368 (1981), involving a regulatory statute, ORS 92.325(1), that provides that no one shall sell or lease subdivided land without having complied with all applicable provisions including registration with the county and state. The earnest money agreement at issue provided for the sale of unregistered lots and was therefore unlawful. The court noted that the statute did not expressly declare unlawful agreements unenforceable. The statutory scheme provided the Real Estate Commissioner with various sanctions. Given the statutory scheme and its purpose of protecting the public, the court found the unlawful agreement to be enforceable by the purchasers. The court granted specific performance compelling the unlawful act of selling unregistered properties. *Seal v. Polehn, supra.*

violation of the law.[8] This would not be consistent with the purpose of the Insurance Code, which is to protect the insurance-buying public. *See* ORS 731.008. Thus, in the light of the statutory design and the dangers of a judicially created sanction, we hold that the alleged rebate agreement is enforceable by the policyholder. The trial court erred by dismissing the contract claim.

Plaintiff sought reformation of the written policy to include the rebate agreement and for damages for breach of the policy as reformed. The trial court dismissed this claim on the apparent ground that equity would not reform or enforce a contract where the reformed contract would be unlawful and unenforceable. Because the contract is enforceable, as discussed above, dismissal of this claim was error.

Plaintiff also brought two fraud claims. Plaintiff alleged that defendant had falsely represented that the cost of insurance would be computed according to a predetermined formula and that a sum determined from the formula would be

returned to plaintiff.[9] The trial court dismissed both fraud claims for failure to state a cause of action, ORCP 21A, on the basis of defendant's contention that there was no "right to rely" on an "illegal promise."

In general, an action for fraud can be brought when the promisor made promises that it did not intend to perform or with reckless disregard for whether it could perform. *Weiss v. Northwest Accept. Corp.*, 274 Or 343, 546 P2d 1065 (1976); *Elizaga v. Kaiser Found. Hospitals*, 259 Or 542, 487 P2d 870 (1971). A fraud claim can be maintained even if the same set of facts give rise to a contract action, and even if the contract is unenforceable. Restatement (Second) of Torts § 530, comment c (1976).[10] Prosser explains:

> "* * * The question frequently arises whether the action for misrepresentation can be maintained when the promise itself cannot be enforced *as where it* is without consideration, *is illegal*, is barred by the statute of frauds, or the statute of limitations, or falls within the parol evidence rule, or a disclaimer of representations.

---

[8] It is small comfort to the policyholder that his contractual bargain could be lost to the state's general fund if the Commissioner should choose to bring forfeiture proceedings against the insurer. ORS 731.988.

[9] In the first fraud claim plaintiff sought damages equal to the promised rebates ($257,762), plus $1,000,000 punitive damages. In its second, alternative fraud claim, plaintiff alleged the same facts and added that defendants had by their representations induced plaintiff to change its insurance coverage from the State Accident Insurance Fund (SAIF) to defendant. In the second claim plaintiff sought damages equal to the difference between defendants more costly insurance and SAIF's less expensive insurance ($555,558), plus $1,000,000 punitive damages.

[10] The public policy considerations that might render a contract void and unenforceable shift when fraud is added to the bargain. The common law has always abhored fraud; and so, too, does the Insurance Code. *See* ORS 731.418(1)(b); 746.075; 746.110; and 746.240.

"One group of cases, undoubtedly in the minority, have held that it cannot, arguing that to allow the action would be to permit an evasion of the particular rule of law which makes the promise unenforceable, or that the promisee must be deemed to know the law, and must be held not to have been deceived by such a promise. The prevailing view, however, permits the action to be maintained, considering that the policy which invalidates the promise is not directed at cases of dishonesty in making it, and that it may still reasonably be relied on even where it cannot be enforced. * * * *[T]he tendency is clearly to treat the misrepresentation action as a separate matter from*

the contract." Prosser on Torts § 109 at 729-30 (4th ed 1971). (Footnotes omitted; emphasis supplied.)

Oregon adheres to the majority view. For example, in *Burgdorfer v. Theilmann,* 153 Or 354, 55 P2d 1122 (1936), the court held that a promise unenforceable due to the statute of frauds was nevertheless actionable in deceit. In *Meyer v. Barde,* 112 Or 197, 228 P 121 (1924), the court described certain payments as an illegal and unenforceable transaction whose object was to stifle a criminal prosecution. The court noted, however, that the payor could recover the payments because she had acted under duress. Although the case presented a different issue, the court observed:

"* * * The illegal and void contract having been fully executed, neither party to it can recover back money paid or property transferred in the execution of the illegal and void contract *unless the money or property was obtained from such a party by fraud, mistake or duress.*" 112 Or at 211. (Citation omitted; emphasis supplied.)

In a case similar to the one at hand, a California court permitted a policyholder to bring a deceit action for an insurer's fraudulent and illegal promises to rebate workers' compensation insurance premiums. Following the majority position described by Prosser, the court said:

"* * * Plaintiff is not seeking to enforce an illegal contract, but rather to recover damages suffered when defendants fraudulently induced it to enter into the illegal transaction.

"* * * [P]laintiff's complaint sounds in tort rather than contract * * *. * * * [I]t adequately states a cause of action for fraud and deceit." *R. D. Reeder Lathing Co., Inc. v. Cypress Ins. Co.,* 3 Cal App 995, 84 Cal Rptr 98, 100 (1970).

We agree that deceit is a legal wrong separate and distinct from breach of contract. *See Prosser on Torts* § 109; Restatement (Second) of Torts § 530, comment c (1976). An aggrieved party's ability to bring a fraud claim does not hinge on whether the promise coincides or conflicts with a statute. The relevant question in tort analysis is whether, given the particular facts of the case, the plaintiff relied on the fraudulent promise. *See Outcault Advertising Co. v. Jones,* 119 Or 214, 234 P 269, 239 P 1113 (1922).

Plaintiff, whom we *must* regard as an innocent policyholder, should be permitted to prove that it relied on and was induced by defendant's alleged false and misleading representations. Permitting plaintiff to bring an action for fraud is consistent with the rebate statute.

> "* * * [B]y imposing damages upon defendants, the sales argument by insurance companies of what to them are known to be illegal rebate plans to attract new customers would be discouraged. The purpose of the law would be served rather than frustrated." *R.D. Reeder Lathing Co., Inc. v. Cypress Ins. Co., supra,* 84 Cal Rptr at 101.

The law will not shelter the insurer with a defense built of the insurer's own wrong-doing, nor will the law deny a policyholder the opportunity to seek relief for damages resulting from the insurer's deceit. The trial court erred by dismissing the fraud claims.

Reversed and remanded.

WARDEN, J., dissenting.

Because I am satisfied that the trial court did not err in finding the parties' agreement to refund to plaintiff a portion of the premium it paid for workers' compensation insurance to be illegal and therefore unenforceable, I am unable to join the majority. Therefore, I dissent.

The parties' rebate agreement clearly violates ORS 746.035 and ORS 746.045, because it is not included in the policy of insurance. The majority, however, although it recognizes the agreement's illegality, finds it enforceable. In doing so, the majority quotes from *Hendrix v. McKee,* 281 Or 123, 128, 575 P2d 134 (1978):

> "It is often stated that courts will not enforce 'illegal' contracts. This is an oversimplification of a legal principle, the application of which often involves construction of statutes and contractual provisions, delineation and balancing of public policies, and a difficult sorting and sifting process."

No mention is made by the majority of the first sentence of the paragraph immediately following the above quoted language in *Hendrix.* It says:

> *"If* the consideration for the contract or *its agreed purpose is illegal or against public policy on its face, it will not be enforced."* 281 Or at 128. (Emphasis supplied.)

Defendant agreed to a rebate of a portion of the premiums paid by plaintiff; plaintiff agreed to receive the rebate. Those terms were not set out in the written contract of insurance. On its face, the agreed purpose is illegal as clearly violating ORS 746.035 and ORS 746.045. It is also against the public policy embodied in those statutes. Under the rule stated in *Hendrix,* it is not enforceable.

The majority, in quoting from *Uhlmann v. Kin Daw,* 97 Or 681, 689, 193 P 435 (1920), again omits a significant sentence, which immediately proceeds the quoted portion:

> "If a statute having a penalty and a prohibition, express or implied, or only a penalty or only a prohibition, is silent and otherwise contains nothing from which the contrary is to be inferred, then an agreement which conflicts with the statute is void."

ORS 746.035 and 746.045 expressly prohibit making agreements such as plaintiff seeks to enforce and, as the majority amply points out, ORS chapter 731 provides a variety of penalties for violations. ORS 746.035 and 746.045 are silent as to whether an agreement in conflict with them is void, and I find nothing from which it may be inferred that such an agreement is not void. The majority draws an inference from the wide variety of sanctions and penalties available to the Insurance Commissioner in ORS chapter 731. In other words, it infers from the fact that there *are* penalties that the agreement is not void and therefore unenforceable. Making that inference is directly contrary to the rule in *Uhlmann,* the case on which the majority purports to rely, which is that an agreement in violation of a statute is void if the statute *has* a penalty or prohibition, unless the statute says that it is not or contains something from which it may be inferred that it is not.

In *Uhlmann* the defendant sought to abate the foreclosure of a mortgage on the ground that the plaintiffs had failed to file an assumed name certificate in the county in which the mortgage was executed prior to its execution. The statute involved prohibited conducting business under an assumed name unless a certificate setting forth the true and

real name or names of the party or parties conducting the business had been filed in the office of the county clerk of the county in which the business was to be conducted. The statute further provided that such persons were not entitled to maintain any suit or action without alleging and proving that an assumed name certificate had been filed. The plaintiffs in *Uhlmann* had filed an assumed business name certificate after the mortgage was executed but before bringing suit to foreclose it.

The Supreme Court, in finding that plaintiff's failure to file the assumed name certificate before the mortgage was executed did not render the mortgage void, said:

> "Our conclusion is that failure to file the certificate affects only the qualification of the person to sue, and that upon filing a certificate the disqualification is removed, and a suit or action may be maintained on a contract made before or after such filing." 97 Or at 695.

The court, in discussing legislative intent, said:

> "Here the primary purpose is, not to prevent business, but to require the performance of a statutory duty which is entirely collateral to any agreement that may arise out of any business transaction." 97 Or at 692-93.

Clearly, the statute involved in *Uhlmann* did not prohibit the making of mortgage contracts, but, as construed by the court, merely affected the capacity of parties to sue.

The purpose of the statute in this case is quite different. It does not require the performance of the statutory duty

which is collateral to the agreement involved but prohibits the making of the very agreement that plaintiff seeks to enforce. The majority states, "[T]he insurance statutes do not declare a rebate agreement void or unenforceable." *But see* ORS 746.035; 746.045. How much more clearly must the legislature speak? That the making of "under the counter" rebate agreements like the one plaintiff seeks to enforce is clearly prohibited by those statutory sections makes it clear enough that the legislature meant to allow no effect to be given rebate agreements, unless they were part of the form of the insurance policies which the legislature required to be submitted to the Insurance Commissioner for his approval or disapproval pursuant to ORS 743.006 and 743.009. . .

Interestingly, the majority makes no mention of *Hunter v. Cunning,* 176 Or 250, 154 P2d 562, 157 P2d 510 (1945). In that case, the defendant was the personal representative of a Mrs. Wells who, with her husband, had entered into a written agreement employing the plaintiff to procure a purchaser for her timber lands and agreed to pay him a commission of 5 percent. Plaintiff found a purchaser and transmitted the offer of purchase to Mrs. Wells and her husband, who rejected it. Mrs. Wells and her husband continued negotiations with the purchaser and, in fact, completed the sale. In *Hunter*

> "[t]he sale was consummated solely through the employment and efforts of Hunter as the procuring cause thereof, and he fully performed his contract of employment, except that Mrs. Wells, in an effort to escape payment of Hunter's commission, prevented him from fully consummating the sale, by pretending to reject the offer obtained by him, and secretly, without his knowledge, effecting a sale of the property to [the purchaser procured by Hunter]." 176 Or at 253.

Hunter brought the action for his commission. During the trial, defendant moved for a directed verdict on the ground that the plaintiff was not a licensed real estate broker during the time that he was carrying on negotiations for the sale. The motion was overruled, and the plaintiff recovered judgment. On appeal, the judgment of the trial court was reversed, the Supreme Court holding that the motion for directed verdict should have been sustained, because the plaintiff had procured the purchaser three days before he had secured his broker's license.

In *Hunter,* the respondent relied heavily on *Uhlmann v. Kin Daw, supra,* much as the majority does in this case. The Supreme Court carefully analyzed *Uhlmann* and distinguished it, stating "that the rule, which avoids a contract made in contravention of a statute, will *always* be applied when the statute is intended for the protection of the public against those evils which we know from experience society must be guarded against by protective legislation." 176 Or at 287. The statute in this case is just such a statute. The majority recognizes that the statute has such a purpose but mistakenly uses that as a reason for holding the illegal agreement to be enforceable. Citing ORS 731.008, it proclaims that to hold the agreement of these parties to be unenforceable "would not be

consistent with the purpose of the Insurance Code, which is to protect the insurance-buying public." How strange! It is for precisely that reason that the agreement should be held unenforceable, because one of the very clear purposes of ORS 743.035 and 743.045 is to prevent a party, such as this plaintiff, from securing an advantage in rates that is not available to members of "the insurance-buying public."

Because I would find the contract unenforceable, I would also affirm the trial court's dismissal of plaintiff's claim for reformation.

Because the majority finds this agreement enforceable, it says it was error to dismiss plaintiff's fraud claims. But a contract such as this, being void as against public policy, cannot serve as a basis for an action for deceit. *Thielsen v. Blake, Moffitt & Towne,* 142 Or 59, 65, 17 P2d 560 (1933).

As the majority recognizes, "the legislature has given the Commissioner broad powers of investigation and an array of sanctions." Included are those contained in ORS 731.988. ORS 731.988(1) provides for civil penalties to be paid to the general fund of the state by "any person who violates any provision of the Insurance Code" in an amount to be determined by the Commissioner and sets limits on the amounts thereof. ORS 731.988(2) provides:

> "In addition to the civil penalty set forth in subsection (1) of this section, any person who violates any provision of the Insurance Code * * * may be required to forfeit and pay to the General Fund of the State Treasury a civil penalty in an amount determined by the commissioner but not to exceed the amount by which such person profited in any transaction which violates any such provision * * *."

We would do better to let the Commissioner, who is charged with the duty to regulate rebates, apply his expertise to determine, what, if any, sanctions are necessary to protect the insurance-buying public. That is his work.

The trial court did not err and should be affirmed.

I respectfully dissent.

Gillette and Warren, JJ, join in this dissent.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

PACIFIC MOTOR TRUCKING COMPANY,
Petitioner,

v.

BUREAU OF LABOR AND INDUSTRIES,
Respondent.

(16-78; CA A25781)

Judicial Review from Bureau of Labor and Industries.

Argued and submitted May 20, 1983.

Jeffrey M. Batchelor, Portland, argued the cause for petitioner. With him on the brief were Laurence F. Janssen, Richard C. Hunt, and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland.

William F. Nessly, Jr., Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and William F. Gary, Solicitor General, Salem.

Before Richardson, Presiding Judge, and Van Hoomissen and Newman, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Employer Pacific Motor Trucking Company (PMT) seeks review of an order of the Commissioner of the Bureau of Labor and Industries issued pursuant to ORS 659.400 *et seq.*, finding that it unlawfully discharged John D. McKay because of his back condition. At that time ORS 659.425(1) provided:

> "It is an unlawful employment practice for any employer to refuse to hire, employ or promote or to bar, discharge, dismiss, reduce in compensation, suspend, demote or discriminate in work activities, terms or conditions because an individual has a physical or mental handicap, *unless it can be shown that the particular handicap prevents the performance of the work involved.*" (Emphasis supplied.)[1]

The issue is under what circumstances an employer may discharge an employe on the ground of the risk of an on-the-job handicap-related injury. McKay had been working for PMT for 10 months as a truck driver on a casual basis. His duties included heavy lifting. He was released when he was disqualified from permanent employment as a heavy-duty truck driver on the basis of back x-rays that revealed spondylolisthesis.

The medical evidence regarding McKay's condition and the nature of the disease is substantially undisputed. Spondylolisthesis is a progressive condition characterized by the slipping forward of one vertebra over another. McKay's

[1] The parties agree that the applicable statute is the one in effect at the time of the alleged violation. The statute was amended in 1979. Or Laws 1979, ch 640, § 3.

spondylolisthesis was categorized as a Class I on a three or four class scale, because the displacement was less than 25 percent. There was medical evidence that spondylolisthesis is degenerative, a Class I spondylolisthesis could progress to a more advanced state and eventually develop into serious back problems. The risk of injury increases as the person ages and the supporting muscles, tendons and ligaments lose their elasticity. There was also evidence that many people with the condition never develop incapacitating problems. An orthopedic physician testified that there was a medical probability greater than 50 percent that McKay could work as a heavy duty truck driver without back problems but that he would not encourage him to do that kind of work.

At the time of the hearing in December, 1980, McKay was 43 and was working for Union Pacific Railroad as a heavy-duty truck driver. The Commissioner found that McKay's employment history included a number of positions that required heavy lifting related to the duties of a truck driver. There was evidence that on two occasions after leaving PMT McKay suffered back injuries, one at home and one working at Union Pacific, but the Commissioner made no findings regarding those incidents. There was no other evidence of back pain or injury.

The Commissioner found:

> "At the time of his rejection, Mr. McKay had the ability to perform the duty of heavy-duty truck driver at no higher risk of injury or incapacitation than others."

She concluded:

> "Since Mr. McKay had the current or present ability to perform the duties of heavy-duty truck driving, [PMT's] rejection of his application for full-time employment constitutes a violation of ORS 659.425."

PMT makes two assignments of error. It challenges the finding regarding McKay's comparative risk of injury or incapacitation and also argues that the Commissioner erred in her interpretation of the risk of injury due to the physical defect that the statute requires the employer show in order to justify a discharge. We consider the second point first.

The statute was previously construed by the Supreme Court in *Montgomery Ward v. Bureau of Labor,* 280 Or 163, 570 P2d 76 (1977). A man who had had a heart attack and suffered continuing angina was refused employment as a heavy appliance salesman because of his heart condition. The issue, as here, was how to take into account the possibility of injury to the applicant in determining whether, under the statute, the "handicap prevents the performance of the work." The Commissioner found that a handicap justified a refusal to employ when there was

> " '* * * a *high probability* of incapacitation while performing the ordinary tasks comprising the job in question.' " 280 Or at 165. (Emphasis theirs.)

On appeal we disagreed, stating that the question was whether there was

" '* * * a reasonable medical *possibility* that the applicant *might*, because of the extent of disability and the nature of the work, be unable to perform the work or could experience injury as a result of attempting to perform it. * * *' " 280 Or at 165. (Emphasis theirs.)

The Supreme Court, although agreeing that

"* * * the possiblity that a particular job might be seriously injurious to a handicapped person's health comes within the terms of ORS 659.425 as well as the person's outright inability to perform it[,]" (280 Or at 168.)

preferred a middle ground, stating:

"* * * [T]he Commissioner raises the standard beyond the policy of the statute when he requires a 'high' probability of incapacitation, while the mere 'reasonable possibility' expressed by the Court of Appeals lowers it too far.

"It is our conclusion that the legislature intended by the statutory language to impose upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a *probability* either that the employee cannot do the job in a satisfactory manner or *that he can do so only at the risk of incapacitating himself.* * * *" 280 Or at 168-69. (Emphasis supplied.)

We understand PMT to raise two issues regarding the standard applied by the Commissioner: first, the extent of risk of injury or incapacitation due to the handicap; and, second, the point in time to be considered in evaluating the risk. With respect to the relevant point in time, the Commissioner stated in her opinion:

"* * * [I]t is this forum's opinion that risk of injury or incapacitation should mean current or present risk of injury. * * *"

With respect to the extent of risk to be shown, the Commissioner applied a standard of "probability of incapacitation."[2]

At the outset we must consider our function on review of the Commissioner's standard. We conclude that the statutory standard represents an "inexact" statutory term, rather than a "delegative" one, and therefore our task is to determine whether the agency's application of the statute in this case reflects an interpretation that is consistent with the legislative policy. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 621 P2d 547 (1980).[3] We review for error of law under ORS 183.482(8)(a), and we must uphold the order unless the agency has "erroneously interpreted a provision of law," even if we would have made a different interpretation. *Springfield Education Assn. v. School Dist, supra,* 290 Or at 234.

In our review of the Commissioner's standard we are called on to interpret and apply the Supreme Court's standard.[4] With respect to the extent of risk of incapacitation,[5] we take as our starting point that the court's phrase "probability * * * that the employee * * * can do [the job] only at the risk of

[2] The Commissioner's opinion did not directly address this issue, but it stated:

"Specifically at issue is the meaning of the phrase '. . . a probability . . . that he can do so only at the risk of incapacitating himself.' In setting the standard the Oregon Supreme Court rejected the Commissioner's Order which required a showing of 'high' probability of incapacitation as well as the Court of Appeals standard of 'reasonable possibility' of incapacitation. * * * At least in this regard, then, the determination of probability appears to be left to the testimony of experts. * * *"

incapacitating himself" (280 Or at 168-69) must be interpreted to require a greater showing of risk than our standard, rejected by the Supreme Court, of "reasonable medical possibility that the [employe] * * * could experience injury." 28 Or App at 751. PMT here interprets the Supreme Court's language to the effect that it must only show that the *risk* of incapacitation is probable, rather than that incapacitation is probable. It argues that the evidence in this case showed a *certain* risk of incapacitation and, therefore, it did not violate the law in discharging McKay. However, we agree with the Commissioner that the

Supreme Court's language cannot be taken literally. The interpretation urged by PMT makes little sense; it would require, in essence, the evaluation of a chance of a chance. In many jobs *any* employe has a *risk* of incapacitation and the *probability of a risk* of injury. In rejecting our "reasonable possibility" standard, the Supreme Court was setting a higher one.[6] Bearing in mind the standards rejected by the Supreme Court in *Montgomery Ward,* we conclude that the applicable standard is "probability of incapacitation."[7]

We next consider the point in time at which the probability of incapacitation is relevant. PMT argues that because McKay's condition was progressive, his increased risk of incapacitation in the future should be considered and not just the extent of the current risk. We conclude that the Commissioner was not in error in considering the employe's risk of incapacitation at the time of rejection. To refuse to allow a discharge to be based on an employe's risk of injury in the future is consistent with the statute's policy. At the time of McKay's discharge, ORS 659.405 provided in relevant part:

> "(1) It is declared to be the public policy of Oregon to guarantee physically and mentally handicapped persons the fullest possible participation in the social and economic life of the state, to engage in remunerative employment * * *.
>
> "(2) The right to otherwise lawful employment without discrimination because of physical or mental handicap where

[3] The parties are in agreement on this point. The Supreme Court apparently applied this standard of review when it construed ORS 659.425(1) in *Montgomery Ward v. Bureau of Labor, supra,* but we note that that decision preceded *Springfield Education Assn. v. School Dist., supra,* and *McPherson v. Employment Division,* 285 Or 541, 591 P2d 1381 (1979).

We base our conclusion on factors including the language to be construed ("prevents the performance of the work involved") and the inclusion in the statutory scheme of a statement of policy. ORS 659.405. *See Springfield Education Assn. v. School Dist., supra.*

[4] We previously dealt with the standard when we reconsidered *Montgomery Ward v. Bureau of Labor* on remand, 42 Or App 159, 600 P2d 452, *rev den* 288 Or 81 (1979). However, our opinion there is not dispositive, because we found subtantial evidence to support a finding that the claimant could do the job "without the risk of incapacitating himself." Time and extent of risk were not considered.

[5] On occasion the parties and the Commissioner use the word "injury" interchangeably with the word "incapacitation." Because the Supreme Court's standard was phrased in terms of "incapacitation," we use that word.

[6] Further, in rejecting the Commissioner's "high probability of incapacitation" standard, the Supreme Court stressed the word "high" by placing quotation marks around that word only, indicating that the Court's objection to the standard was due to that particular word.

[7] PMT constructs scenarios in which one could be forced to hire an airline pilot with an even chance of a heart attack or a construction worker who has an even chance of incapacitating himself and whose job would require work on a high rise or scaffold with other employes. We do not decide the extent to which the safety of others may affect the standard expressed in *Montgomery Ward.*

the reasonable demands of the position do not require such a distinction * * * [is] hereby recognized and declared to be the [right] of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 649.435 shall be construed to effectuate such policy.[8]

To deny the opportunity to work when a risk is less than probable would contravene the policy of the statute to guarantee "the fullest employment of handicapped persons which is compatible with the reasonable demands of the job." *Montgomery Ward v. Bureau of Labor, supra,* 280 Or at 168. Because an employe with the present ability to work would be prevented under PMT's analysis from doing so by an impairment that would not be present until some time in the future, the expressed policy of the statute would not be met. An employer is not prevented from discharging a handicapped employe at a later time when there is a basis for determining that the risk of incapacitation has increased to a probability.

PMT also challenges the Commissioner's "Ultimate Finding of Fact" that:

> "At the time of his rejection, Mr. McKay had the ability to perform the duty of heavy-duty truck driver at no higher risk of injury or incapacitation than others."

We review for substantial evidence in the record, ORS 183.482(8)(c), and agree that the finding that McKay faced no greater risk than others is not supported by substantial evidence.[9] PMT contends that reversal is therefore required, because the finding was part of the basis on which the Commissioner purported to justify her decision. An erroneous but immaterial finding provides no basis for reversal. *Kokotan v. Emp. Div.,* 30 Or App 391, 567 P2d 138 (1977). Even if McKay's risk of injury at the time of discharge was greater than that of the general population because of his handicap, the Commissioner's reasoning and other findings demonstrate that employer was not thereby justified in discharging him. One of the Commissioner's findings of fact was:

> "e) Although there is a medical probability in excess of 50% that Mr. McKay could perform the duties of a heavy-duty truck driver without experiencing back problems, Dr. Bird would encourage him to pursue another vocation which presents less risk of injury or incapacity."

We can determine from her opinion that she relied on the above finding in concluding that McKay had the current ability to perform the job and that employer therefore unlawfully discharged him. The finding relied on is supported by substantial evidence.

Affirmed.

[8] The words "physical(ly) or mental(ly)" preceding "handicap(ped)" were deleted in 1979. Or Laws 1979, ch 640, § 2.

[9] Two of the three physicians who testified stated that because of his back defect McKay was at a greater risk of injury than the general population. The third testified that McKay was at "increased risk," but it is not clear to whom or what the risk was compared. None of the physicians located the risk at any point in time. The Commissioner argues that the finding is supported by evidence of McKay's trouble-free work history; however, the fact he may not have experienced problems is not necessarily probative of the medical risk of injury.

INDEX CONTENTS

OVERVIEW OF SUBJECT INDEX

PERMANENT TOTAL DISABILITY

PSYCHOLOGICAL CONDITIONS & FACTORS

RECONSIDERATION See APPEAL & REVIEW

REMAND See APPEAL & REVIEW

REOPENING CLAIM WITHIN ONE YEAR OF DETERMINATION ORDER

REQUEST FOR HEARING See APPEAL & REVIEW

REQUEST FOR REVIEW--BOARD See APPEAL & REVIEW

RES JUDICATA

SETTLEMENTS & STIPULATIONS

SUBJECT WORKERS See NON-SUBJECT/SUBJECT WORKERS

SUCCESSIVE INJURIES See AGGRAVATION/NEW INJURY

TEMPORARY TOTAL DISABILITY

THIRD PARTY CLAIM

TORT ACTION

VOCATIONAL REHABILITATION

CASE CITATIONS

Name, Citation-----Page(s)

Name, Citation-----Page(s)

Name, Citation-----Page(s)

Name, Citation-----Page(s)

VAN NATTA CITATIONS

Name	Citation	Page(s)
Joyce Adair	34 Van Natta 203 (1982)	358,532
Robert L. Akins	35 Van Natta 231 (1983)	556
Angel Albarez	33 Van Natta 598 (1981)	716
James Albers	34 Van Natta 1622 (1982)	678,789
Claude Allen	34 Van Natta 769 (1982)	299
Lucy (Froyer) Anders	34 Van Natta 1249 (1982)	1332
Marcella Anderson	27 Van Natta 119 (1979)	716
Edward M. Anheluk	34 Van Natta 205 (1982)	93,377
Ernest A. Annette	35 Van Natta 35 (1983)	190
Dick L. Babcock	35 Van Natta 325 (1983)	1303
Warren C. Bacon	35 Van Natta 41 (1983)	47
Zelda M. Bahler	33 Van Natta 478 (1981)	1,13,16,25,72,198, 329,635,665,739,802,1075,1153,
Zelda M. Bahler	31 Van Natta 139 (1981)	117 1181,1200,1206,1238
Roger Ballinger	34 Van Natta 732 (1982)	75,772,1114
Clarice Banks	34 Van Natta 689 (1982)	598,655
Robert A. Barnett	31 Van Natta 172 (1981)	72,94,112,115,203, 235,235,299,320,325, 557,559,634,797,896,1161,1168, 1179,1180
Phillip J. Barrett	34 Van Natta 450 (1982)	789
Gary A. Becker	34 Van Natta 1654 (1982)	1153
George Bedsaul	35 Van Natta 695 (1983)	1049
Brent Bennett	34 Van Natta 1563 (1982)	684
Pamela S. Bernhardt	35 Van Natta 787 (1983)	1340
Phillip A. Bertrand	35 Van Natta 1087 (1983)	1120,1123
Phillip A. Bertrand	35 Van Natta 874 (1983)	869,1087,1120
Phillip A. Bertrand	35 Van Natta 869 (1983)	874,1087,1111,1123
Curtis H. Best	35 Van Natta 298 (1983)	582,1213
Daniel K. Bevier	35 Van Natta 258 (1983)	789
Ronald D. Blackwell	29 Van Natta 629 (1980)	1276
David D. Blair	30 Van Natta 407 (1981)	716,1369
Edwin Bolliger	33 Van Natta 559 (1981)	52,181,532,586,665
Anthony A. Bono	35 Van Natta 1 (1983)	161,198,350,744,802, 869,1075,1142,1273
Cynthia K. Bowman	33 Van Natta 582 (1981)	1173
W. Leonard Bradbury	32 Van Natta 246 (1981)	363
George Brasky	34 Van Natta 453 (1982)	761,1261
Gary W. Brill	34 Van Natta 489 (1982)	1373
Kelly P. Britt	34 Van Natta 1182 (1982)	813
Ronald Bronski	34 Van Natta 612 (1982)	143,885
Ronald D. Brown	34 Van Natta 1004 (1982)	1,233
Clyde V. Brummel	34 Van Natta 1183 (1982)	63
Wilma Kim Buhman	34 Van Natta 252 (1982)	299
William Bunce	33 Van Natta 546 (1981)	19,572
Harvey Burt	22 Van Natta 42 (1977)	716
John F. Byers	1 Van Natta 25 (1967)	1057
John Cameron	34 Van Natta 211 (1982)	231,556,1369
Jess Campbell	15 Van Natta 146 (1975)	47
Larry Campuzano	34 Van Natta 734 (1982)	515,859
Clea B. Carpenter	34 Van Natta 456 (1982)	789

VAN NATTA CITATIONS

Name	Citation	Page(s)
Ruth M. Case	33 Van Natta 490 (1981)	885
Richard A. Castner	33 Van Natta 662 (1981)	281
David Cheney	35 Van Natta 21 (1983)	368,695,744,1261
Douglas Chiapuzio	34 Van Natta 1255 (1982)	104,386,660
Bonnie Chytka	35 Van Natta 86 (1983)	699
Gary L. Clark	35 Van Natta 117 (1983)	131,257,772,802,818,1075
Mary Lou Claypool	34 Van Natta 943 (1982)	25,716,851,1315
Angela V. Clow	34 Van Natta 1632 (1982)	120,1287,1327
Warren Collins	17 Van Natta 236 (1976)	93
Ora M. Conley	34 Van Natta 1698 (1982)	72,112,115,203,235,235,299, 320,325,557,559,634,896,1161, 1168,1179,1180
Betty L. Counts	35 Van Natta 1356 (1983)	1368,1372
Leon E. Cowart	34 Van Natta 1597 (1982)	695
Larry Crane	29 Van Natta 113 (1980)	587
Harlan Crawford	34 Van Natta 1010 (1982)	789
Sylvia Crites	7 Van Natta 100 (1971)	332
Kathie L. Cross	34 Van Natta 1064 (1982)	125,310,840
Max D. Cutler	34 Van Natta 1480 (1982)	286,716,1084,1109
Ralph R. Cutright	35 Van Natta 1142 (1983)	1136,1151
Ralph R. Cutright	27 Van Natta 186 (1979)	1142
Shawn Cutsforth	35 Van Natta 515 (1983)	823
Pauline Cutter	34 Van Natta 1709 (1982)	355
Robert W. Dalton	35 Van Natta 352 (1983)	557,1095
John R. Daniel	34 Van Natta 1020 (1982)	12,198,1181
Patricia Davis	35 Van Natta 635 (1983)	716,814,1133,1372
Roberta Davis	6 Van Natta 251 (1971)	56
Patricia M. Dees	35 Van Natta 120 (1983)	131,348,377,528,1287,1327,1400
Robert DeGraff	29 Van Natta 893 (1980)	75
Ada C. Del Rio	32 Van Natta 138 (1981)	358
Robert Delepine	35 Van Natta 72 (1983)	1161
Warren E. Dent	35 Van Natta 1100 (1983)	1114
Juanita DesJardins	34 Van Natta 595 (1982)	31,136,789
Ray D. Dezellum	34 Van Natta 213 (1982)	63
Dale Donaldson	34 Van Natta 1154 (1982)	707
Douglas Dooley	35 Van Natta 125 (1983)	120,131,624,740
Terry Dorsey	31 Van Natta 144 (1981)	1287,1327
Gayle Duckett	32 Van Natta 284 (1981)	355
Anthony J. Duman	35 Van Natta 260 (1983)	789
Madonna Duman	34 Van Natta 1642 (1982)	260,789
Hettie M. Eagle	33 Van Natta 671 (1981)	384,528 ,1338095,1101,1323,1338
Earl E. Ekstrand	34 Van Natta 742 (1982)	262
Patrick Elliott	32 Van Natta 155 (1981)	156
Vernon D. Ellis	35 Van Natta 45 (1983)	47
Marion L. Ells	34 Van Natta 1010 (1982)	298
Frederick Estabrook	17 Van Natta 66 (1976)	716
Billy J. Eubanks	35 Van Natta 131 (1983)	117,120,125,140, 216,257,289,368,377, 699,818,1084,1093,1109,1181,1377
Keith K. Evans	34 Van Natta 1035 (1982)	1350
Willard B. Evans	34 Van Natta 490 (1982)	62,125,528,859,1142
Roy J. Fenton	34 Van Natta 1686 (1982)	1290,1373
Herb Ferris	34 Van Natta 470 (1982)	678
Yvonne C. Fish	34 Van Natta 1038 (1982)	86
Dixie Fitzpatrick	34 Van Natta 974 (1982)	96,136

VAN NATTA CITATIONS

Name	Citation	Page(s)
Dennis Fraser	35 Van Natta 271 (1983)	851
Gary A. Freier	34 Van Natta 543 (1982)	332,614,678,1095,1101,1323
Gary E. Freshner	35 Van Natta 528 (1983)	1057,1338,1400
Melodie A. Gage	34 Van Natta 1245 (1982)	1244
John Galanopoulos	34 Van Natta 615 (1982)	282,548,859,1049
Norman Garbutt	28 Van Natta 351 (1979)	262
Billie Gardner	34 Van Natta 218 (1982)	528
Fred Gascon	34 Van Natta 1551A (1982)	1288
Norman J. Gibson	34 Van Natta 1583 (1982)	16,72,117,665,1075,1276
Paul Gill	34 Van Natta 1471 (1982)	75,772,1114
Anita Gilliam	35 Van Natta 377 (1983)	384,1084,1091,1400
John P. Ginter	34 Van Natta 547 (1982)	598
Christine N. Givens	34 Van Natta 258 (1982)	21
Donald A. Godell	34 Van Natta 50 (1982)	587
Frank Gonzales	34 Van Natta 551 (1982)	125,358,1169,1181
Delbert Greening	34 Van Natta 145 (1982)	1287,1327
Elmer C. Gregory	35 Van Natta 93 (1983)	377
Glenn O. Hall	35 Van Natta 275 (1983)	282,365
Glenn O. Hall	34 Van Natta 1725 (1982)	789,863
Mary Ann Hall	31 Van Natta 56 (1981)	117,125,528,859,1142
Isla M. Halligan	34 Van Natta 594 (1982)	716
Ruby J. Hampton	30 Van Natta 708 (1981)	642
Fred Hanna	34 Van Natta 1271 (1982)	9,47,143,271, 299,368,885
Edward Hanson	35 Van Natta 1107 (1983)	1201,1256,1388
Jesse E. Hardy	35 Van Natta 171 (1983)	523
Clyde M. Hargens	34 Van Natta 751 (1982)	109,111,358,744
Quinten Hargraves	35 Van Natta 156 (1983)	155
Margaret L. Harris	34 Van Natta 558 (1982)	156
John R. Hart	35 Van Natta 665 (1983)	1267
Michiel Harth	34 Van Natta 703 (1982)	88,388,406,1057
Lavona Hatmaker	34 Van Natta 950 (1982)	252,678,789,824
Robert Heilman	34 Van Natta 1487 (1982)	241,684,847
Rose Hestkind	35 Van Natta 250 (1983)	251,695
Julia I. Hicks	33 Van Natta 497 (1981)	151,1198,1294
Donald W. Hill	34 Van Natta 1291 (1982)	587,700
Robert Hill	24 Van Natta 39 (1978)	332
Hiroshi Hitomi	33 Van Natta 609 (1981)	1198
Benjamin Hockema	26 Van Natta 437 (1979)	299
Herman J. Howland	28 Van Natta 368 (1979)	716
William W. Hughes	35 Van Natta 358 (1983)	532
David S. Hunter	33 Van Natta 273 (1981)	47
Lorena Iles	30 Van Natta 666 (1981)	350,830,1236
Norman Jager	34 Van Natta 1558 (1982)	716
William Jameson	34 Van Natta 1532 (1982)	268
James B. Johnson	35 Van Natta 47 (1983)	41,45,56,296,299
Vivian Johnson	11 Van Natta 98 (1974)	253
Billy Joe Jones	34 Van Natta (1982)	713
Harry C. Jordan	35 Van Natta 282 (1983)	275
Derral D. Kelley	34 Van Natta 73 (1982)	329
Donna P. Kelley	30 Van Natta 715 (1982)	363
Karen K. Kephart	34 Van Natta 707 (1982)	281
Michael J. King	33 Van Natta 636 (1981)	176,295,628,699,1107,1310,1388
Richard Kirkwood	35 Van Natta 140 (1983)	131,818,1075,1093
Leonard F. Kisor	35 Van Natta 282 (1983)	548

VAN NATTA CITATIONS

Name	Citation	Page(s)
Beneta Kissas	33 Van Natta 596 (1981)	1068
Henry A. Kleeman	7 Van Natta 70 (1971)	56
Marlene L. Knight	34 Van Natta 278 (1982)	89
Francis Knoblauch	35 Van Natta 218 (1983)	744
Ahmad Noor Kojah	28 Van Natta 262 (1979)	1247
Dennis Kurovsky	35 Van Natta 58 (1983)	1383
Evelyn LaBella	30 Van Natta 738 (1981)	1355
Jim Lafferty	33 Van Natta 530 (1981)	806
Jimmy Layton	35 Van Natta 253 (1983)	578,830,1093,1153,1254
Ralph R. Lee	35 Van Natta 1109 (1983)	1206,1301
Donald L. Lentz	35 Van Natta 1084 (1983)	1206,1301,1322
James Leppe	31 Van Natta 130 (1981)	716,1315
Patricia Lewis	34 Van Natta 202 (1982)	350,1236,1242
Jay Long	34 Van Natta 1519 (1982)	587
Dianne Lopatin	29 Van Natta 466 (1980)	789
Brad L. Loren	35 Van Natta 303 (1983)	314
Letty Louden	34 Van Natta 1156 (1982)	1198
Hazel Stanton Lovell	31 Van Natta 69 (1981)	1288
Curtis A. Lowden	30 Van Natta 642 (1981)	1251
Robert A. Lucas	34 Van Natta 1553 (1982)	716
Robert Luhrs	34 Van Natta 1089 (1982)	325
Laura Maitland	34 Van Natta 1294 (1982)	772
Frank Mason	34 Van Natta 568 (1982)	52,755,844,863
David S. Mathews	35 Van Natta 75 (1983)	83,179,203
Richard L. McBee	34 Van Natta 1119 (1982)	787
Joyce McCammon	22 Van Natta 28 (1977)	332
Roy A. McFerran	34 Van Natta 621 (1982)	19,58,179,267,572, 797,1383
Henry McGarrah	33 Van Natta 584A (1981)	205
Dorothy McIver	32 Van Natta 192 (1981)	716
Violet B. McKinnon	26 Van Natta 40 (1978)	716
A. B. McManus	28 Van Natta 521 (1980)	1113
Darrell Messinger	35 Van Natta 161 (1983)	156
Harold Metler	34 Van Natta 710 (1982)	797
Vernon Michael	34 Van Natta 1212 (1982)	540,569,617,764,1142
Richard R. Miller	34 Van Natta 514 (1982)	303
Richard D. Minshall	34 Van Natta 1173 (1982)	303
Lorrie A. Minton	34 Van Natta 162 (1982)	665,789,1267,1372
David Mobley	34 Van Natta 35 (1982)	789
Steven E. Moffet	35 Van Natta 56 (1983)	47
Ronald W. Mogliotti	35 Van Natta 384 (1983)	377
Jack G. Monroe	34 Van Natta 1106 (1982)	757
Edward Morgan	34 Van Natta 1590 (1982)	271,768
Martha Mount	35 Van Natta 557 (1983)	1161
Charles A. Murray	34 Van Natta 249 (1982)	678
Ray M. Mushaney	35 Van Natta 1114 (1983)	1100
Edwin L. Mustoe	34 Van Natta 659 (1982)	86,830
Victoria Napier	34 Van Natta 1042 (1982)	86
Donald P. Neal	34 Van Natta 237 (1982)	190,578
Joseph Needham	32 Van Natta 63 (1981)	1294
Patricia R. Nelson	34 Van Natta 1078 (1982)	21,591,1079,1261
William A. Newell	35 Van Natta 629 (1983)	716,1084,1177,1234
Alfred M. Norbeck	35 Van Natta 802 (1983)	1075,1101,1181
John J. O'Halloran	34 Van Natta 1504 (1982)	695,859,1049
John J. O'Halloran	34 Van Natta 1101 (1982)	695
Mark O'Hara	35 Van Natta 587 (1983)	700

VAN NATTA CITATIONS

Name	Citation	Page(s)
Gordon L. Ogden	34 Van Natta 1567 (1982)	736
Elvin Ornbaun	9 Van Natta 270 (1973)	1142
Raymond Orsborn	34 Van Natta 576 (1982)	10,81,365
Alvy Osborne	34 Van Natta 127 (1982)	716
Mary E. Osborne	35 Van Natta 186 (1983)	181,660
Ivan Ouchinnokov	34 Van Natta 579 (1982)	1224
Dorotha L. Oyler	34 Van Natta 1128 (1982)	89,821
Robert A. Parker	32 Van Natta 259 (1981)	695,859,866
Jimmie Parkerson	35 Van Natta 1247 (1983)	1378
Susan Parries	32 Van Natta 19 (1981)	355
Wayne Patterson	34 Van Natta 1493 (1982)	1318
Rose E. Pederson	34 Van Natta 1658 (1982)	143,298,1276
Flora Pelcha	34 Van Natta 1141 (1982)	368,824
Clara M. Peoples	31 Van Natta 134 (1981)	515,807,1273,1357
Dock A. Perkins	31 Van Natta 180 (1981)	388,806,1350
Harold O. Peterson	30 Van Natta 273 (1980)	275
Michael Petkovich	34 Van Natta 98 (1982)	89
Keith Phillips	35 Van Natta 388 (1983)	885,1057,1165
Walter C. Phillips	33 Van Natta 505 (1981)	93
Richard Pick	34 Van Natta 957 (1982)	346,388,785
Vicki Pine	35 Van Natta 619 (1983)	1340
Dean Planque	34 Van Natta 1116 (1982)	563,658
Fred H. Poehler	34 Van Natta 76 (1982)	789
Adelma Potterf	30 Van Natta 275 (1981)	716
Raymond Presnell	21 Van Natta 44 (1977)	716
Jeri Putnam	34 Van Natta 744 (1982)	125,840
Mike A. Ratliff	30 Van Natta 814 (1981)	83,203
Bringfried Rattay	17 Van Natta 171 (1976)	716
Hazel Ray	34 Van Natta 1183 (1982)	63
Darreld W. Rayle	34 Van Natta 1204 (1982)	156
James H. Roberts	34 Van Natta 1603 (1982)	282,695,1049
George Roth	14 Van Natta 202 (1975)	716
Wilma H. Ruff	34 Van Natta 1048 (1982)	761
Barbara Rupp	30 Van Natta 556 (1981)	176,295,628,1107,1388
Peter J. Russ	33 Van Natta 409 (1981)	189,1380
Danny H. Sackett	34 Van Natta 1107 (1982)	757
Matthew Sampson	34 Van Natta 1145 (1982)	1293
Lucine Schaffer	33 Van Natta 511 (1981)	253,621,859,866,1177,1338
Anna Scheidemantel	35 Van Natta 740 (1983)	897
LeRoy R. Schlecht	32 Van Natta 261 (1981)	548,695
William Schneider	34 Van Natta 520 (1982)	104
Richard Schoennoehl	31 Van Natta 25 (1981)	233
James C. Schra	34 Van Natta 1577 (1982)	716
Paul Scott	35 Van Natta 1215 (1983)	1257,1356,1368,1372
Donald K. Shaw	34 Van Natta 1260 (1982)	1332
Howard Shirley	9 Van Natta 254 (1973)	253
Richard S. Short	27 Van Natta 274 (1979)	253
Mark L. Side	34 Van Natta 661 (1982)	12,869,1181
Lenford Simmons	30 Van Natta 400 (1981)	716
Juanita Skophammer	18 Van Natta 18 (1976)	35
Janie Smith	34 Van Natta 1055 (1982)	1153
Allen M. Sparks	34 Van Natta 526 (1982)	353
Carlton A. Spooner	34 Van Natta 1594 (1982)	690
Susan K. Spratt	34 Van Natta 1028 (1982)	570
Terry L. Starbuck	34 Van Natta 81 (1982)	241
Johnnie L. Stepp	34 Van Natta 1685 (1982)	624

VAN NATTA CITATIONS

Name	Citation	Page(s)
Edith Stevens	34 Van Natta 642 (1982)	253,1093
Victor Stewart	30 Van Natta 472 (1981)	125
Eonia Z. Stoa	34 Van Natta 1206 (1982)	186
Sidney A. Stone	31 Van Natta 84 (1981)	555,558
Marlene Strauser	34 Van Natta 168 (1982)	377,1338
Dorothy Swift	34 Van Natta 1059 (1982)	86,729
Eugene Thomas	35 Van Natta 16 (1983)	75
James G. Thomas	35 Van Natta 714 (1983)	1053,1223
Minnie Thomas	34 Van Natta 40 (1982)	143,271,321,660,
Myrtle L. Thomas	35 Van Natta 1093 (1983)	1254 787,885
James Thurston	32 Van Natta 146 (1981)	789
Bonnie R. Tolladay	35 Van Natta 198 (1983)	740
James M. Tornow	35 Van Natta 71 (1983)	1217
Juanita Trevino	34 Van Natta 632 (1982)	363
Lewis Twist	34 Van Natta 290 (1982)	75,83,120,203,310, 332,525,528,635,1057,1338
Keith G. Underwood	34 Van Natta 1305 (1982)	303
William E. Urton	34 Van Natta 1263 (1982)	789
Inez Van Horn	35 Van Natta 342 (1983)	328,611
Clair Vandehey	26 Van Natta 27 (1978)	716
Victor Vanderschuere	35 Van Natta 1074 (1983)	1107
Michael Vernon	34 Van Natta 1212	318,319
Eugene Voris	35 Van Natta 439 (1983)	1152,1217
Delbert Walker	29 Van Natta 149 (1980)	716
Nick L. Ward	34 Van Natta 1739 (1982)	642
Darryl G. Warner	34 Van Natta 634 (1982)	143,885,1133
Barbara Wasson	34 Van Natta 1094 (1982)	249,619
George F. Weiland	34 Van Natta 961 (1982)	205
Wayne E. Welch	34 Van Natta 766 (1982)	755,789
David C. Welsh	34 Van Natta 1246 (1982)	642
Curtis L. West	31 Van Natta 106 (1981)	570
Cecil Whiteshield	4 Van Natta 203 (1970)	267
Glen A. Williams	34 Van Natta 1222 (1982)	716
Ray A. Williams	20 Van Natta 195 (1977)	1247
Donald Wischnofske	32 Van Natta 136 (1981)	198,349,740,1099
John J. Wittlake	35 Van Natta 350 (1983)	1368
Ardean Woodfin	30 Van Natta 281 (1980)	587
Donald Woodman	34 Van Natta 178 (1982)	256
Robert B. Woodruff	35 Van Natta 249 (1983)	619
Olin Yoder	35 Van Natta 607 (1983)	1340
Donald J. Young	35 Van Natta 143 (1983)	151,271,368,660,885
Lesley Young	28 Van Natta 958 (1980)	716
Peter A. Zaklan	35 Van Natta 716 (1983)	1315
Gilbert Zapata	8 Van Natta 99 (1972)	56

ORS CITATIONS

page(s)

ADMINISTRATIVE RULE CITATIONS

LARSON CITATIONS

The following Memorandum Opinions are not published in this volume. These decisions may be ordered from the Workers' Compensation Board using the numbers provided.

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Abrego, Virgilio, 82-10187 (8/83)
Alexander, Dennis G., 81-00731 (2/83)
Anderson, A.V., 82-02549 (8/83)
Anderson, Bill R., 82-02459 (6/83)
Anderson, Edwina J., 82-01866 (3/83)
Anderson, Gerald L., 79-08942 (3/83)
Anderson, James W., 81-03907 & 81-04409 (5/83)
Anderson, Mayrie, 82-05127 (6/83)
Anderson, Walter L., 81-11056 (3/83)
Andrews, Patricia R., 82-02045 (7/83)
Archer, Catherine, 82-01131 & 82-01132 (3/83)
Armstrong, Veston C., 81-06683 (3/83)
Arnhold, Terry L., 82-01722 (6/83)
Bailey, Phyllis L., 81-07298 (5/83)
Baker, Ernest Jr., 81-04390 (3/83)
Banks, James A. (Deceased), 82-08738, 82-08739 etc. (6/83)
Barcicevic, John J., 81-11310 (3/83)
Barnett, Everett E., 82-04329 (5/83)
Barnett, Tom, 81-10824 (3/83)
Barrett, David F., 81-02757 (7/83)
Bartlett, Robert G., 82-02880 (6/83)
Batman, James, 80-10907 (2/83)
Beedy, Rocky, 81-01067 (5/83)
Behnke, Leo R., 82-575 (2/83)
Bell, George P., 82-04786 (9/83)
Bellmore, Charles F., 82-01208 (5/83)
Bennett,Ray, 82-01352 (6/83)
Benninger, Martha A., 82-08378 & 82-09310 (7/83)
Berov, Valentin S., 81-07326 (3/83)
Bex, Maxine E., 82-08417 (8/83)
Bichler, Elmer J., 82-01447 (5/83)
Bigelow, Grant W., 82-06148 (9/83)
Billings, Bonnie J., 82-03725 (8/83)
Binkley, Marnell F., 82-07301 (8/83)
Birkenfeld, Roger W., 82-06210 (7/83)
Bisbey, Geoffrey, 82-04779 (6/83)
Black, John E., 82-11118 (9/83)
Blake, Ronald E., 82-08375 (8/83)
Bonner, Melvin, 81-09837 (2/83)
Booher, Raymond C., 82-00077 & 82-04161 (9/83)
Boyd, Thora, 81-10508 (2/83)
Boyeas, Clarence F., 82-06331 (9/83)
Bracken, Rhonda, 82-03137 & 82-03138 (8/83)
Braxmeyer, James A., 82-02856 (6/83)
Breasaw, Dionne D., 82-06826 (4/83)
Bredvold, William F., 83-02310 (9/83)
Britt, William E., 81-09702 (4/83)
Brown, Douglas, 81-09136 (3/83)
Brown, Linda J., 81-10742 (5/83)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Brown, Patricia A., 82-08008 (7/83)
Brown, Ralph, 81-10213 (3/83)
Bryan, Maurice, 82-00713 (8/83)
Bryant Evick, Niada M., 82-02938 (5/83)
Bureau, Donna M., 81-07527 (3/83)
Burgess, Edward E., 81-11521 (5/83)
Burke, Kathy D. (Leeth), 82-06053 (5/83)
Burley, Arthur F., 82-04205 (9/83)
Caddell, Avis C. 82-00301 (1/83)
Cahill, Shirley, 82-08150 (7/83)
Callagan, Mary, 81-06067 (7/83)
Cambron, Connell R., 82-11388 (9/83)
Campbell, Daniel, 82-01745 (6/83)
Card, H. Roger, 81-05569 & 81-05569 (1/83)
Cardoza, Linda, 83-0009M (1/83)
Carlston, Larry W., 82-04823 (6/83)
Carpenter, Charles E., 80-01687 (1/83)
Carr, Joseph L., 82-03278 (8/83)
Carter, Ronald P., 82-04684 (6/83)
Cartwright, Leatha, 81-01112 & 81-01113 (2/83)
Carver, Clifford, 81-02519 (9/83)
Case, Patrick A., 81-09780 (2/83)
Castimore, Jeanette M., 81-06411 (8/83)
Champ, Sherman L., 81-06786 (2/83)
Chandler, William, 81-08446 (2/83)
Chappell, Leslie H., 81-00881 (3/83)
Charitar, Ram, 81-10223 (1/83)
Cheek, Troy, 81-07031 (8/83)
Chubbuck, Curtis G., 82-00057 (5/83)
Cissna, John J., 82-05775 (8/83)
Clooten, Joseph D., 82-03940 (8/83)
Colcord, Ronald, 82-07958 (3/83)
Conken, Chester S., 81-10093 (6/83)
Connell, Ida P., 82-02931 (8/83)
Connelly, Robert, 82-00754 (8/83)
Conner, Gary B., 82-08472 (5/83)
Conner, Roger, 82-06848 (9/83)
Cook, John A., 82-02897 (6/83)
Cooper, Edward D., 82-07829 (9/83)
Cornell, John H., 82-06759
Corry, David B., 81-02675 (6/83)
Counts, James R., 82-03729 (3/83)
Coutinho, Augusto, 81-1790 (3/83) (4/83)
Couturier, Richard, 82-00501 (7/83)
Cox, Charley N., 82-02066 (5/83)
Cox, Sandra J. (Mills), 82-01892 (5/83)
Cregeen, Beverly M., 81-00475 etc. (7/83)
Croxell, Norma J., 82-00676 (8/83)
Culley, Robert J., 80-09954 (6/83)
Culp, Charles L., 81-03091 (2/83)
Culwell, Edward L., 82-04567 (8/83)
Cureton, Lonnie, 81-04237 (3/83)
Currin, Robert A., 81-07800 (5/83)
Cutsforth, Shawn, WCB n/a (5/83)
Dahlheim, Arthur, 80-03968 (8/83)
Daniels, Wilbur R., 82-03722 (7/83)
Daugherty, Charles W., 80-09223 & 81-01183 (1/83)

Name, WCB Number (Month/Year)

Davidson, Vernal M., 81-07246 (8/83)
Davis, Janet D., 81-01117 (3/83)
Davis, Patsy, 82-02404 (8/83)
Davis, William A., 81-08455 (1/83)
Day, Lorri K., 81-09685 (3/83)
DeBolt, Maudie M., 82-05929 (8/83)
DeGroot, Robert J., 82-06167 (8/83)
DeLaRosa, Bense, 82-06199 (8/83)
DeLong, Barbara J., 82-01571 & 82-01154 (5/83 & 6/83)
Deos, Jack, 81-02829 (2/83)
Desau, David R., 81-05375 (2/83)
Dewitz, Clyde W., 82-10211 (7/83)
Dials, Crayton J., 81-08908 (4/83)
Dodge, Theodore J., 82-02559 (5/83)
Donnelly, Eileen F., 82-03122 (7/83)
Dooley, Douglas, 81-06280 (5/83)
Dotson, Harold L., 82-05493 (8/83)
Doty, Melvin T., 82-02060 (9/83)
Drennan, Carol L., 82-08850 (8/83)
Driggers, Roger A., 82-07883 (7/83)
Dubisar, Elizabeth, 82-05304 & 82-10987 (9/83)
Dunlap, Joyce A., 82-01614 (7/83)
Dunsmore, Sandra, 82-02555 (1/83)
Duran, Nancy A., 81-04607 (1/83)
Durham, David R., 81-05933 (3/83)
Duvall, Kay, 80-08624 (1/83)
Early, Linda M., 82-09045 (9/83)
Elliott, Norma J., 82-04519 & 82-04520 (6/83)
Ellis, Jocelyne M., 82-07710 (7/83)
England, Wayne A., 82-01433 (8/83)
Erickson, Wayne A., 82-04001 (9/83)
Esquivel, Juventino, 82-03874 (3/83)
Everson, Ernest E., 80-09191 & 80-09192 (3/83)
Farfan, Gig B., 81-00138 (7/83)
Fisher, Laurel T., 82-00769 (3/83)
Flick, Mike R., 81-11402 (5/83)
Forrest, Ray, 81-02535 (7/83)
Forsyth, James, 81-02716 (1/83)
Franzel, Joan P., 81-02107 (1/83)
Freeman, Leslie (Sanders), 81-06083 (1/83)/83)
Galusha, Mable I., 81-04567 & 81-04568 (8/83)
Gascon, Lori, 81-11622 (8/83)
Gates, Mary, 82-04403 (1/83)
Gates, Patricia J., 82-06135 (6/83)
Gates, Thomas D., 80-10515 (6/83)
Gaylord, William R., 80-04832 (2/83)
Getman, Gary A., 82-10962 & 82-03707 (9/83)
Gilbert, Rory F., 82-04820 (7/83)
Gilkey, Arlene, 82-03413 (7/83)
Gill, Thomas P., 81-02329 (6/83)
Giofu, Robert, 81-09105 (3/83)
Glover, Bernice, 81-05776 (5/83)
Goldstein, George A., 82-09776 (8/83)
Goodstein, David R., 82-09438 (8/83)
Gormley, Dennis H., 81-09531 (8/83)
Gorringe, Philip M., 82-01434 (8/83)
Gray, Jack L., 82-05123 (7/83)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)
Greer, Dimidy A., 80-08353 (3/83)
Gross, Leon F., 81-06755 (1/83)
Gusinow, John E., 82-03592 (8/83)
Gutierrez, Clemente E., 82-03054 (3/83)
Hackett, Julia, 82-02055 (1/83)
Haines, Robert J., 82-0316M (1/83)
Hains, Colleen E., 82-09630 (7/83)
Hall, Jay, 81-011495 (1/83)
Hall, Terri A., 82-07584 (9/83)
Hamilton, Betty A., 82-02236 (7/83)
Hankins, Roy L., 82-04944 (5/83)
Hannick, Robert A., 82-02736 & 82-01846 (6/83)
Harris, Carl F., 82-01036 (3/83)
Hash, Stanley, 82-01452 (7/83)
Hassler, Maxine, 81-03872 (2/83)
Hauser, Benton L., 82-00700 (3/83)
Hawes, Charlene D., 82-00049 (5/83)
Heath, Patricia H., 82-04328 (8/83))
Helzer, Joanne M., 81-07340 (3/83)
Hendren, Madeline C., 81-01990 (4/83)
Hershey, Thomas E., 82-06263 & 82-06324 (9/83)
Hess, Candy J., 82-02550 (6/83)
Hilderbrand, James, 82-00123 (3/83)
Hill, Del Ray, 81-00862 (1/83)
Hill, James L., 82-00204 (7/83)
Hoban, Jerry, 81-11726 (1/83)
Hodges, Norman S., 81-09590 (8/83)
Hoffman, Joseph J., 82-03600 (7/83)
Hoover, Esther, 81-02324 (2/83)
Hope, Patrick C., 82-07127 (9/83)
Hoppe, Lois, 81-10080 & 80-06520 (2/83)
Horner, Lloyd J., 80-02020 (3/83)
Hort, Albert E., 80-11056 (2/83)
Householder, Dan L., 82-08414 (8/83)
Hove, Carolyn, 82-07357 (8/83)
Howard, Joseph W., 82-09043 (9/83)
Hunnel, Sandra J., 81-10600 (2/83)
Hunter, Jeffrey K., 82-05878 (7/83)
Hurt, John M., 82-00329 (3/83)
Hutchinson, Marc, 81-01715 (1/83)
Isaacs, David R., 81-01071 (5/83)
Isarraras, Javier R., 82-06994 (9/83)
Jefferies, Melvin W., 82-07501 & 82-10058 (9/83)
Jeffries, Frances M., 81-11401 (3/83)
Johnson, Jack, 80-09455 & 81-06623 (7/83)
Johnson, Paula J., 82-00838 (7/83)
Johnson, Raymond P., 81-11074 & 82-04730 (6/83)
Johnston, Cheryl A., 82-05651 (5/83)
Jones, Linda G., 82-07565 (9/83)
Jones, Murl E., 81-06864 (1/83)
Jones, Stoddard (Deceased), 82-02121 (6/83)
Jones, Walter A., 81-09474 (5/83 & 6/83)
Jordan, Melvin, 81-08472 (1/83)
Joyner, Debra A., 82-01942 (6/83)
Kaforski, Lawrence J., 81-08076 (1/83)
Kalivas, Salomi, 82-06442 (9/83)
Kallimanis, William S., 81-04832 (6/83)

Name, WCB Number (Month/Year)
Kappitz, William H., 81-08674 (3/83)
Kassahn, Jerry E., 82-08351 (6/83)
Keene, Roy H., 82-05175 (9/83)
Kelly, James R., 82-06154 (5/83)
Kemp, Robert E., 81-08549 (9/83)
Ketchum, Frank, 81-04706 (1/83)
Keyes, Kevin W., 82-04338 (5/83)
Kight, Lee M., 81-11508 (6/83)
King, Randy, 82-03625 (3/83)
Kinsey, Robert R., 82-05701 (8/83)
Kintz, Susan M., 80-02978, 80-11233 & 81-07950 (7/83)
Kirkpatrick, Jerry H., 79-05300 (5/83)
Kiser, Delroy, 82-06010 (6/83)
Kitt, Jack, 82-06233 (8/83)
Kivisto, Harold A., 81-01752 (6/83)
Knight, Margaret, 82-05544 (3/83)
Kniskern, Judith Ann, 81-09014 (1/83)
Koehler, Jack S., 82-02324 (6/83)
Kramer, Dennis R., 81-11127 (2/83)
Kutch, Gerald, 82-00202 (2/83)
Kyllo, Hilda E., 81-05118 (5/83)
Lane, George W., 82-02357 (6/83)
Lang, Dan K., 82-07474 (9/83)
Langley, Billey L., 81-06997 (1/83)
LaQue, Bernard, 82-04830 (5/83)
Larson, Ole E., 82-02152 (9/83)
Latham, Donald, 82-10925 (7/83)
Lawson, Wesley A., 81-09032 (3/83)
Lawver, Charles E., 81-07097 (6/83)
Leap, Dale L., 81-07262 (2/83)
Lemay, James P., 82-07306 (5/83)
Lewis, D.H & E.M., 81-05850 (3/83)
Lewis, Paul E., 78-04577 (3/83)
Lingo, Wanda J., 82-05958 & 81-10925 (5/83 & 8/83)
Lipe, William, 81-06071 (5/83)
Littlefield, Raymond S., 81-10191 & 81-06530 (3/83)
Londo, Beulah I., 81-03379 (2/83)
Lundy, Eyvonne, 81-04501 (1/83)
Lyon, Claude, 81-11497 (3/83)
Maarefi, Margaret, 82-00194 (8/83)
MacIvor, Frank H. (Deceased), 82-02901 (6/83)
Macon, Wyman L., 81-11568 (2/83)
Madden, Essie F., 80-00127 (2/83)
Maddocks, Elmer, 82-01631 (8/83)
Manning, Ronald, 81-10733 (3/83)
Margison, Harold A., 81-07478 (3/83)
Marker, Ethel, 82-06111 (8/83)
Marquardt, David L., 82-05034 (7/83)
Marshall, Danny C., 81-07627 (2/83)
Martin, Walter, 81-03895 (8/83)
Mary, Jerry D., 81-05956 (5/83)
Mason, Sammy J., 82-01982, 82-01784 & 81-10922 (6/83)
Masoumpanah, Ahmad, 81-02934 (1/83)
Matthews, Martin L., 82-04580 (8/83)
Matthews, Ned T., 80-10828 (8/83)
Maxwell, Carl, 79-00195 (1/83)
McArthur, John W., 82-03781 (9/83)

Name, WCB Number (Month/Year)
McCann, Albert, 81-11537 & 82-02702 (3/83)
McCarty, Jean, 82-02576 (5/83)
McCormick, Timothy I., 81-06127 (3/83)
McCoshum, Gary, 81-09301 (2/83)
McCune, Michael P., 81-10051 (8/83)
McDevitt, Timothy J., 81-07972 (6/83)
McDonald, William F., 82-04486 (7/83)
McGinnis, Monty D., 82-01697 (5/83)
McGril, Thomas H., 81-10781 (5/83)
McKinney, Kenneth N., 79-02868 (1/83)
McLaughlin, Thomas P., 81-11623 (3/83)
McPhail, Richard, 81-05023 (5/83)
Mead, James W., 81-09602 (5/83)
Mead, Kenneth R., 82-03356 (3/83)
Mead, Russell J., 82-00953 (2/83)
Mespelt, Beverly, 81-07030 & 82-01317 (5/83)
Miles, Harold W., 81-06954 (7/83)
Miles, Ray M., 81-07012 (6/83)
Miller, Junior B., 82-04812 (9/83)
Miller, Sharon, 82-01711 (3/83)
Mills, Leroy B., 82-10088 (7/83)
Mills, Rhonda G., 81-10908 (3/83)
Millus, Debra, 82-02443 & 81-00941 (2/83)
Minnick, William, 81-04753 (3/83)
Mitchell, Ronald L., 81-06868 (7/83)
Montgomery, Eautie P., 82-04946 (5/83)
Morris, David D., 83-00687 (9/83)
Morris, James R., 82-01899 (5/83)
Moser, Mary F., 81-04008 (2/83)
Mullaney, Danny J., 81-04454 & 81-05600 (8/83)
Nacoste, James A., 81-00180 (5/83)
Nall, Shelby J., 81-08980 (6/83)
Nixon, Tom A., 82-04343 (6/83)
Nordberg, Marion, 81-07851
Norris, Charl M., 82-07655 (9/83)
Norton, Billy D., 82-01771 (7/83)
O'Neal, Billy L., 81-02144 (5/83)
Olinghouse, Ronald S., 82-04653 (6/83)
Oliver, Cheryl K., 80-10666 & 81-06952 (5/83)
Olson, Robert O., 82-06019 (7/83)
Orth, Michael J., 82-08717 (6/83)
Osborne, Sylvester, 81-11265 & 81-11266 (7/83)
Osorio, Martha O., 82-01241 (3/83)
Owen, David C., 81-08660 (1/83)
Owens, Donald L., 81-10633 (5/83)
Palmisano, Pat, 82-02601 (9/83)
Parker, Thomas D., 80-10438 (3/83)
Parkinson, Robert J., 82-05500 (8/83)
Parks, William N., 81-06839 (1/83)
Paul, Vesta G., 81-01113 (2/83)
Payne, Rosalie Bauman, 81-00152 (6/83)
Pearson, Kathie, 82-01284 (6/83)
Peck, Franklin J., 80-00280 & 81-07571 (8/83)
Pence, Russell, 80-10831 (3/83)
Penfold, Donald G., 82-02646 (8/83)
Pennington, Carolyn M., 81-10352 (8/83)
Pennington, Mollie A., 82-02875 (3/83)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Perchez, Ramon R., 81-03169 (9/83)
Perez, Jose, 80-03457 (5/83)
Perkins, Opal, 82-04458 (6/83)
Persad, Clarence B., 82-08619 (7/83)
Peterson, Kenneth M., 80-06187 (1/83)
Pettijohn, Lewis D., 82-01599 (3/83)
Peyton, Gary B., 81-11299 (3/83)
Peyton, Gwen A., 82-02345 (2/83)
Phillips, Richard, 80-9518 (5/83)
Poe, Theodis E., 82-0324M (1/83)
Pollard, Keaver H., 82-02898 (4/83)
Popoff, Floreen A., 82-01327, 82-00116 etc. (3/83)
Porter, Milton, 81-06024 (7/83)
Potts, Marvin L., 82-04885 (5/83)
Powell, Jess S., 82-02657 (7/83)
Power, Barbara A., 82-03870 (8/83)
Powers, Colleen G., 80-02368 (3/83)
Price, Jack M., 82-01970 (8/83)
Purifoy, Bordy, 81-09206 (2/83)
Ramm, Leroy L., 81-08806 (2/83)
Rasmussen, Warren F., 81-11138 (6/83)
Reavely, Dolores, 81-09587
Redmond, Dana, 81-09761 (9/83)
Redwing, Edward J., 82-03439 (5/83 & 6/83)
Reed, Rick R., 81-00172 (3/83)
Rice, Diana R., 82-01886 & 82-01885 (5/83)
Richter, Katharine, 81-09260 (5/83)
Riddle, Charles W., 82-04901 (5/83)
Rietkerk, Dick, 82-02490 (5/83)
Rigot, Cindy, 80-10186 (1/83)
Rinck, Robert, 82-08696 (6/83)
Robbins, Teresa, 82-00224 (2/83)
Robertson, Jesse, 80-00717 (2/83)
Robison, Nancy, 82-05445 (7/83)
Rodriguez, Eustolio, 81-08074 (9/83)
Rodriguez, Lupe, 81-06244 (1/83)
Ross, Edward T., 82-09044 (8/83)
Ross, Teddie, 80-05039 (7/83)
Rowe, Ronald L., 82-02355 & 82-06338 (9/83)
Russworm, Hubert D., 82-03960 & 82-06406 (6/83)
Rust, Robert H., 81-07665 & 81-07666 (8/83)
Ruzicka, Mary E., 82-02222 (3/83)
Sampson, Charles, 81-06270 (2/83)
Sanders, Juanita M., 81-08252 (5/83)
Sarich, Judy A., 82-02672 (1/83)
Sassmen, Jerry L., 82-06927 (8/83)
Saville, Nellie M., 82-04607 & 82-05922 (6/83)
Schaffer, Karl, 81-09005 (2/83)
Schultz, Marie, 81-07798 (3/83)
Schuster, Carrie L., 82-03084 (3/83)
Schwanke, Marvin, 81-04820 & 80-08259 (5/83)
Schwichtenberg, Linda, 82-06654 (7/83)
Scofield, Dale, 82-02777 (5/83)
Scott, Bernard F., 82-00290 (9/83)
Scruggs, Maggie, 81-09732 (1/83)
Sharp, Jesse, 81-04002 & 82-01934 (1/83)
Shaw, Gerald W., 82-05364 (5/83)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)
Sherburne, Ruth, 82-08145 (8/83)
Sherrill, Tim, 80-11067 (2/83)
Shipman, William, 81-10119 (6/83)
Shotsky, Linda, 81-11135 (3/83)
Singleton, Roy, 82-03047 (5/83)
Sisemore, Jeffrey, 81-05374 (3/83)
Skinner, Holly A., 81-09171 (3/83)
Smith, Richard, 81-07640 (2/83)
Smith, Robert V., 82-07745 & 82-07746 (8/83)
Smith, Roy L., 82-01544 (2/83)
Smith, Walter M., 81-05462 & 81-05463 (6/83)
Sold, Frederick J., 81-03459 (3/83)
Solomon, Reginald B., 81-10476 (2/83)
Spiering, Betty J., 81-09303 (6/83)
Spilde, David, 82-01266 (2/83)
Stanwood, Edna L., 82-02914 (7/83)
Stedman, Robert W., 81-01763 (5/83)
Steele, George, 81-06823 (2/83)
Steele, Helen J., 81-11420 (6/83)
Stenkamp, Robert, 82-02579 (6/83)
Stephens, John L., 82-06492 (8/83)
Stevens, Doris M., 81-08495 (1/83)
Strawn, Darrell G., 80-06395 (1/83)
Strickland, Donald, 78-06887 (3/83)
Strohecker, Ken L., 81-10398 (5/83)
Stulken, John H., 81-10770 (8/83)
Sunseri, Gerald J., 82-00729 & 82-03147 (2/83)
Taylor, Gene R., 81-10917 & 82-04748 (3/83)
Taylor, Larry C., 82-06811 (9/83)
Temple, Beatrice M., 82-08097, 82-08098 & 82-04528 (9/83)
Tennant, Kevin E., 82-07689 (5/83)
Thacker, Donald J., 80-11388 (1/83)
Thacker, Michael E., 82-06083 (5/83)
Thedford, Doris B. (Employer), 82-04779 (6/83)
Theriault, Arthur, 81-09550 (2/83)
Thomas, Leora A., 81-03307 (2/83)
Thomas, Myrtle L., 82-04330 (7/83)
Thomas, Richard R., 82-09953 (7/83)
Thompson, Glen, 82-04025 (6/83)
Thompson, Sam, 81-08775 & 81-08774 (4/83)
Tippie, Clarence C., 81-00460 (5/83)
Tolman, Gordon B., 81-01036 (2/83)
Tow, Robert E., 82-07544 (8/83)
Travis, Paula, 81-11054 (3/83)
Treanor, Mary J., 82-02891 (5/83)
Tucker, Lindberg M., 80-09391 (3/83)
Tupper, Lovie, 81-00482 (3/83)
Turner, Frank J., 82-02803 (6/83)
Turner, James E., 81-07597 (1/83)
Turner, Susan, 81-06582 (6/83)
Tyger, William R., 82-03585 (9/83)
Vaden, Tracy, 81-10222 (5/83)
Vann, David A., 82-00417 (9/83)
Vierra, Carol A., 81-04322 & 81-04547 (1/83)
Volkers, Edgar B., 82-03455 (3/83)
Volkers, Edgar, 81-04175 (2/83)
Wager, Russell W., 81-11590 (1/83)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Waldron, Duane E., 81-04702 (3/83)
Walker, Sandra, 81-10314 (2/83)
Wallace, Harvey M., 80-05364 (2/83)
Walter, Clark M., 81-11714 (5/83)
Weddle, James D., 82-03713 (8/83)
Weir, John R., 81-06324 (2/83)
Welborn, Shirley, 81-09686 (3/83)
Welburn, Ronald W., 82-04399 (9/83)
West, Carl F. 80-00288 (3/83)
Westfall, Marvin D., 81-02120 (1/83)
Whitley, James E., 80-06085 (2/83)
Widenmann, Leo, 81-05767 (2/83)
Wight, Betty W., 78-08991 (1/83)
Wilhelm, Adam N., 82-02705 (6/83)
Willison, Athena c., 81-06051 (7/83)
Williver, Phillip M., 82-00425 (9/83)
Wilson, Norman L., 82-07078 (8/83)
Winkler, Karen M., 81-04022 (2/83)
Winnett, Cecil W., 82-08759 (9/83)
Wittlake, Carolyn, 82-05642 (8/83)
Wood, Pat L., 82-09884 (9/83)
Wood, Winston, 81-11385 (6/83)
Wright, Steven L., 79-10371 (5/83)
Zandofsky, John S., 81-00185 (2/83)
Zehe, Frederick H., 81-04884 (3/83)

The following decisions under Own Motion Jurisdiction are not published in this volume. They may be ordered from the Workers' Compensation Board using the numbers provided.

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)
Alexander, Robin, 83-0211M (9/83)
Allmon, Thomas, 83-0121M (5/83 & 7/83)
Anderson, Dianna, 81-0182M (3/83)
Anderson, Joseph, 83-0160M (9/83)
Anderson, Nolan D., 81-0238M (9/83)
Armstrong, Bill, 82-0258M (1/83)
Audas, Troy, 82-0193M & 82-0328M (3/83)
Baker, Richard, 83-0035M (2/83)
Baldwin, Gerald A., 83-0058M (3/83)
Barber, Vivian I., 83-0124M (8/83)
Barnes, Diane, 82-0042M (3/83 & 8/83)
Barnes, Harvey, 83-0023M (2/83)
Barnes, Rita M., 83-0154M (6/83)
Barnett, Keith, 81-0212M (9/83)
Bass, Corrie, 83-0005M (1/83)
Bayne, William D., 83-0169M (9/83)
Beatty, Lyn, 81-0056M (5/83 & 9/83)
Been, Norman, 83-0021M (1/83)
Belecz, Frank J., 83-0240M (9/83)
Betker, Larry, 83-0026M (4/83)
Bex, Marshal, 83-0151M (7/83)
Blevins, Jack, 83-0076M (4/83)
Bolander, Patrick, 83-0224M (9/83)
Bones, Leonard W., 83-0006M (1/83)
Borders, Robert O., 83-0155M (9/83)
Brandaw, David A., 83-0197M (9/83)
Brewis, Evelyn P., 83-0142M (6/83)
Briley, Carroll, 83-0185M (9/83)
Briley, Pat, 83-0212M (9/83)
Brister, Lloyd, 82-0247M (8/83 & 9/83)
Britt, William T., 83-0202M (9/83)
Brittson, Charles B., 83-0173M (9/83)
Britzius, Daryl M., 81-0098M (9/83)
Brod, William M., 83-0163M (9/83)
Brooks, Donald, 83-0102M (5/83)
Brown, Dale C., 81-0018M (9/83)
Brown, Frank, 83-0129M (5/83)
Brown, Larry, 83-0146M (7/83)
Brown, Raymond, 83-0063M (3/83)
Bruce, Walter J., 83-0137M (6/83)
Bryan, Karen J., 83-0230M (9/83)
Buchanan, Patrick L., 80-0003M (9/83)
Buckshnis, Rick, 83-0135M (5/83)
Buffum, Marvon C., 83-0045M (5/83)
Bush, Dorothy, 81-0333M (3/83 & 4/83)
Bustamante, Enrique, 83-0167M (6/83)
Buxton, Oliver, 83-0258M (9/83)
Cabal, Robert C., 82-0259M (1/83)

Name, WCB Number (Month/Year)
Campbell, Betty J., 83-0235M (9/83)
Campbell, Donald T., 83-0159M (8/83)
Cardoza, Linda, 83-0009M (1/83)
Carrillo, Ray, 83-0198M (9/83)
Castoe, Ezra Eugene, 83-0190M (7/83)
Caudell, Leonard, 82-0131M (9/83)
Champlin, Mauri, 83-0002M (1/83 & 3/83)
Christensen, Marian, 83-0091M (4/83)
Christensen, Marian, 83-0091M (7/83)
Christy, Patty, 82-0195M (9/83)
Clemons, Richard E., 82-0185M (3/83)
Clough, Robert, 83-0199M (9/83)
Coble, Steven, 83-0028M (2/83)
Combs, Harold W., 83-0015M (3/83)
Cooper, Edward E., 82-0148M (1/83)
Cooper, John, 83-0177M (9/83)
Crafton, Wallace D., 83-0187M (8/83)
Crocker, Peter E., 83-0059M (3/83)
Cunningham, Josette, 83-0139M (5/83)
Curry, Harold, 81-0215M (1/83)
Daniel, Frederick G., 83-0234M & 83-0236M (9/83)
Davis, Denise, 82-0175M (1/83)
Davis, Wallace J., 83-0029M (2/83 & 3/83)
Deffenbaugh, John, 83-0257M (9/83)
Delgado, Joseph, 83-0036M (3/83)
Denzer, Albert, 83-0204M (9/83)
Deos, Jack, 83-0112M (5/83)5/83)
Dick, Ralph, 83-0085M (4/83)
Donaldson, Richard, 81-0167M (9/83)
Donathan, Wilson, 83-0110M (4/83)
Doroski, Anthony, 83-0037M (2/83)
Doster, Milton L., 83-0123M (5/83)
Dowdy, Roscoe, 82-0292M (3/83 & 5/83)
Driggers, Roger, 82-0298M (7/83)
Duffy, Patrick, 83-0050M (3/83)
Edwards, Lloyd H., 83-0226M (9/83)
Edwards, Winona, 83-0252M (9/83)
Ellerbroek, Harvey, 83-0128M (5/83)
Elwell, John, 81-0320M (2/83)
Erofeeff, Nazarii, 82-0256M (9/83)
Ethridge, Roy D., 83-0186M (7/83 & 8/83)
Fast, Donald D., 82-0318M (1/83)
Featherly, James, 83-0149M (7/83)
Fennimore, Edgar, 83-0221M (9/83)
Fifer, Eva, 83-0138M (5/83 & 9/83)
Fones, Edward, 83-0099M (4/83)
Forrester, Billy, 83-0071M (3/83)
Foust, George, 83-0087M (3/83)
Franks, William Allen, 83-0038M (3/83)
Frear, James, 82-0291M (3/83)
Freauf, Lillian, 83-0117M (5/83)
Gaither, Lela E., 83-0181M (8/83)
Gardner, Dennis L., 82-0284M (1/83 & 6/83)
Gardner, John, 83-0051M (3/83)
Gardner, Walton, 83-0049M (4/83)
Gascon, Fred, 82-0269M (1/83)

Name, WCB Number (Month/Year)
Giffin, Jerry D., 83-0079M (3/83 & 4/83 & 6/83)
Gold, Crystal, 82-0270M (6/83)
Gorman, Oma, 83-0089M (4/83)
Gossman, Ronald, 82-0162M (9/83)
Grant, Frederick, 83-0042M (3/83)
Gray, Edward, 83-0266M (9/83)
Griffey, Brian, 83-0223M (9/83)
Hacker, Roy L., 83-0066M (3/83)
Haines, Robert J., 82-0316M (1/83)
Hamilton, Walter J., 83-0106M (5/83)
Hammer, Charley, 83-0254M (9/83)
Hampton, Frank, 83-0100M (5/83)
Hannon, James, 83-0218M (9/83)
Hansen, Kathleen, 81-0262M (1/83 & 3/83)
Hansen, Richard, 83-0114M (5/83)
Hartill, Gene A., 83-0210M (8/83)
Hartl, Thomas C., 83-0174M (9/83)
Heidenreich, Karl F., 83-0056M (3/83)
Hemminger, Clayton, 83-0164M (8/83)
Hetrick, Gregory, 83-0032M (3/83)
Hills, Frank, 82-0232M (1/83)
Hinzman, Bernie, 83-0097M (4/83)
Hollamon, Ezekial A., 83-0183M (9/83)
Holliday, Richard, 83-0024M (3/83)
Holmes, Joe, 81-0034M (4/83 & 5/83)
Holmstrom, Paul, 81-0277M (3/83)
Howard, Terry O., 83-0084M (3/83)
Howell, Michael, 83-0107M (5/83)
Hubbs, Warren, 82-0171M (3/83)
Hudman, Emmett M., 83-0172M (9/83)
Hudson, Nancy, 83-0086M (5/83)
Hudspeth, William R., 83-0268M (9/83)
Hulbert, David, 83-0075M (3/83 & 6/83)
Hurley, Howard, 83-0018M (1/83)
Hutchinson, James W., 82-0052M (9/83)
Idlewine, James R., 81-0197M (6/83 & 9/83)
Jackson, David, 83-0105M (4/83)
Jackson, Eugene, 83-0153M (6/83)
Jackson, Robert D., 83-0025M (1/83 & 5/83 & 9/83)
Jelineo, James M., 83-0148M (6/83)
Jensen, August, 83-0263M (9/83)
Jerome, David, 82-0137M (2/83 & 3/83)
Johns, George D., 83-0246M (9/83)
Johns, Joseph D., 82-0065M (9/83)
Johnson, Ronald L., 83-0165M (9/83)
Jones, Leo, 82-0164M (1/83 & 3/83)
Kallay, Dezo, 83-0118M (5/83)
Karstens, Harvey K., 83-0067M (3/83)
Kaufman, Ivan, 82-0297M (3/83 & 8/83)
Keen, Gwen, 83-0116M (5/83)
Kemmerer, Kenneth E., 82-0189M (8/83)
Keyser, John P., Jr., 82-0191M (9/83)
Kildow, Karen, 82-0208M (3/83 & 4/83)
Kimbrel, Sadie M., 81-0317M (2/83)
Kirchoff, Rex, 82-0089M (9/83)
Kloehn, Donald, 83-0096M (4/83)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Koenig, Tom, 83-0061M (3/83)
Kosack, Dolores a., 82-0246M (8/83)
Kreamier, Fred W., 83-0041M (3/83)
Laing, George, 83-0219M (9/83)
Landers, Arthur, II, 81-0265M (3/83)
Larson, Donald, 83-0108M (4/83)
Larson, Shirleen, 83-0077M (3/83)
Lavelle, Lawrence L., 83-0170M (9/83)
Lawhead, Stephen, 81-0066M (9/83)
Leas, Teresa L., 83-0003M (1/83 & 9/83)
Lesh, Lynn, 83-0092M (4/83)
Lewis, Russell, 81-0295M (3/83)
Lewis, Wilbur A., 82-0160M (3/83)
Linder, Janice K., 83-0068M (3/83 & 8/83)
Lindsley, Stanley, 81-0064M (3/83 & 6/83)
Lloyd, Audley, Jr., 83-0182M (7/83)
Long, Larry, 83-0115M (5/83)
Louden, Mariva, 83-0130M (5/83)
Lovell, Hazel Stanton, 81-0037M (2/83)
Lovins, Lloyd, 83-0043M (3/83)
Ludlow, Helen, 83-0125M (5/83)
Lyon, Claude, 83-0243M (9/83)
Mack, John, 83-0034M (3/83)
Mansker, Melba, 83-0083M (3/83)
Marcott, Kevin L., 83-0040M (3/83)
Martisak, Jerrold, 83-0179M (9/83)
Massey, John, 83-0253M (9/83)
McBride, Patricia, 83-0201M (9/83)
McCasland, Margie, 81-0226M (3/83)
McClay, Dennis, 83-0265M (9/83)
McClay, Taylor L., 82-0309M (2/83)
McConly, Richard, 83-0017M (1/83)
McDaniel, Shelley A., 83-0150M (6/83)
McFadden, William H., 83-0122M (5/83 & 6/83)
McKean, Raymond, 83-0259M (9/83)
McKelvey, Ronald, 83-0014M (3/83)
McKinney, Mary, 83-0057M (3/83)
McNair, Dale, 83-0132M (9/83)
Merrigan, Michael, 83-0119M (5/83)
Milano, Catherine, 82-0230M (5/83)
Miller, Calvin, 83-0262M (9/83)
Miller, Lynn, 83-0074M (3/83)
Miller, Raymond, 83-0047M (3/83)
Moffitt, Joseph, 83-0264M (9/83)
Monroe, Dean C., 81-0245M (7/83)
Moore, Gerald S., 81-0196M (9/83)
Moreno, Erica, 83-0152M (6/83)
Morin, Elizabeth J., 83-0239M (9/83)
Morton, William, 83-0111M (5/83 & 9/83)
Muehlhauser, Eugene, 83-0027M (2/83)
Munroe, Allan B., 83-0180M (9/83)
Myers, Lavene M. Reigard, 83-0062M (3/83)
Nicks, Edward, 83-0158M (6/83)
Noah, Edward, 83-0060M (3/83)
North, Mike, 83-0232M (9/83)
Noyes, Darrel, 83-0022M (3/83)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)
Nunez, Ray, Jr., 83-0065M (4/83)
Nylin, Jean, 83-0193M (9/83)
Olson, Allan D., 83-0194M (9/83)
Orman, Louis, 83-0113M (5/83 & 7/83 & 9/83)
Owens, Leroy James, 83-0227M (9/83)
Oxford, Anderson G., 82-0158M (7/83)
Palmer, Mary R., 83-0081M (3/83) (4/83))
Parazoo, Marshall G., 83-0101M (4/83)
Park, Thomas D., 83-0133M (5/83)
Parmenter, Ruby, 83-0244M (9/83)
Paulsen, John A., 83-0048M (3/83)
Paynter, Warren, 82-0325M (1/83)
Peabody, Eileen Mae, 83-0053M (3/83)
Peabody, Horace E., 83-0030M (2/83 3/83)
Perry, Wayne, 83-0103M (4/83)
Peyton, Gary, 82-0253M (1/83 & 5/83)
Phillips, Annie J., 83-0168M (8/83)
Phillips, Clifford, 80-0156M (5/83)
Pinney, John, 82-0264M (5/83 & 6/83)
Poe, Theodis E., 82-0324M (1/83)
Pope, Robert R., 83-0136M (6/83)
Preston, Donald G., 83-0162M (9/83)
Pullen, Edward, 83-0033M (2/83)
Quinn, Bruce, 82-0073M (9/83)
Randall, Nathan, 83-0127M (5/83)
Reed, Allen L., 82-0155M (4/83)
Rentz, Dennis, 83-0001M (4/83)
Reynolds, Edna, 83-0189M (9/83)
Rimer, Robert L., 83-0166M (9/83)
Rinck, Robert, 82-0295M (5/83)
Robertson, David, 81-0130M (2/83) (4/83)
Robinette, Gary D., 83-0093M (4/83)
Robison, Bill, 82-0207M (8/83)
Romero, Oscar, 82-0313M (1/83)
Ross, Robert, 83-0094M (4/83)
Rothenberger, Albert, 83-0171M (8/83)
Rowley, Steven, 83-0156M (6/83)
Salvetti,Roy, 81-0223M (2/83 & 9/83)
Savage, Fred, 83-0131M (6/83)
Sawyer, Donald R., 83-0144M (8/83 & 9/83)
Schafer, Glenn E., 83-0161M (9/83)
Schenck, Robert A., 81-0198M (1/83)
Schneider, Curtis, 83-0225M (9/83)
Schra, James, 82-0281M (1/83)
Schuster, Carrie, 82-0299M (4/83 & 5/83)
Seehawer, Lyle, 83-0277M (9/83)
Serbick, Laura, 83-0055M (4/83)
Shine, Patrick, 82-0228M (5/83)
Short, Lloyd, 83-0120M (5/83)
Siewell, Noel R., 83-0013M (1/83 & 6/83)
Slater, Roy R., 83-0215M (9/83)
Smith, Bob B., 83-0109M (4/83)
Smith, Lorene, 82-0272M (9/83)
Smith, Phillip R., 83-0073M (3/83 & 5/83)
Smith, Walter G., 82-0181M (2/83 & 6/83 & 9/83)
Snyder, Milton, 83-0203M (9/83)

Name, WCB Number (Month/Year)

Socia, Michael, 83-0143M (6/83 & 9/83)
Spooner, Carlton, 81-0060M (5/83)
Sprague, Elnora M., 83-0205M (8/83 & 8/83)
Stockton, Jack, 81-0296M (4/83)
Stoffal, Nancy, 83-0231M (9/83)
Stringer, Ronald D., 83-0216M (9/83)
Suverly, Raymond T., 82-0238M (4/83)
Sykes, Robert Foster, 83-0020M (1/83 & 6/83)
Tall, Donald, 82-0095M (1/83)
Thies, Harold L., 83-0176M (8/83)
Thompson, Lawrence, 83-0044M (3/83)
Thurston, Arden, 83-0249M (9/83)
Tinner, Carvel R., 81-0181M (9/83)
Todd, Earlene, 83-0054M (3/83)
Tonkin, Thomas, 82-0312M (3/83)
Travis, Pauline, 83-0147M (6/83)
Troiano, Matthew, 83-0052M (3/83)
Turnbull, James, 82-0320M (3/83)
Turner, Cecil Jenetta, 81-0325M (1/83)
Turner, Joyce M., 83-0126M (8/83)
Turpen, Charles, 83-0016M (5/83)
Vanderschuere, Victor, 82-0025M (5/83)
Vinsonhaler, Melvin, 83-0039M (3/83)
Wantowski, John W., 82-0235M (9/83)
Waring, Kenneth V., 83-0238M (9/83)
Warkentin, Jerry, 83-0046M (3/83 & 8/83)
Weber, Donald, 81-0089M (3/83)
Weckerle, Joe, 81-0221M (1/83)
Wells, Herbert J., 81-0276M (1/83 & 6/83)
Wentz, Kenneth D., 83-0233M (9/83)
Whisenhunt, Andrew, 83-0083M (3/83)
White, James Carlos, 82-0213M (3/83)
Widener, Lucille M., 83-0012M (2/83)
Wilken, Keith, 83-0008M (1/83)
Wilkinson, Melvin F., 83-0070M (3/83)
Williams, Joe, 83-0191M (8/83)
Williams, Norman, 82-0326M (1/83)
Wilmoth, Vyron, 82-0145M (1/83 & 5/83)
Wilson, Erma Jean, 83-0095M (4/83)
Wilson, Norman L., 81-0297M (7/83)
Wimmer, Max H., 83-0217M (9/83)
Woody, Ulyess L., 83-0064M (3/83)
Wray, Raleigh, 82-0319M (1/83)
Wyers, Frank, 83-0011M (1/83)
Yarberry, Roger D., 83-0010M (1/83)
Zeleznik, John M., 81-0139M (4/83)
Zongker, Leland L., 83-0175M (8/83)
Zorko, Richard A., 83-0261M (9/83)

CLAIMANTS INDEX

CLAIMANTS INDEX

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)

Claimant (WCB Number and/or Court Citation)-----Page(s)