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36 Van Natta ___ (1984)

BARBARA A. GILBERT, Claimant
Jolles, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-06508
October 9, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Galton's order which dismissed claimant's request for hearing for lack of jurisdiction. The issue is the Board's jurisdiction to consider the extent of claimant's permanent disability in view of claimant's failure to request a Determination Order from the Evaluation Division within one year of the date of the self-insured employer's notice of claim closure, which closed this disabling injury claim with an award for temporary total disability only. See ORS 656.268(3).

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

In Anthony A. Bono, 35 Van Natta 1, 6-8 (1983), rev'd on other grounds 66 Or App 138 (1983), we held that a claimant must request a determination from the Evaluation Division, pursuant to ORS 656.262(6), as a prerequisite to requesting a hearing pursuant to ORS 656.283, when the claimant desires to contest an employer/insurer's classification of a claim as nondisabling. See ORS 656.268(8) and (6). The issue in this case is very similar, primarily because it involves the same set of statutory provisions; however, it is not on all fours with Bono. There is no issue in this case concerning the classification of the claim, which was originally accepted as a disabling injury claim. The issue is whether a claimant may contest an employer/insurer's decision to close a claim as "disabling but without permanent disability" by requesting a hearing pursuant to ORS 656.283, without first requesting a Determination Order from the Evaluation Division within one year of the employer/insurer closure.

ORS 656.268(3) provides an employer/insurer with the mechanism to close a claim without submission to the Evaluation Division, and it provides a remedy to the claimant in the event that claimant disagrees with the employer/insurer's decision:

> "When the medical reports indicate to the insurer or self-insured employer that the worker's condition has become medically stationary and the self-insured employer or the employer's insurer decides that the claim is nondisabling or is disabling but without permanent disability, the claim may be closed, without the issuance of a determination order by the Evaluation Division. The insurer or self-insured employer shall issue a notice of closure of such a claim to the worker and to the Workers' Compensation Department. The notice must inform the worker of the decision that no permanent disability results from the injury; of the amount and duration of temporary total disability compensation; of the right of the worker to request a determination order from the

> Evaluation Division within one year of the date of the notice of claim closure; of the aggravation rights and of such other information as the director may require. Within one year of the date of the notice of such a claim closure, a determination order subsequently shall be issued on the claim at the request of the claimant or may be issued by the Evaluation Division upon review of the claim if the division finds that the claim was closed improperly. If an insurer or self-insured employer has closed a claim pursuant to this subsection and thereafter decides that the claim has permanency, the insurer or self-insured employer shall request a determination order as provided in subsection (2) of this section. If an insurer or self-insured employer has closed a claim pursuant to this subsection, if the reasonableness of that closure decision is at issue in a hearing on the claim and if a finding is made at the hearing that the closure decision was not supported by substantial evidence, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be owing between the date of original closure and the date upon which the claim is closed by determination order. The penalty shall not be less than $500."

The record clearly establishes that the employer complied with the procedure for effecting a proper closure pursuant to this provision.

Other relevant portions of ORS 656.268 are subsections (8) and (6), which provide respectively:

> "Upon receipt of a request made pursuant to ORS 656.262(6) or subsection (3) of this section, the Evaluation Division shall determine whether the claim is disabling or nondisabling. A copy of such determination shall be mailed to all interested parties in accordance with subsection (6) of this section."

> "The Evaluation Division shall mail a copy of the determination to all interested parties. Any such party may request a hearing under ORS 656.283 on the determination made under subsection (4) of this section within one year after copies of the determination are mailed."

Subsection (4) of this same statute presently provides, in pertinent part:

> "Within 10 working days after the

> Evaluation Division receives the medical and vocational reports relating to a disabling injury, the claim shall be examined and further compensation, including permanent disability award, if any, determined under the director's supervision."

ORS 656.268(3) could not be clearer. The procedure for contesting claim closure by an employer/insurer is to request a Determination Order from the Evaluation Division, which is then obligated to perform its statutory function and issue a Determination Order. Requesting a hearing is not a procedural remedy which is available as an alternative to requesting a Determination Order. Cf. Anthony A. Bono, supra, 35 Van Natta at 7-8. Nor does the filing of a request for hearing pursuant to ORS 656.283 satisfy the obligation to request a Determination Order from the Evaluation Division within one year of the employer/insurer's notice of claim closure. Cf. Logue v. SAIF, 43 Or App 991, 998 (1979) ("The Evaluation Division is distinct from the Hearings Division. The Evaluation Division has the responsibility for initially evaluating claims and issuing Determination Orders. ORS 656.708(2). The Hearings Division has the responsibility for conducting hearings and deciding all cases. ORS 656.708(3).").

The statute vests the Evaluation Division with the authority and jurisdiction to review the employer/insurer's claim closure in the first instance. If the claimant is dissatisfied with this administrative review, the claimant has the further right to review by requesting a hearing pursuant to ORS 656.283, requesting Board review pursuant to ORS 656.295 and judicial review pursuant to ORS 656.298. Issuance of a determination by the Evaluation Division, and a timely hearing request contesting that determination, are jurisdictional prerequisites to consideration of issues pertaining to extent of disability. The Referee correctly determined, therefore, that he was without jurisdiction to entertain the permanent disability issue raised by claimant's hearing request. See also Alma M. Berry, 35 Van Natta 1386, 1387 (1983).

Claimant argues that the employer waived the "exhaustion of administrative remedies" defense by its failure to raise it in a more timely manner. This case was before the Board once before on review of a prior Referee's order granting the employer's motion to dismiss on other grounds. 35 Van Natta 1812 (1983). Because the employer's challenge to claimant's hearing request is jurisdictional, the employer did not waive the defense by failure to raise it at the initial hearing. Montmore Home Owners Assoc. v. Brydon, 55 Or App 242, 246 (1981); see City of Hermiston v. ERB, 280 Or 291 (1977).

ORDER

The Referee's order dated March 1, 1984 is affirmed.

SALLY J. PERKINS, Claimant
Richard A. Sly, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-07559
October 9, 1984
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of Referee Fink's order which granted the claimant an award of 15° for 10% scheduled disability to the right hand and 15° for 10% scheduled disability to the left hand. The issue is the extent of claimant's disability. We reverse.

Claimant established her compensable occupational disease claim for bilateral carpal tunnel syndrome effective October 20, 1982. Neither her treating physician, Dr. McVay, nor the independent examining physician, Dr. Button, viewed claimant's condition as being serious enough to warrant surgery, and all treatment has been conservative. Claimant has lost no time from work. The claim was closed by a Determination Order dated July 13, 1983, which awarded claimant no temporary nor permanent disability.

On June 1, 1983 Dr. Button opined that claimant's carpal tunnel syndrome had resolved without impairment, and that claimant had no job restrictions. After the claim had been closed, a nerve conduction study conducted by Dr. Stumme, a neurologist, showed normal findings. Dr. McVay reviewed Dr. Stumme's findings and was of the opinion that the normal nerve conduction results were not inconsistent with what she noted to be claimant's intermittent symptomology by history. Dr. McVay also noted that claimant evidenced decreased grip strength bilaterally.

Ultimately, Dr. McVay concluded:

> "I agree that Miss Perkins' condition is medically stationary, no surgery is recommended at this time, and she is employable at her usual occupation. As far as prognosis is concerned, the patient's condition may improve, may stay the same, or may worsen in the future."

Claimant testified that she now has to use both hands to perform some tasks she formerly could do with one hand, and that she continues to experience some pain and numbness in her hands and fingers. We are not persuaded that claimant's symptoms are likely to be permanent. Claimant has not sustained her burden of proof. We, therefore, reverse the Referee's order.

ORDER

The Referee's order dated March 6, 1984 is reversed. The Determination Order dated July 13, 1983 is reinstated.

SUZANN E. WILLIAMS, Claimant
Brink, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-04201
October 9, 1984
Order on Reconsideration

The insurer requests reconsideration of the Board's Order on Review dated September 25, 1984. Specifically, the insurer requests that we clarify our order to state whether that portion of the insurer's denial which the parties agreed should be construed as denying the proposed surgery is set aside along with that portion of the denial which denied reopening as an aggravation claim. The insurer also urges us to reconsider the merits of the aggravation claim.

On reconsideration, we clarify our previous order to provide that the insurer's entire denial is set aside, including any portion of that denial which denies the proposed surgery. In all other respects we adhere to our previous order.

ORDER

The Board's Order on Review dated September 25, 1984, as amended by this order, is adhered to and republished.

WILLIAM J. ANDERSON, Claimant
Pozzi, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-07774
October 11, 1984
Order on Reconsideration

The insurer requests reconsideration of the Board's Order on Review dated June 22, 1984 which affirmed a Referee's order that had concluded that claimant established good cause for his tardy hearing request. We abated our Order on Review in order to allow claimant an opportunity to respond and to allow sufficient time to consider the insurer's motion. On reconsideration, we withdraw our original order and reverse the Referee's order.

The issue is whether claimant established good cause for requesting a hearing to protest a denial more than 60 days but less than 180 days after the denial was issued. See ORS 656.319(1)(a).

The facts are generally undisputed. Claimant compensably injured his left thumb on January 7, 1981. The claim was accepted, processed and closed by a Determination Order dated November 17, 1981 which granted no award for permanent disability. Shortly after the Determination Order, claimant traveled to Wyoming where he worked for about a month or two, first in the oil fields and then in a hotel. His hand continued to bother him while he worked in Wyoming. He did not file a claim against either of his Wyoming employers.

Claimant returned to Oregon where he saw Dr. Button on April 2, 1982. Dr. Button had previously examined claimant twice at the insurer's request. Dr. Button reported to the insurer and verbally told claimant that claimant had experienced an overuse syndrome while working in Wyoming and that the cause of his problem was that work rather than the January 1981 Oregon injury. The insurer interpreted Dr. Button's report to be an aggravation claim, and issued a denial on April 28, 1982.

That denial contains the usual notice about the right to request a hearing. Claimant testified that he took no action after he received the denial because Dr. Button had told him that

his problems were unrelated to his compensable Oregon injury. However, claimant also testified that his receipt of the denial prompted him to go to Dr. Lawton for assistance.

On June 14, 1982 Dr. Lawton reported to the insurer that he believed that claimant's condition was an aggravation of his compensable Oregon injury. On June 24, 1982 Dr. Lawton reiterated his opinion that claimant's condition had worsened. The record contains no information about whether or to what extent Dr. Lawton expressed these thoughts to claimant.

Claimant's request for hearing on the April 28 denial was filed on August 27, 1982, i.e., beyond the 60 day limit but within the additional time permitted upon a showing of good cause for delay beyond 60 days.

The Referee concluded that claimant's belief that he did not have a valid aggravation claim, based on Dr. Button's advice to that effect, was sufficient to establish good cause for the tardy hearing request. Our prior Order on Review "adopted" this line of reasoning.

On reconsideration, we do not believe that the Referee's good cause analysis can be sustained. In Margaret J. Sugden, 35 Van Natta 1251 (1983), we found that the claimant's subjective belief that a denial letter did not really mean that her claim was denied was insufficient to establish good cause for failing to request a hearing within 60 days. We stated:

> "It is our agency judgment . . . that recognizing such an excuse as 'good cause' . . . 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 understandings 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." 35 Van Natta at 1253-54.

Likewise, it is our judgment that a claimant's subjective belief that his or her claim is without merit should not be enough to excuse timely filing of a hearing request to protest a denial of that claim.

Viewed broadly and generally, any assertion of any claim is some objective indication of the potential validity of the claim; and any hearing request to protest the denial of any claim is also some objective indication of the potential validity of the claim.

We emphasize "potential validity" because there is no requirement that a claimant be certain about the merits of a claim before asserting it in the first instance or before requesting a hearing to protest a denial.

In this case, sandwiched between the original assertion of the aggravation claim and the request for a hearing to protest the denial -- actions that we regard as objective manifestations of a belief in the potential validity of the claim, we will assume for sake of discussion that claimant subjectively believed that it was unlikely he would prevail if he requested a hearing. (Claimant's action in going to Dr. Lawton within 60 days of receiving the denial might be some indication that claimant did not really regard his position to be hopeless.) If we were to find this claimant's pessimism about the potential validity of his claim sufficient to establish good cause, all any claimant would have to do to gain an additional four months in which to request a hearing would be to state that some level of knowledge about some adverse evidence created some doubts about the merits of the claim. As we said in Sugden, this would be tantamount to interpreting the "good cause" exception so broadly as to consume the general rule which requires a hearing request on a denial to be filed within 60 days.

ORDER

The Board's Order on Review dated June 22, 1984 is withdrawn and rescinded. The Referee's orders dated June 23, 1983 and August 31, 1983 are reversed. The insurer's denials dated April 28, 1982 and November 10, 1982 are reinstated and affirmed.

Board Member Lewis Dissenting:

I respectfully dissent. The majority concludes that a claimant who relied on the advice of a medical specialist that his condition is not compensable has not thereby established good cause for late filing of a request for hearing to protest a denial. In essence, the majority holds that in compensability denials no subjective belief is sufficient to establish good cause for late filing. I disagree.

Claimant was unrepresented by an attorney until after the sixty days had elapsed. He has never had a previous workers' compensation claim, so is untutored in workers' compensation procedures. He knew that his claim was denied, but he thought the denial was valid because the insurer's doctor informed him that he did not have a good claim. I believe that in circumstances like these in which an unrepresented and inexperienced claimant reasonably relies on the advice of a physician that a claim is not compensable, it is sufficient to establish good cause for late filing of a request for hearing to protest a denial of the claim.

The majority relies on Margaret Sugden, 35 Van Natta 1251 (1983), in support of its pronouncement that subjective beliefs that a claim is without merit are not sufficient to establish good cause. It is true that in Sugden we held that a claimant's subjective misunderstanding of the denial notice was insufficient

to establish good cause. However, in Sugden, the only basis for claimant's mistaken belief was that the insurer had requested claimant to submit to an additional medical examination in the same telephone conversation in which the insurer informed claimant of its denial.

In essence, we found in Sugden that claimant's belief was unreasonable. In this case, I would find that claimant's belief was reasonable because it was based on the advice of Dr. Button. There is a long line of cases in which we have excused late filings by claimants who were caught in a cross-fire between two insurers and were thus subjectively confused. E.g., Curtis A. Lowden, 30 Van Natta 642 (1981); Guy E. Stephenson, 36 Van Natta 1055 (1984). In Stephensen we said:

> "Claimant testified to some understandable confusion about which insurer was responsible.... Claimant also testified that his treating chiropractor told him that Crawford was paying for the claim and that it was properly an aggravation claim against Crawford. This is sufficient, we believe, to establish that claimant had good cause for his late request for hearing [to protest the other insurer's denial]...." 36 Van Natta at 1056.

Thus, apparently the majority is of the opinion that relying on a doctor's advice is sufficient to establish good cause for late filing to protest one insurer's denial in a responsibility context but is not sufficient to establish good cause in a regular compensability context. The distinction between the two types of cases is not readily apparent. If the majority believes that subjective beliefs are never sufficient to establish good cause, then that rule should apply to both responsibility and compensability denials. If, on the other hand, the majority believes that sometimes subjective beliefs are sufficient to establish good cause, then the standard for when they are sufficient should be whether the subjective belief is reasonable. In Sugden the subjective belief was not reasonable. In Stephensen the subjective belief was reasonable. Under the circumstances of this case, I would find claimant's subjective belief reasonable. Accordingly, I would adhere to our previous order affirming the Referee's finding that claimant had good cause for late filing.

GARY A. STEELE, Claimant
Brink, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-08552
October 11, 1984
Order Denying Request to Dismiss

The Board has received claimant's request to dismiss the insurer's request for review on the ground that the insurer has failed to timely file a 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.

DAVID R. KAU, Claimant
Bischoff & Strooband, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-04493 & 83-04494
October 12, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Peterson's order which upheld the insurer's denials of claimant's neck injury claims and declined to impose penalties/attorney fees for an unreasonable denial.

Claimant allegedly sustained industrial neck injuries on December 14, 1981 and April 8, 1983. With regard to both alleged injuries, the issue is whether claimant has satisfied his burden of proving that he sustained an accidental injury arising out of and in the course of his employment. Claimant also contends that the insurer's denial of his alleged 1983 injury was unreasonable. We agree with the Referee's findings and conclusions on all issues.

Claimant has raised an issue concerning the propriety of the Referee's evidentiary ruling, by which he refused to admit and consider certain testimony concerning a statement allegedly made by claimant's foreman. An offer of proof was made, and the disputed testimony of one of claimant's co-workers appears in the record. This testimony is offered in support of claimant's contention that he reported his injury to the foreman and attempted to file a workers' compensation claim but was rebuffed by the foreman.

The Referee apparently excluded this testimony on the basis that it constitutes hearsay. We find that the testimony of claimant's co-worker was offered as evidence of the fact that the foreman made the alleged statement, and that the statement attributed to the foreman was not offered to prove the truth of the matter asserted. Therefore, the statement is not hearsay. Sheedy v. Stall, 255 Or 594 (1970); State v. Dixon, 5 Or App 113, 126-27 (1971); see Oregon Evidence Code Rule 801 Legislative Commentary (Butterworth Legal Publishers 1983).

We have considered the testimony of claimant's co-worker on our de novo review, and we find it of limited probative value. Consideration of this additional evidence does not alter the conclusion that claimant has failed to sustain his burden of proof.

ORDER

The Referee's order dated January 27, 1984 is affirmed.

ALBERT W. MOORE, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, et al., Defense Attorneys

WCB 82-03451
October 12, 1984
Order on Remand (Remanding)

This case is on remand from the Court of Appeals. The court's order states:

> "The reports of Dr. Whitney shall be made part of the record, and Respondent may depose Dr. Whitney, obtain an independent medical examination and present rebuttal evidence on the issue of causation."

The court instructs that these activities be completed and the entire record forwarded to it within 90 days of October 4, 1984. Accordingly, the Board remands the case to the assigned Referee for proceedings and evidence taking consistent with the court's order. The Referee shall forward the completed record to the Board within 80 days of this order.

IT IS SO ORDERED.

MATHILDA D. WILLIAMSON, Claimant
Olson Law Firm, Claimant's Attorneys
Miller, et al., Defense Attorneys

WCB 83-04202
October 12, 1984
Order on Reconsideration
Rescinding Order on Review

The insurer has requested reconsideration of the Board's Order on Review dated September 28, 1984.

In support of the motion for reconsideration, the insurer states that it sent the Board a letter in May 1984 which requested that the Board hold this case in abeyance pending resolution of a related case pending before the Hearings Division. Claimant joined in the request that this case be held in abeyance. The letter requesting abeyance is not contained in this file. A copy of the letter accompanies the insurer's motion for reconsideration.

In view of these circumstances, the Board reconsiders it order and hereby rescinds it. As the parties request, this case will be held in abeyance pending resolution of the related case.

ORDER

The Board's Order on Review dated September 28, 1984 is rescinded.

DAVID H. DAVIDSON, Claimant
Evohl Malagon, Claimant's Attorney
John Snarskis, Defense Attorney

WCB 83-10486
October 16, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

The insurer requests review of Referee Baker's order which awarded claimant 15° for 10% loss of the right leg in addition to the 30° for 20% loss of the right leg awarded by Determination Order and which awarded 48° for 15% unscheduled low back disability. Extent of scheduled and unscheduled disability are the issues on review.

Claimant injured his right knee at work in June 1980. That injury led to knee surgery. In August 1982, while he was still on time loss, claimant's knee gave out and he fell, injuring his low back. The initial CAT scan indicated a mild bulge at L5-S1, but a subsequent myelogram revealed no abnormality. Dr. Freudenberg, the treating physician, suggested that claimant's complaints indicated moderate back impairment. However, several doctors, therapists, rehabilitation workers, etc., have stated that claimant has not cooperated with physical therapy efforts. Claimant was able to ride in a pickup to go deer hunting and a

surveillance film shows claimant installing a large window with only intermittent help from a friend. Claimant made a claim for unemployment benefits when he was found medically stationary but was not actively seeking employment.

Because there are no objective findings and because Dr. Freudenberg relied on the history related by claimant whom the Referee found not credible, we discount that medical opinion. Edwin Bolliger, 33 Van Natta 559 (1981), aff'd 58 Or App 222 (1981); Moe v. Ceiling Systems, Inc., 44 Or App 429 (1980). Taking all the evidence into consideration, we find that claimant has failed to prove by a preponderance of the evidence that he has any permanent back disability.

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

ORDER

The Referee's order dated April 26, 1984 is affirmed in part and reversed in part. That portion of the Referee's order which awarded 48° for 15% unscheduled disability is reversed. The remainder of the order is affirmed.

KIYOKO T. EASTMAN, Claimant
Evohl Malagon, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-03678
October 16, 1984
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Baker's order which set aside its partial denial of claimant's shoulder (and, according to claimant's testimony, neck) condition and which ordered claimant's temporary total disability benefits restored effective April 4, 1983.

I.

Claimant has an accepted occupational disease claim for bilateral carpal tunnel syndrome, with an assigned injury date of June 13, 1980. Dr. Jewell performed carpal tunnel surgery in October and December of 1982. After Dr. Jewell issued a first release to modified work in February 1983, claimant saw Dr. Wichser for bilateral shoulder spasms. Dr. Wichser said the shoulder spasms were secondary to claimant's bilateral carpal tunnel syndrome. The employer's partial denial of claimant's shoulder condition as secondary to her accepted wrist condition forms the basis of the first issue on review.

We are not persuaded that the evidence establishes a causal link between the accepted condition in one body area and the disputed condition in a different body area. Dr. Jewell, who was claimant's surgeon and primary treating physician for her carpal tunnel condition, never noted any shoulder problem. Only Dr. Wichser opines that there is some form of causal link between the former and the latter but, despite having the opportunity to do so at a deposition, Dr. Wichser never explained the basis of his opinion, i.e., never explained how a wrist condition that had been surgically corrected several months before he ever saw claimant could be causing shoulder pain when he first saw claimant. In our

opinion, this "migration" of symptoms is sufficiently unusual that we are unable to find a physician's conclusory opinion, without supporting reasoning or analysis, to be persuasive. See Moe v. Ceiling Systems, 44 Or App 429 (1980).

Furthermore, although the record is not completely clear, (1) Dr. Wichser apparently agreed at deposition that he found no objective findings of shoulder disability, no loss of shoulder function and no sensory deficit in the shoulder area but only muscle tenderness; however (2) claimant apparently was involved in some horse riding activities at about the same time she first saw Dr. Wichser, a detail that was apparently not known to Dr. Wichser. Finally, we note that claimant ultimately testified at hearing, over the employer's objections, about what a variety of people had supposedly told her about the causal nexus between her wrist problems and her shoulder problems; we attach little weight to this testimony other than to note that it suggests that additional expert evidence on the causation issue may have been available, but it is not in this record.

II.

We turn to the issue of claimant's entitlement to time loss benefits. Claimant's arguments on this point, if we understand them correctly, include the assertion that she was entitled to the time loss benefits in question because she was unable to work due to the muscle spasms in her shoulders. Having concluded that the shoulder condition has not been proven to be compensable, it follows that this argument fails.

Claimant's alternative and primary argument is that she was entitled to additional time loss on her accepted carpal tunnel claim. As previously stated, Dr. Jewell first released claimant to light work in February 1983, but he revoked that release within about a week. Dr. Jewell again released claimant to light work on April 4, 1983, after examining claimant on March 30, 1983. The employer had provided Dr. Jewell with written descriptions of four light duty jobs which the employer had available for claimant; Dr. Jewell stated that claimant was released to do any of those jobs. That Dr. Jewell so advised claimant is confirmed both by Dr. Jewell's March 30 chart note and by claimant's hearing testimony.

Claimant disagreed with Dr. Jewell's modified work release, testifying as follows:

> "Q: [Did you then] go back and talk to the employer about a light duty job . . .?
>
> "A: No, I didn't because I have been on light duty before, and there is no light duty there."

On April 6, 1983 the employer sent claimant a letter advising her as follows:

> "We do have light duty work available and since your physician has released you to light duty work, compensation benefits will cease as of April 4, 1983. I would suggest that you contact Bill Weils for return-to-work on a light duty basis."

Claimant failed to respond in any way to this letter, other than filing a hearing request on April 20, 1983 contending that the termination of her time loss benefits was improper.

OAR 436-54-222(6) contemplates reducing a claimant's benefits from temporary total disability to temporary partial disability when the claimant refuses to return to modified work. (The modified work offered in this case was at claimant's pre-injury wage, so her temporary partial disability benefits would be nothing.) The Referee apparently concluded that the employer failed to comply with the mechanical requirements of OAR 436-54-222(6) and ordered claimant restored to temporary total disability.

We disagree. OAR 436-54-222(6) 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 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 rate payable; an accurate description of the job duties and that the attending physician has said the worker is capable of performing the employment."

Regarding subsections (a) and (b), the Referee found that the job descriptions supplied to Dr. Jewell were unsatisfactory. We generally disagree as set forth below.

The employer argues that, although it did not specifically satisfy the requirements of subsection (c), it substantially complied with that subsection. We generally agree as set forth below.

As we see it, most of the parties' and the Referee's concerns with the various details in OAR 436-54-222(6) really miss the mark in this case. The employer notified Dr. Jewell about modified work that was available for claimant. Dr. Jewell then notified claimant about this available work, as indicated in his March 30, 1983 chart note:

"I have asked that [claimant] return to work on a modified type duty basis. The appropriate papers were issued to [claimant]."

While "nits" can probably be "picked" with the level of details that the employer provided to Dr. Jewell, or the level of details that the employer provided directly to claimant or indirectly to claimant through Dr. Jewell, the ultimate problem with basing any decision on such nitpicking is that claimant's position, as stated rather emphatically in her hearing testimony, was that she refused to return to work for this employer because of her belief that she was physically unable to do any available job. The problem was not that claimant was unaware of the details of the offered modified work; rather, claimant felt she was sufficiently aware of the details to form the opinion that she was not able to do the offered modified work.

Claimant's emphatic position was based in part on her shoulder condition, which we have concluded was not proven to be compensable, and in part on her compensable wrist condition. Focusing to the extent possible only on the compensable wrist condition, we cannot say that claimant's beliefs about her inability do to modified work -- regardless of how strongly held -- should be accorded more significance than the contrary opinion of her treating physician. Therefore, the employer properly terminated claimant's temporary total disability benefits when she refused offered modified work that Dr. Jewell agreed she was capable of performing.

ORDER

The Referee's order dated October 6, 1983 is reversed. The employer's partial denials dated April 4, 1983 and May 6, 1983 are reinstated and affirmed to the extent that they denied: (1) compensation for temporary total disability beyond April 4, 1983; and (2) benefits for claimant's shoulder/neck condition as secondary to claimant's accepted occupational disease claim for carpal tunnel syndrome.

Board Member Lewis Dissenting:

I respectfully dissent.

On the issue of the compensability of claimant's shoulder problems, Dr. Wichser explained that the shoulder developed a reflex spasm in response to the carpal tunnel syndrome. Therefore, he opined, the shoulder problem was causally related to the compensable carpal tunnel syndrome. I would find Dr. Wichser's uncontroverted opinion sufficient to establish the compensability of the shoulder problems.

On the issue of claimant's entitlement to further time loss benefits, the effect of the majority decision is to allow the employer to unilaterally terminate all TTD benefits even though claimant is not released to regular work, is not doing her regular work and is not medically stationary.

The relevant facts are that claimant has an accepted occupational disease claim for carpal tunnel syndrome. Her

condition was not medically stationary at the time of hearing. Dr. Jewell released claimant to light work on March 30, 1983. Claimant testified that Dr. Jewell informed her that she was released to light work on March 30, 1983. In April 1983 the employer provided claimant's treating physician, Dr. Jewell, with descriptions of four light duty jobs. On April 4, 1983 Dr. Jewell signed a statement saying that claimant could perform the duties described in the four job descriptions. Two days later, the employer issued a letter containing the standard appeal notice for denials which stated:

> "We do have light duty work available and since your physician has released you to light duty work, compensation benefits will cease as of April 4, 1983. I would suggest you contact Bill Weils for return-to-work on a light duty status."

On June 1, 1983 the employer issued a clarifying letter apparently intended to justify termination of claimant's benefits under OAR 436-54-222(6). It stated:

> "This light-duty work is still available and has been since April 4, 1983 with the concurrence of your attending physician Dr. Jewell. If you return to work at a light-duty job, you would be entitled to temporary partial disability benefits. But, we would pay you at your regular wage. Therefore, temporary partial benefits would not be indicated."

Thus, in summary, claimant was informed by her treating doctor on March 30, 1983 that she was released to light work. Her physician approved claimant's release to four jobs described by the employer. There is no indication that claimant was ever provided with a copy of the job descriptions, the beginning time and place of the job, or the duration of the job. She was not informed of the rate of pay until June 1, 1983. The majority finds that these circumstances are sufficient to establish substantial compliance with OAR 436-54-222. I disagree.

OAR 436-54-222(6) specifically requires that claimant be provided with a written offer. Apparently the majority believes that the denial letter constituted a written offer to claimant. The regulation further provides that the written offer contain an accurate description of the jobs offered. Claimant was never provided with a description of the jobs offered, let alone an accurate description. The Referee found, and I agree, that the descriptions provided to Dr. Jewell were not accurate. Claimant testified that every one of the four jobs required repetitive hand motions. None of the job descriptions indicates that requirement.

Thus, the majority finds that a release to light work by the treating physician plus a denial which suggests contacting the employer for possible light work are sufficient to establish substantial compliance with a very specific regulation. The majority apparently believes that because claimant later testified that she would not have taken any job with that employer, the employer is thereby justified in unilaterally terminating all time loss benefits under the pretense that it has substantially

complied with the regulation. This is ex post facto reasoning at its worst.

Under the majority's reasoning, all an insurer or employer need do to unilaterally terminate time loss benefits is to provide the treating phyisician with a job description (whether accurate or not) of a light job with a rate of pay the same as claimant's regular job, get the physician's approval for the claimant to try the job and then issue a denial of further benefits with a postscript suggesting that the claimant contact the employer for light duty.

The obvious purpose of the detailed requirements contained in the regulation is to make sure that the claimant is fully informed of all the particulars of light work offered so that she can make an informed decision whether to accept or reject the offered work. It is only when claimant has rejected the offered work that the insurer or employer is authorized to reduce time loss benefits. In this instance the claimant was informed of almost none of the particulars of the offered work. Under the majority's decision, claimant's rights to be informed about proposed jobs become virtually nonexistent.

I would affirm the Referee and hold that claimant is entitled to temporarty total disability benefits from April 4, 1983.

CHARLES E. FISCHER, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-06763
October 16, 1984
Order on Review

Reviewed by Board Members Lewis and Barnes.

The SAIF Corporation requests review of those portions of Referee Braverman's order which had the effect of requiring separate temporary total disability payments for overlapping periods of time loss caused by separate injuries.

Claimant suffered a compensable right wrist injury in April, 1982. Claimant returned to light duty work and injured his right foot on July 27, 1982. A Determination Order dated January 5, 1983 closed the wrist claim with an award of time loss from April 26, 1982 to October 21, 1982. A Determination Order dated July 11, 1983 closed the foot claim with an award of time loss from July 29, 1982 to June 10, 1983, less amounts paid on the wrist claim.

The Referee set aside the "less-amounts-paid" portion of the latter Determination Order. The Referee thus ordered, in effect, that claimant should receive double payment of compensation for temporary disability between July 29, 1982 and October 21, 1982 -- one payment on the wrist claim and a separate payment on the foot claim.

We disagree. The purpose of time loss on an accepted claim is to compensate a claimant for loss of income. Steinnon v. SAIF, 68 Or App 735 (1984). The governing statute, ORS 656.210(1), focuses not upon the amount an insurer must pay, but rather upon the amount the injured worker is to receive: "When the total

disability is only temporary, the worker shall receive . . . . " (Emphasis added). Any claimant, including this claimant, is made whole by payment of 100% of the appropriate time loss rate whether the claimant is off work due to one, two or more injuries.

Moreover, there is a general policy to the effect that a claimant should not be able to receive and retain double (or some other multiple) benefits. See Petshow v. Portland Bottling Co., 62 Or App 614 (1983). For this claimant to receive 200% of the appropriate time loss rate for almost three months is inconsistent with that policy.

ORDER

The Referee's order dated January 19, 1984 is affirmed in part and reversed in part. That portion of the Referee's order which awarded claimant additional compensation for temporary total disability between July 29, 1982 and October 21, 1982 is reversed. The remainder of the Referee's order is affirmed.

RICHARD L. FOLKENBERG, Claimant
Steven Pickens, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-07457
October 16, 1984
Order on Remand

On review of the Board's order dated September 28, 1983 the Court of Appeals reversed the Board's order and remanded to the Board with instructions to reinstate the order of the Referee dated February 24, 1983. Folkenberg v. SAIF, 69 Or App 159 (1984).

Accordingly, the Board's order dated September 28, 1983 is vacated and the Referee's order dated February 24, 1983 is republished and affirmed.

IT IS SO ORDERED

DANIEL P. MIVILLE, Claimant
Ringo, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06440
October 16, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Seymour's order which set aside its denial of claimant's aggravation claim for a low back condition.

SAIF contends claimant's on-the-job incidents in Washington and Indiana materially contributed to his disability or need for medical services. Consequently, SAIF argues that, under the last injurious exposure rule, it is not responsible for claimant's worsened low back condition. We agree and reverse.

In November 1980 claimant suffered a compensable low back injury while working as a hospital orderly for SAIF's insured. The diagnosis was radicular low back discomfort on the right. A myelogram noted minimal changes at L4-5 which were "compatible with intervertebral disc pathology and possible extradural compression of the left L5 nerve root sheath."

Claimant has a preexisting condition of spondylolysis and spondylolisthesis. Further, he has had two prior compensable back strains, as well as a back injury while serving in the Air Force.

None of these injuries resulted in an award of permanent disability.

Following the November 1980 incident, claimant was off work for two months. His claim was subsequently closed, with no permanent disability award.

The claim was reopened in May 1981. Claimant was found medically stationary in November 1981. A December 11, 1981 Determination Order awarded claimant 5% permanent disability.

Since the December 1981 award, claimant has experienced at least three incidents involving his low back, each occurring on-the-job but in other jurisdictions. In October 1982, while working for a Washington department store, claimant suffered severe back pain when he attempted to lift a 50 pound crated portable bar. After emergency room treatment, claimant was placed in traction. His Washington claim for compensation benefits was "accepted as an aggravation of a pre-existing condition."

In February 1983 claimant experienced two incidents in Indiana while working as a hospital orderly. One incident resulted in emergency room treatment, the other in 3 days of hospitalization. Following his hospitalization, his attending Indiana physician opined that claimant sustained no permanent impairment. Claimant did not advise the doctor of his previous back injury or of his Washington claim. He filed a claim for Indiana compensation benefits, but had received no reply at the time of hearing.

Claimant has treated with Dr. Erkkila, orthopedist, intermittently since 1980. We find that Dr. Erkkila has the most complete history concerning claimant's low back problems and treatment. Therefore, his opinion shall be afforded due deference. Dr. Erkkila felt that the out-of-state events had a specific incremental additive effect to the initial November 1980 event. However, somewhere between 75-85% of claimant's condition was probably due to the November 1980 injury.

The Referee concluded that since there were three separate out-of-state industrial incidents, which collectively caused 15-25% of claimant's current problem, it could not be said that any of the three incidents were a "material" contribution to claimant's disability. Consequently, he found that SAIF remained responsible for claimant's worsened condition. The Referee relied on Peterson v. Eugene F. Burrill Lumber, 294 Or 537 (1983), which held that the last injurious exposure rule did not apply under a successive injury theory unless the subsequent injury materially contributed to the disability.

We are persuaded that the subsequent out-of-state incidents constituted independent and material contributions to claimant's disability and need for treatment. We have previously defined "material" contribution as one which causes the worker to become disabled or incur the need for medical services earlier than otherwise would have occurred in the absence of the injury. Wilma H. Ruff, 34 Van Natta 1048 (1982).

Accordingly, we find that the last injurious exposure rule should apply. Therefore, responsibility for claimant's current worsened condition shifts from SAIF to a subsequent employer, outside of our jurisdiction.

As an alternative theory, the Referee found that the last injurious exposure rule did not apply because Oregon had no jurisdiction over the out-of-state incidents. The Referee applied the Grable analysis. Grable v. Weyerhaeuser, 291 Or 387 (1981). Since claimant had established that his compensable injury had materially contributed to his disability, under the Grable analysis the last injurious exposure rule did not operate to free SAIF from responsibility. The Referee further reasoned that claimant's Oregon benefits could be adjusted to consider claimant's out-of-state recovery.

In Grable, supra, a worker suffered a compensable injury and, after returning to work, an off-the-job injury. The Grable court held that if the worker established that the on-the-job injury was a material contributing cause of the worsened condition, the employer remained responsible for the worker's benefits. The court reasoned that in establishing that a compensable injury was a "material contributing cause" of a worker's condition, the worker had necessarily established that the worsened condition was not the result of an "independent, intervening" non-industrial cause. Grable, 291 Or at 400-401.

We find that a Grable analysis does not apply to this particular situation. Therefore, the last injurious exposure rule does apply, shifting responsibility for claimant's current worsened condition from SAIF.

Claimant has received compensation for one out-of-state injury and has filed for Indiana benefits for at least one other industrial injury. To find that he is entitled to recover Oregon benefits would enable him to recover additional compensation for essentially the same condition. Such a result would be contrary to the policy behind Grable which seeks to ensure benefits to a worker as long as the compensable injury has materially contributed to the current condition. Grable should not be employed to grant claimant an opportunity to recover a windfall of workers' compensation benefits merely because he sustained industrial injuries in other jurisdictions.

Furthermore, we cannot envision how claimant's Oregon benefits could be adjusted to accomodate for his past and future out-of-state recoveries. Such an accomodation would undoubtedly be a "processing nightmare" considering the logistics involved and the various intricacies of foreign systems. Lacking jurisdiction over the claims, we fail to see how the matter could be effectively policed to insure that claimant was receiving only his "Oregon" equivalent of workers' compensation benefits.

Our decision does not conflict with the Board's recent decision in Dick A. Comstock, 36 Van Natta 1115 (1984). In Comstock, we held that the Grable test, rather than the last injurious exposure rule, applied where the claimant's compensable injury materially contributed to his current worsened condition, even though his work exposure, while self-employed but uninsured, also contributed to that condition. Unlike Comstock, claimant has at least one accepted claim and has filed for further benefits in other jurisdictions. These claims concern the same condition for which claimant now seeks Oregon benefits. Once again, to apply the Grable analysis would enable claimant to recover compensation over and above that to which he is entitled.

ORDER

The Referee's order dated March 5, 1984 is reversed. The SAIF Corporation's denial dated June 28, 1983 is reinstated and affirmed.

WANDA M. PRUITT, Claimant
James P. O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-01958
October 16, 1984
Order Denying Request to Dismiss

The Board has received claimant's request to dismiss the SAIF Corporation's request for Board review on the grounds that SAIF did not file it's appellant brief within the schedule set forth for filing of briefs.

The Board normally does not reject a brief that has been submitted a few days past the filing deadline, and in this instance, although it is certainly borderline, we will accept SAIF's brief even though it was filed eight days late. Respondent has 20 days from the date of this order to file it's respondent's brief. The request for dismissal hereby is denied.

IT IS SO ORDERED.

KENNETH E. BOHARD, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07524
October 18, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Podnar's order which: (1) concluded that claimant had not proven that his claim was prematurely closed by the Determination Order dated October 7, 1983; (2) modified that Determination Order to award claimant compensation for 20% loss of his left arm rather than 20% loss of his left forearm; (3) found that claimant had not proven any unscheduled disability; and (4) modified the beginning date of claimant's aggravation rights.

The Board affirms and adopts the Referee's order on all issues except the extent of claimant's scheduled disability.

The Determination Order awarded claimant 30° for 20% loss of the left forearm. The parties stipulated at this hearing that claimant's award should be based on the entire arm, not just the forearm. The Referee found 20% loss of the arm, which resulted in an award of an additional 8.4 degrees.

The residuals of claimant's compensable injury primarily involve the ulnar nerve distribution at the elbow, wrist and into claimant's left hand. There is a loss of extension and pain at the elbow. There is numbness and loss of strength in the hand. Considering the evidence as a whole, we conclude that claimant would be more properly compensated by an award for 30% loss of use or function of his left arm.

ORDER

The Referee's order dated April 12, 1984, is affirmed in part

and modified in part. The Referee's order is modified to award claimant an additional 19.2° for 10% loss of his left arm, making a total award of 57.6° for 30% loss of his left arm. Claimant's attorney is allowed 25% of the additional compensation granted by this order, not to exceed $3,000, as a reasonable attorney fee. The remainder of the Referee's order is affirmed.

KENNETH N. CROCKER, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-83009
October 18, 1984
Third Party Distribution Order

This matter is before the Board on the SAIF Corporation's application for an order distributing the proceeds of a third party recovery obtained by claimant's settlement of a civil action. ORS 656.593(1), (3). SAIF has approved the settlement. ORS 656.587. SAIF seeks reimbursement for its current expenditures paid in connection with this claim and expressly waives any right of reimbursement for anticipated future claim costs. See ORS 656.593(1)(c). Claimant contends that SAIF is bound by the terms of an oral agreement, according to which SAIF agreed to reduce its statutory lien by $8,000 in consideration of claimant's withdrawal of his workers' compensation claim. Claimant contends, therefore, that SAIF is not entitled to reimbursement to the extent presently claimed.

Claimant was injured in a motor vehicle accident in May of 1980 while working in the course of his employment. Claimant filed a claim with SAIF, the employer's industrial insurer, and the claim was accepted and processed. Claimant also elected to pursue a civil action for damages against the third party allegedly responsible for causing the motor vehicle accident. See generally ORS 656.154, 656.578, 656.593(1). Claimant entered into a structured settlement of his third party action, by the terms of which he was to receive an initial cash payment of $65,000, monthly payments thereafter and additional cash payments periodically over the next 20 years. By letter dated September 28, 1983, SAIF's third party claims section expressly granted its approval of this structured settlement, stating that funds received at the time of settlement should be held in claimant's attorney's trust account until such time as a distribution agreement was reached.

SAIF and claimant thereafter apparently engaged in negotiations concerning an appropriate distribution of the third party proceeds. A letter from SAIf to claimant's attorney, dated October 12, 1983, indicates that an agreement had been reached, according to the terms of which SAIF would reduce its statutory lien by a maximum of $8,000
in consideration of claimant's request that his workers' compensation claim be denied. By letter dated November 4, 1983 addressed to SAIF, claimant personally stated his agreement with a denial of his workers' compensation claim in consideration of SAIF's reduction of its lien in the sum of $8,000. According to this letter, claimant expressly requested that his claim be denied.

On December 2, 1983 SAIF advised claimant that it was unable to comply with claimant's request in view of the Supreme Court's recent decision in Bauman v. SAIF, 295 Or 788 (1983), wherein the court held that a claim, once accepted, may not be denied unless there is a showing of "fraud, misrepresentation or other illegal activity."

SAIF states that it has no basis upon which to allege that any fraud existed or exists in connection with this claim and that, therefore, it is unable to withdraw its acceptance and deny the claim. It is claimant's position that Bauman should not be "applied retroactively" in order to allow SAIF to "increase its lien," and further that, because SAIF has agreed to reduce its statutory lien, it is not now at liberty to change the terms of its agreement.

We do not view the issue as one of "retroactive application" of Bauman as claimant's initial submission to the Board seemingly suggests. Rather, as claimant's more recent statement reflects, the issue is the binding effect of the parties' oral agreement concerning distribution of the third party proceeds. Claimant cites Denton v. EBI Companies, 67 Or App 341 (1983), and SAIF v. Cowart, 65 Or App 733 (1983), in support of his position that SAIF is bound by the terms of the parties' agreement. Neither case requires this conclusion.

In Denton the claimant settled his third party action in reliance upon the industrial insurer's representations concerning the extent of its lien for claim costs paid to date and anticipated future expenditures. The following passage from our Third Party Distribution Order in Denton serves to highlight the factual differences between Denton and the case presently before us:

> "Following the settlement, EBI was paid $55,630.84 as reimbursement for expenditures made up to that time. A written agreement entitled 'Stipulation and Agreement' signed by claimant's attorney, counsel for EBI and an authorized representative of EBI recites that EBI was to be paid $55,630.84 'in satisfaction of [its] lien for expenses advanced on behalf of [claimant].' The stipulation also recites that $45,000 was to be placed in a special account pending resolution of the dispute concerning the proper distribution of the proceeds and further provides that EBI 'claims a lien in said settlement in the sum of . . . $40,361 for expected future expenditures.'" John Denton, 34 Van Natta 1598 (1982).

We held, and the court agreed, that EBI was bound by the terms of its written agreement, and that its lien was limited to the amounts stated therein.

In this case, unlike Denton, there is no written agreement by the terms of which the industrial insurer has limited its right to reimbursement. Nor is there any allegation in this case that, in settling his third party action, claimant relied upon SAIF's representations concerning the extent of its lien.

In SAIF v. Cowart, supra, the court found that claimant and SAIF had agreed to a settlement of claimant's cause of action for the sum of $65,000, pursuant to ORS 656.587, and that claimant, thereafter, attempted to allocate $15,000 of the settlement proceeds to his wife in satisfaction of her claim for loss of consortium. The court stated:

> "Although claimant's attorneys may have overlooked Mrs. Cowart's right to a part of the settlement when negotiating with SAIF for its approval, SAIF was entitled to rely on claimant's initial representation that the entire settlement was for his cause of action. Clearly, the parties agreed to a settlement of claimant's cause of action for $65,000; he thereafter attempted to change the agreement." 65 Or App at 738.

As in Denton, supra, it was found that one of the parties had relied upon the other party's representation in the settlement approval process required by ORS 656.587. The element of reliance simply does not appear in this case.

Because claimant's third party recovery was obtained by settlement, the operative statutory provision is ORS 656.593(3), which provides:

> "A claimant may settle any third party case with the approval of the paying agency, in which event the paying agency is authorized to accept such a share of the proceeds as may be just and proper and the worker or the beneficiaries of the worker shall receive the amount to which the worker would be entitled for a recovery under subsections (1) and (2) of this section. Any conflict as to what may be a just and proper distribution shall be resolved by the board."

In Marvin Thornton, 34 Van Natta 999 (1982), we held that the statutory formula for distribution of the proceeds of a third party recovery obtained by judgment, as set forth in subsection (1) of ORS 656.593, applies to distribution of a third party recovery obtained by settlement. More recently, in Robert T. Gerlach, 36 Van Natta 293 (1984), we made a slight departure from Thornton in order to " . . . in effect, reconstruct an agreement the parties substantially entered into, but which subsequently fell apart primarily due to an unfortunate failure of communication." 36 Van Natta at 296. We found it appropriate to depart from the statutory distribution formula in Gerlach because the claimant in that case had entered into a settlement of his third party action in substantial reliance upon the industrial insurer's promise to compromise a portion of its lien.

In this case there is no element of reliance on claimant's part which might justify departure from the statutory distribution formula stated in ORS 656.593(1). Rather, claimant essentially seeks an order which would have the effect of enforcing an arrangement, not reduced to writing, negotiated with SAIF after and independently of the third party settlement process. Under these circumstances, we find no reason to depart from our holding in Marvin Thornton, supra; therefore, we order distribution in accordance with the statutory formula.

We also note that the agreement which claimant would have us

enforce contemplates that claimant will, in effect, withdraw his workers' compensation claim in exchange for the present receipt of a larger portion of the proceeds of his third party recovery. Such an agreement appears to be inconsistent with the policy expressed by our decision in William J. Hamilton, 36 Van Natta 576 (1984), and ORS 656.236(1). See also SAIF v. Parker, 61 Or App 47 (1982).

ORDER

The proceeds of claimant's third party recovery shall be distributed in accordance with the distribution formula set forth in ORS 656.593(1), and the SAIF Corporation shall be paid and retain the sum of $22,876.62 in full and final satisfaction of its statutory lien.

STEVEN R. JONES, Claimant
Velure & Bruce, Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 83-07732
October 18, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Galton's order which granted claimant 208° for 65% unscheduled permanent disability in addition to the 16° for 5% unscheduled disability awarded by Determination Order. Claimant cross-requests review alleging that he is permanently and totally disabled or in the alternative that he is entitled to an award for 100% unscheduled disability. The only issue on review is extent of disability.

Claimant was compensably injured in July 1979 in a truck accident. His injuries have been diagnosed as "scalp contusion, cervical strain, shoulder pain, vertigo, post-concussion syndrome, vestibular dysfunction, possible brain trauma, possible organic brain syndrome, post-traumatic and/or muscular tension and/or migraine equivalent headaches, dizziness, Meniere's disease, and transient hypertension." The Referee found and we agree that "claimant suffers from causally-related vertigo and post-concussion syndrome." A Determination Order awarded 16° for 5% unscheduled permanent disability.

The Referee found claimant and his employer credible on the issue of claimant's ability to work full-time. After reciting the factors to consider in making an award for permanent disability, the Referee increased the award to 224° for 70% unscheduled permanent disability. We disagree.

After considering all the evidence and the guidelines contained in OAR 436-65-600 et seq., and compared with cases which granted smaller amounts of disability, e.g. Myron C. Smith, 35 Van Natta 753 (1983) (50% disability), aff'd mem. 66 Or App 752 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982) (40% disability); Eugene A. Page, 36 Van Natta 288 (1984) (40% disability); Ronald W. Doud, 35 Van Natta 756 (1983) (30% disability), we conclude that claimant would be most appropriately compensated by an award of 112° for 35% unscheduled disability.

ORDER

The order of the Referee dated January 25, 1984, is modified to award claimant 96° for 30% unscheduled permanent disability in addition to the 16° for 5% unscheduled disability previously awarded by Determination Order.

LILLIE G. McCLENDON, Claimant
Elliott Lynn, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-10845
October 18, 1984
Order on Review

Reviewed by Board Members Lewis and Barnes.

The self insured employer requests review of Referee Mulder's order that set aside its denial of claimant's occupational disease claim for right shoulder arthritis.

Claimant alleges that her 13 years of repetitive motions involved in her work packaging cookies and crackers is the major cause of her arthritis. There are three medical opinions in the record.

Dr. Eisendorf commented that claimant evidenced a "destructive process [of the] right acromioclavicular joint, etiol[ogy] undetermined."

Dr. Post opined: "With these changes clearly evolving over the past year and a half and yet with symptoms only over the past half year or so, this would seem to be a pre-existing condition without specific industrial relationship."

Dr. Cherry stated: "It is my impression that [claimant] does have osteoarthritic change at the right acromioclavicular joint due to or aggravated by her occupation."

The Referee apparently found Dr. Cherry's opinion the most persuasive. We disagree because we think there are at least two distinct flaws in Dr. Cherry's assessment. First, he fails to quantify the magnitude of occupational causation. While "magic words" are not essential, Dr. Cherry offers little in the way of explanation or analysis which could form the basis of a finding of major causation.

Second, we are persuaded that Dr. Cherry's opinion is based upon a history of claimant's work activities that is inconsistent with the balance of the evidence, including claimant's testimony. Dr. Cherry apparently understood that claimant's work involved considerable overhead use of her arms; in fact, almost all of claimant's work involved using her arms at waist or chest height.

ORDER

The Referee's order dated February 16, 1984 is reversed. The employer's denial dated October 24, 1983 is reinstated and affirmed.

LETTIE REYNOLDS, Claimant
Bischoff, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 82-02757
October 18, 1984
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated August 31, 1984. The Board issued its Order of Abatement on September 25, 1984 to allow claimant an opportunity to respond. Having received no response, we now address the insurer's request.

Claimant sustained a compensable left shoulder injury in December 1978 when she was struck by a light fixture while bending down to sweep under a table. Following an August 1981 hearing, claimant received a permanent disability award. In February 1982 claimant filed Form 801, contending her left knee condition was related to the December 1978 incident. In a March 16, 1982 chart note, Dr. Roy stated that claimant related her left knee pain to the light fixture incident, noting that the pain began several months after the incident and had become increasingly more severe. In a May 3, 1982 "To Whom It May Concern" letter, Dr. Roy opined that claimant's knee injury had rendered her totally disabled for an undetermined length of time. The insurer took no action on the claim until January 31, 1983, when it issued its denial.

Although the Referee upheld the insurer's denial of the aggravation claim, he found the March chart note and the May report, taken together, constituted a notice or knowledge of a medically verified inability to work resulting from the worsened condition. ORS 656.273(6). Therefore, interim compensation should have been forthcoming within 14 days of the date of notice of a medically verified inability to work. Accordingly, he found claimant was entitled to interim compensation, as well as accompanying penalties and attorney fees from May 3, 1982 until January 31, 1983.

We agree with the Referee's analysis. The duty to pay interim compensation exists irrespective of the ultimate finding as to the compensability of a claim. Jones v. Emmanuel Hospital, 280 Or 147 (1977). When the underlying aggravation claim is determined not to be compensable, interim compensation runs from the date of notice of a medically verified inability to work. Kosanke v. SAIF, 41 Or App 17 (1979); ORS 656.273(6). Although it is not clear exactly when the insurer received Dr. Ray's May 3, 1982 letter, we think it appropriate under these circumstances to consider the letter's date as the beginning date for interim compensation purposes.

We believe the documents received by the insurer (the Form 801, chart notes and medical report) were sufficient to place it on notice of claimant's medically verified inability to work as a result of a worsened condition. The documents certainly established a possible relationship between claimant's temporary total disability and the 1978 industrial incident. Under these circumstances, we feel it was incumbent upon the insurer to initiate some action or investigation designed to respond to the claim. One of these actions should have been the payment of interim compensation within 14 days of notice of a medically verified inability to work resulting from a worsened condition.

ORS 656.273(6). Instead, the insurer neither accepted, denied nor paid interim compensation for some 9 months. Consequently, the insurer should be assessed penalties and attorney fees for its unreasonable conduct. ORS 656.262(10).

In conclusion, the Board grants the insurer's request for reconsideration. However, on reconsideration, the Board adheres to its former order which is republished by this reference.

IT IS SO ORDERED.

VIRGINIA S. SANDERS, Claimant
Olson Law Firm, Claimant's Attorneys
Bottini & Bottini, Defense Attorneys
G. Howard Cliff, Defense Attorney

WCB 83-01235 & 83-05955
October 18, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of those portions of Referee Nichols' order which: (1) awarded her a total of 15% (48°) unscheduled permanent partial disability for a low back condition, whereas prior Determination Orders had awarded her a total of 10% (32°); (2) found that her claim was not prematurely closed; and (3) found that Industrial Indemnity Company's denial of her aggravation claim was not unreasonable. Industrial cross requests review of that portion of the Referee's order which set aside its denial of claimant's aggravation claim and upheld Mission Insurance Company's denial of claimant's alternative new injury claim.

The Board affirms the order of the Referee with the following comment. In determining claimant's permanent loss of earning capacity, we have considered all of the factors delineated in OAR 436-65-600 et seq., including permanent impairment attributable to claimant's disabling pain. Harwell v. Argonaut Insurance Co., 296 Or 505 (1984). After considering these factors and the evidence as a whole, we find that a 15% disability award is a fair and adequate assessment of claimant's permanent loss of earning capacity due to the compensable injury. ORS 656.214(5).

ORDER

The Referee's orders dated March 6 and 19, 1984 are affirmed.

RONALD L. WARNER, Claimant
Evohl Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 83-11702
October 18, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Nichols' Order on Reconsideration which set aside its denial of claimant's claim for aggravation of his back injury. The issue is compensability.

Claimant suffered a compensable injury to his neck and back in September 1976 while employed as a choker setter. By means of a Determination Order and two subsequent stipulations, claimant was eventually granted a total award of 128° for 40% permanent

partial disability to his back. The last award or arrangement of compensation was January 20, 1982.

On June 15, 1983 claimant saw Dr. Rabin, a chiropractor, who had treated him earlier. Dr. Rabin opined that claimant's complaints were "a minor exacerbation..." of his permanent condition, noting that his condition was basically unchanged since he had last seen claimant. The record is silent as to when Dr. Rabin had last seen claimant prior to June 15, 1983.

On October 31, 1983 claimant saw Dr. Markee, whose chart notes indicated that claimant complained of constant neck and back pain enhanced with activity and occasional pain and numbness of his arms and legs. Dr. Markee referred claimant for physical therapy.

On January 26, 1984 Dr. Markee noted that claimant experienced an onset of pain and numbness when a wrench slipped as he was working on his car three days earlier.

Dr. Markee's chart notes show that on or about February 10, 1984 he apparently responded to a letter from the SAIF Corporation asking several questions relating to claimant's condition. The notes show his responses to be that he felt that according to claimant's statements to him on October 1983 there "apparently" had been an objective worsening of claimant's condition which "apparently" involved more discomfort than would be expected to be associated with a 40% disability of that part of the body.

There is no other medical evidence.

Claimant testified that after his claim was closed in January 1982 he went back to work in the woods, first as a choker setter, his preinjury occupation, then as a chaser on the landing. He stated that he was unable to perform either of these heavy jobs because of pain.

We are not persuaded that claimant has established his aggravation claim. Claimant's testimony shows a continuing experience of pain after the January 1982 award of compensation, but does not establish that his condition was any worse in October 1983 than it was in January 1982. Dr. Markee's opinion is based solely upon claimant's statement and with no basis for a comparison of his condition between January 1982 and October 1983. His chart notes do not mention claimant's attempted return to heavy logging work. We are persuaded that claimant's continuing symptoms are the waxing and waning of his disability, for which he was granted an award of 40% disability to his back, rather than a compensable aggravation.

ORDER

The Referee's order of March 15, 1984 as amended by the order of April 17, 1984 is reversed. The SAIF Corporation's denial dated February 15, 1984 is reinstated.

BORDY PURIFOY, Claimant
Charles Paulson, Attorney
Cynthia Barrett, Attorney
Noreen Saltveit, Attorney
Bloom, et al., Attorneys

WCB 83-05308
October 22, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Shebley's order which upheld the insurer's denial of his claim for aggravation.

The Board affirms the Referee's order with the following comment: The Referee stated that in order to establish an aggravation claim, claimant must provide expert medical opinion to support the claim. Since the Referee's order, the Supreme Court has stated that an aggravation claim can be established solely on the basis of lay testimony. Garbutt v. SAIF, 297 Or 148 (1984). The court noted that lay testimony may or may not be sufficient to satisfy the claimant's burden of proof. 297 Or at 151. In this case we find that claimant's testimony is insufficient to carry his burden of proof.

ORDER

The Referee's order dated January 25, 1984 is affirmed.

LINDA L. HAMILTON, Claimant
Evohl Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-07930
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Daron's order which awarded claimant additional compensation for temporary total disability compensation from July 7 to July 20, 1983 and 64° for 20% unscheduled permanent partial disability in addition to the 48° for 15% unscheduled disability granted by Determination Order.

Claimant injured her low back in December 1982 while working as a bartender. Dr. Serbu performed a laminectomy and diskectomy in January 1983.

The activities that claimant was able to engage in shortly after her surgery suggest a rapid recovery and a good surgical result. Dr. Serbu reported in February 1983:

> "[Claimant] is doing very well and denies any of her sciatic discomfort. She forward flexes normally. Straight leg-raising is negative. I have released her to start working next Monday, February 28, 1983. I have asked her to return . . . in approximately three months."

Claimant returned to work in a cafe in April 1983 as a cook, waitress and dishwasher, working six to seven hour shifts, five days a week. Claimant left that employment in June 1983 because the work was too physically demanding.

Claimant was examined by Dr. Becker, an orthopedic surgeon, in May 1983. Dr. Becker reported that Claimant complained of daily low back pain that felt worse after working two or three hours. The pain sometimes radiated into her right leg and was sometimes present upon waking. Dr. Becker stated that claimant "has an excellent result from the surgery"; "is now medically stationary"; that "no further active medical treatment is necessary"; and her "impairment would be rated at 5%, having no major limitations other than simply to follow good body mechanics for lifting, which was a pre-injury indication anyway."

Dr. Serbu subsequently expressed his agreement with Dr. Becker's findings and assessment.

On June 15, 1983 Dr. Kasher reported that he had initiated a program of "physical therapy for approximately one month." A month later Dr. Kasher reported that the physical therapy program was completed and:

> "I would agree that her surgery has provided a good result as far as the disc is involved, but she does continue to have pain in her back when she does heavy lifting. She does not have this pain when she is not working. * * * [I]t would seem to me that the appropriate action would be re-training in a field that would be less physically demanding."

A Determination Order was issued on August 10, 1983. It found that claimant was medically stationary on July 6, 1983 and entitled to compensation for temporary disability to that date. July 6 was the date of Dr. Serbu's report stating that he agreed with Dr. Becker's prior report. Also, as previously stated, the Determination Order awarded claimant 48° for 15% unscheduled disability.

The only post-Determination Order medical report in the record is from Dr. Serbu, who wrote on September 23, 1983 that claimant's condition "was definitely stable by May 21, 1983, and in my opinion it was rather stable on February 28, 1983."

The Referee concluded Claimant was medically stationary on May 21, 1983, i.e., about a month and a half before the medically stationary date established by the August 1983 Determination Order. However, the Referee did not reduce claimant's award for temporary disability; instead, he increased it by awarding additional temporary total disability from July 7 to July 20, 1983, which the Referee apparently concluded was the period of time when claimant was participating in Dr. Kasher's physical therapy program.

We disagree. Dr. Serbu, who was claimant's surgeon and primary treating physician, has opined that claimant was stationary not later than May 21, 1983. Dr. Becker is of the same opinion. What little information there is in the record about the subsequent treatment in the form of physical therapy suggests something closer to the palliative than the curative end of that spectrum and, in any event, is certainly insufficient to overcome

the opinion of the treating doctor. Claimant is not entitled to compensation for temporary disability beyond May 21, 1983.

We turn to the question of the extent of claimant's permanent disability. The Referee viewed this case as involving a conflict between Dr. Becker and Dr. Kasher; the Referee did not even mention the opinions of Dr. Serbu, claimant's surgeon. We see more areas of medical agreement than disagreement. All three doctors seem to agree that claimant achieved a good to excellent surgical result. All three doctors seem to agree that she nevertheless has some resulting minimal impairment in the form of pain, especially associated with lifting. (Dr. Becker's impairment rating of 5%, which Dr. Sebru endorsed, must have been based on disabling pain since none of the evidence suggests any other form of impairment.)

The problem, as usual, is to attempt to ascertain how disabling claimant's pain actually is. The Referee concluded that claimant's permanent disability was 35%, despite her "seeming lack of motivation." We disagree. It is clear to us that Drs. Becker and Serbu considered claimant's complaints of pain in forming their opinions of her impairment. Those opinions of relatively little impairment from pain would seem to be consistent with claimant's ability to dance and to drive long distances. Admittedly, Dr. Kasher appears to be somewhat less sanguine, but little in the way of explanation for his position is developed in his two reports in evidence. Claimant's testimony includes both a description of her back pain from prolonged standing or heavy lifting and a description of her recreational dancing activity, which sounds like it is sometimes substantial. All told, we find no persuasive basis in the record for disagreeing with the 5% impairment rating from Drs. Becker and Serbu.

We thus disagree with the 13% impairment figure used to calculate the permanent disability award granted by the August 1983 Determination Order; that figure was too favorable to claimant. On the other hand, we also disagree with the -25 figure under the labor market finding, which apparently was based on the understanding that claimant successfully returned to her pre-injury work; that figure was too adverse to claimant because claimant's return to restaurant work was brief, not completely successful and that experience indicates it is probable that her back pain now precludes her from doing the most heavy jobs in the restaurant industry on a full-time basis. Our two disagreements with the Evaluation Division's calculus -- one figure being overly favorable and another being overly adverse -- approximately cancel out. Considering claimant's minimal impairment, including disabling pain, as well as the relevant social/vocational factors, we conclude that claimant was properly compensated by an award of 48° for 15% unscheduled disability.

ORDER

The Referee's order dated March 22, 1984, is reversed. The Determination Order dated August 10, 1983 is reinstated and affirmed as to compensation for permanent partial disability and modified as to compensation for temporary disability as follows. Claimant's condition is found to be medically stationary on May 21, 1983 and no compensation for temporary disability is due beyond that date. The insurer may setoff its overpayment of temporary disability compensation against the permanent disability award.

DELBERT L. HARVEY, Claimant
Dickey & Dickey, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08860
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Mongrain's order which upheld the SAIF Corporation's "denial of responsibility for medical services." The issues are: (1) whether claimant is barred by res judicata from claiming the medical services here in issue; and (2) assuming no res judicata bar, whether the medical services are compensable.

The Referee concluded that res judicata did not bar the current "claim." SAIF argues that the Referee erred in this regard. We agree with the Referee's conclusion because we find that SAIF has not proven that the medical services here in issue were litigated in a prior proceeding. See Lewis Twist, 34 Van Natta 290, 293 (1982), affirmed 62 Or App 602 (1983).

We reverse on the merits. The medical services in question were rendered years ago when claimant was briefly hospitalized in January 1980; SAIF paid the hospital bill years ago. This "claim" has arisen as a result of SAIF's apparent efforts to recover its prior payment from the hospital, which the parties have treated as something akin to a "partial denial."

We conclude that SAIF was correct in paying the bill for claimant's hospitalization in January 1980 for either or both of the following reasons: (1) As recently reported by Dr. Saez, that hospitalization was a consequence of claimant's cervical myelogram which was a consequence of claimant's industrial injury; and/or (2) that hospitalization is compensable on a diagnostic basis pursuant to cases like Brooks v. D. & R. Timber, 55 Or App 688 (1982), and Jimmy K. Layton, 35 Van Natta 253 (1983).

In view of our conclusion on the merits, it is necessary to award claimant's attorney a reasonable fee for prevailing on this "denied claim." ORS 656.386(1).

ORDER

The Referee's order dated April 11, 1984 is reversed. The SAIF Corporation's "denial" of responsibility for payment of claimant's hospital bill for the period January 11 through January 16, 1980 is set aside, and SAIF is ordered to accept this expense. Claimant's attorney is awarded $500 for services at hearing and $275 for services on Board review, to be paid by the SAIF Corporation.

EUGENE R. JONES, Claimant
Malagon, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08605
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of those portions of Referee Seifert's order which upheld the SAIF Corporation's denial of his aggravation claim and held that SAIF was not obligated to pay the cost of Dr. Smith's December 1983 consultation report. We agree with the result reached by the Referee on both issues, although we reach our conclusions by somewhat different reasoning.

Claimant sustained a compensable injury in September of 1979. He was released for and returned to regular work in early October of 1979. A Determination Order closed his claim in early December of 1979 with an award for approximately ten days of temporary total disability. Claimant sought additional compensation for a worsened condition allegedly related to his original injury, and in December of 1982 SAIF denied the claim for reopening for the stated reason that there was insufficient evidence relating claimant's then-current complaints to his 1979 industrial injury. This denial was resolved by the parties' stipulation, which was approved in May of 1983. The stipulation resolved claimant's aggravation claim on a disputed claim settlement basis, pursuant to ORS 656.289(4). By virtue of the parties' agreement, claimant's aggravation claim remained in denied status. The parties also agreed that the denial was rescinded insofar as it denied the causal relationship between claimant's industrial injury and his then-current back complaints. It was agreed that claimant's medical expenses would be paid by SAIF under the provisions of ORS 656.245.

Claimant continued to experience low back problems, and he again requested claim reopening for a worsened condition pursuant to ORS 656.273. SAIF again denied the causal relationship between claimant's then-current complaints and his 1979 industrial injury, by denial letter dated March 2, 1984. It is this denial that is in issue in the present proceeding.

The Referee stated that this aggravation claim appeared to be "a relitigation of the aggravation issue already decided by the stipulation of May 19, 1983 rather than showing of worsening since that date." Based upon this conclusion, he upheld SAIF's denial.

Unlike the Referee, we do not believe that the present aggravation claim is appropriately resolved by determining whether claimant's condition is worse since the "last award or arrangement of compensation." Rather, we believe that a threshhold issue is whether claimant's current back condition is causally related to his original industrial injury; and we conclude that claimant has failed to establish by a preponderance of the evidence that the requisite causal relationship exists.

The medical opinions are divided. Dr. Degge, who has examined claimant twice on SAIF's referral, is consistently of the opinion that, as a result of his injury, claimant sustained a minor back strain. Claimant has a degenerative condition of the lumbar spine, diagnosed as spondylolysis, which preexisted his

industrial injury. Dr. Degge is of the opinion that this spondylolysis was neither caused nor worsened by claimant's industrial injury. Dr. Degge is of the further opinion that claimant's industrially caused back strain has resolved, and that claimant's current complaints are attributable to the ongoing degenerative condition of his lumbar spine. In support of his opinion, Dr. Degge relies on the contemporaneous emergency room record of claimant's initial treatment, in which the diagnosis was contusion of the right buttock muscles and back strain. X-rays at that time disclosed the spondylolysis, which was considered to be a preexisting condition. Dr. Degge also relies upon claimant's prompt return to work and the absence of medical attention for a period well in excess of one year after his return to work.

In support of causation, the record contains Dr. Smith's reports, which appear to state that, as a result of his injury, claimant sustained a "severe aggravation" of his preexisting spondylolysis.

The causation issue in this case is a complex medical question, resolution of which requires competent medical evidence. See Uris v. Compensation Department, 247 Or 420, 424 (1967). Because there are conflicting medical opinions, the relative persuasiveness of the respective opinions may determine whether claimant has sustained his burden of proof. Indeed, we find Dr. Degge's opinion more persuasive because it makes more sense to us that, if claimant had acquired the lesion of his fifth lumbar vertebra as a result of his industrial injury, or even if the preexisting lesion had been "severely aggravated" as suggested by Dr. Smith, claimant would not have been capable of returning to work within such a relatively short period of time. In addition, an injury of the magnitude suggested by Dr. Smith would seem to us to require more medical attention during the period immediately following the injury than is reflected in this record. Even if we were not persuaded that Dr. Degge's opinion was more persuasive than Dr. Smith's, and we found these opinions equally persuasive, the evidence would be in equipoise, and we would be unable to conclude that claimant had sustained his burden of proof.

In sum, we find that claimant sustained a relatively minor injury in 1979; that he has a preexisting structural defect of his lumbar spine which was neither caused nor worsened by his industrial injury, which resulted in a contusion and back strain. His current back complaints are attributable to his preexisting condition and are not attributable in material part to his industrial injury. Therefore, claimant's current aggravation claim must fail.

Claimant argues that the parties' stipulation in May of 1983 renders SAIF's denial of the current aggravation claim a nullity, based on the reasoning expressed in Bauman v. SAIF, 62 Or App 323, affirmed 295 Or 788 (1983). Bauman is inapposite. See also Roller v. Weyerhaeuser Co., 67 Or App 583 (1984).

If there is any support for claimant's contention that the parties' stipulation in May of 1983 has some preclusive effect upon SAIF's ability to deny further responsibility for claimant's condition in March of 1984, it is to be found in Clinkenbeard v. SAIF, 44 Or App 583 (1980). The claimant in Clinkenbeard contracted viral pneumonia, which was accepted as a compensable

occupational disease. The claimant thereafter began to suffer from diabetes mellitus and lupus erythematosus. Compensability of these conditions apparently was placed in issue, and the parties entered into a stipulation which provided that the claim would be reopened for payment of temporary total disability, "including payment of all treatment which resulted from the diabetes and from the lupus erythematosis." The stipulation further provided that when the claimant was found medically stationary, the claim would be closed pursuant to ORS 656.268. Approximately one year after this stipulation, SAIF denied the compensability of claimant's diabetes and lupus erythematosus. A Referee upheld SAIF's denial, and the Board affirmed. The court reversed, stating:

> "As we read the stipulation, the question of compensability is no longer open. The only question, assuming claimant is now medically stationary, is the extent of disability to be determined upon closure pursuant to ORS 656.268." 44 Or App at 585-86.

The stipulation in Clinkenbeard specifically provided that SAIF accepted responsibility for the disputed conditions of diabetes and lupus erythematosus. By contrast, the stipulation in this case does not specify any particular condition for which SAIF agreed to pay medical expenses. The stipulation merely refers to claimant's "current back complaints," and recites that the claim for claimant's "current back complaints shall remain accepted for the provision of treatment and payment of medical bills due to claimant under ORS 656.245." Just as a denial of current medical treatment generally will be interpreted as a denial of only then-current medical treatment and not future medical treatment, Patricia M. Dees, 35 Van Natta 120, 124 (1983), a stipulation which refers to acceptance and payment of medical expenses for a claimant's "current back complaints" or condition generally will be construed as acceptance of only those medical bills then in issue. If the parties desire or intend to agree that a specific condition is or is not the employer/insurer's responsibility, then the stipulation should so provide, as in Clinkenbeard. See Townsend v. Argonaut Ins. Co., 60 Or App 32, 36-7 (1982) ("We will not interpret the stipulations as admitting what they do not clearly state.").

Based upon our conclusion that claimant's condition is not causally related to his industrial injury, it necessarily follows that claimant is not entitled to compensation for medical services pursuant to ORS 656.245. This disposes of the issue concerning payment for Dr. Smith's consultation report. Even assuming that Dr. Smith's billing would otherwise be compensable as a medical expense, and therefore SAIF's responsibility, based upon our conclusion that the record fails to establish claimant's entitlement to treatment for his current back condition, it follows that Dr. Smith's billing would not be a compensable medical expense. Accordingly, it is unnecessary to decide the medical expense versus litigation expense issue which formed the basis of the Referee's conclusion.

ORDER

The Referee's order dated March 23, 1984 is affirmed.

OREN L. KNUPP (Deceased)
NORMA KNUPP, Claimant
Clark, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-00795
October 23, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Daron's order which upheld the SAIF Corporation's denial of her claim for death benefits. The issue on review is whether the decedent sustained an injury arising out of and in the course of his employment on September 27, 1982. Specifically, the question is one of medical causation: Whether the evidence preponderates in favor of finding that acute stress associated with an argument decedent had with his supervisor immediately prior to leaving work on September 27, 1982, was a material contributing cause of his myocardial infarction later that day.

Claimant argues that the Referee erred in his determination that Dr. Griswold's opinion was entitled to be given no weight. There are discrepancies between Dr. Griswold's understanding of the facts and circumstances leading up to decedent's myocardial infarction and the facts as found by the Referee.

Like the Referee, we find that Dr. Griswold's apparent misunderstanding of the lapse of time between decedent's argument at work and the onset of symptoms of his myocardial infarction at home casts considerable doubt upon the reliability of his opinion. Even if Dr. Griswold's opinion on causation did not suffer from this deficiency, however, we would nevertheless conclude that claimant had failed to satisfy her burden of proof by a preponderance of the evidence. Although Dr. Danner had been decedent's treating physician for a number of years, as to the causation issue presented on review, his opinion is entitled to less weight than the persuasive expert opinions of either Dr. Kloster or Dr. Rogers, who share the opinion that there is no causal connection between decedent's argument at work and his myocardial infarction later that day. Considering the deficiencies in Dr. Griswold's understanding of the facts, it is clear that claimant has failed to sustain her burden of proof.

ORDER

The Referee's order dated December 22, 1983 is affirmed.

KAY L. LANG, Claimant
Doblie & McSwain, Claimant's Attorneys
Rankin, et al., Defense Attorneys
Mitchell, et al., Defense Attorneys

WCB 83-09015 & 83-11597
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Fireman's Fund Insurance Company requests review of Referee Podnar's orders which set aside its denial of responsibility for claimant's occupational disease claim. Fireman's Fund contends that Argonaut Insurance Company, which began providing the employer's workers' compensation insurance on January 1, 1983, should be found responsible for payment of claimant's compensation. Fireman's Fund also argues that the Referee erred in awarding claimant's attorney a $400 fee.

We affirm the Referee's order in all respects. On the attorney fee issue, we do not understand the Referee to have awarded claimant's attorney a fee for services at hearing. Such an award would have been inappropriate under OAR 438-47-090(1) as interpreted in Wilfred Pultz, 35 Van Natta 684 (1983), and Robert Heilman, 34 Van Natta 1487 (1982).

Rather, we think the Referee's award of a nominal attorney fee was based on OAR 438-47-015, which provides for a fee to be awarded when a claimant's attorney is instrumental in obtaining compensation for a claimant without a hearing. Up until two weeks before the hearing, Fireman's Fund was contesting both compensability and responsibility; Fireman's Fund then withdrew its compensability denial and the matter proceeded to hearing just on the question of insurer responsibility. This situation is analogous to Edward M. Anheluk, 34 Van Natta 205 (1982), in which the claimant filed a claim, which was denied initially but later accepted, partially as a result of claimant's attorney's efforts. In Anheluk we stated:

> "Technically, claimant did not prevail on the denied claim at the hearing because a month before the hearing SAIF reversed its position and accepted the claim. We have no doubt about the authority of an insurer to reverse itself and issue notice of claim acceptance after a request for hearing. When an insurer does so, however, it is a safe bet that the request for hearing and other efforts of the claimant's attorney were instrumental in obtaining the ultimate result of claim acceptance. We thus conclude that in this kind of situation claimant's attorney is entitled to an insurer-paid fee pursuant to ORS 656.386(1)." 34 Van Natta at 205.

It would have been preferable for claimant's attorney to present an affidavit of services rendered up until the time of the concession of compensability by Fireman's Fund. There are, however, sufficient indicia of the efforts of counsel on claimant's behalf to provide an ample basis for the Referee's award of attorney fees.

ORDER

The Referee's orders dated February 29, 1984 and March 13, 1984 are affirmed.

A.M. TAYLOR, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06454 & 83-08820
October 23, 1984
Order on Reconsideration

Claimant has requested reconsidertion of the Board's Order on Review dated September 28, 1984. Claimant's motion is granted. On reconsideration, the Board adheres to its previous order with the following comment.

In our order we relied on the opinion of Dr. Gulick, the original treating physician who opined that claimant's industrial injury had resolved and that her continuing back problems were related to her obesity. Claimant argued that Dr. Gulick's opinion was undercut by the fact that claimant had lost 40 pounds and yet continued to be symptomatic. In response to that argument we stated:

> "We are unconvinced by this argument. Despite the loss of weight, claimant's lowest recorded weight is 180 pounds. At that weight she was still described 'overweight.'"

Claimant asks "On what basis in the record does the Board make such a statement?" In a report dated September 6, 1983 Dr. Wagner states:

> "[Claimant] is an overweight female of approximately 180 pounds. Her maximum weight was 220 pounds and she has lost 40 pounds in the previous year."

We deferred to Dr. Gulick's opinion in part because he was the initial treating physician. It was his opinion that her continuing problems were related to her obesity. Even though she had lost 40 pounds, Dr. Wagner still described her as overweight. The fact that we understand Dr. Wagner's statement that claimant is "overweight" to mean that she is obese does not mean that we are substituting our judgment for the judgment of experts. Dorland's Medical Dictionary defines "overweight" as "excessive increase in adipose tissue (obese overweight) or in muscle and skeletal tissue (muscular overweight)." In context, we understand Dr. Wagner as stating that claimant has "obese overweight". Thus, the mere fact that claimant has lost 40 pounds does not mean that she has controlled the obesity which Dr. Gulick opined was the cause of her continuing problems. According to Dr. Wagner claimant continues to be obese.

ORDER

The Board adheres to its Order on Review dated September 28, 1984.

JEFFERY S. TRAGO, Claimant
Robert Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 83-10698
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

The noncomplying employer requests review of Referee Seymour's order which, in effect, upheld the SAIF Corporation's acceptance of claimant's industrial injury claim. See ORS 656.054(1); OAR 436-52-040(1). There are two issues presented on review: Whether the Referee correctly assigned the burden of proving compensability to claimant, as opposed to assigning the burden to the noncomplying employer to prove that SAIF's acceptance was erroneous; and whether claimant sustained an injury arising out of and in the course of his employment.

We agree with the Referee's assignment of the burden of proof to claimant. We further find that the evidence slightly preponderates in favor of concluding that the claim is compensable. The conflicts in testimony given by the various witnesses were resolved by the Referee largely on the basis of his assessment of the witnesses' demeanor. Although the record presents some basis for questioning claimant's veracity, we find no comfortable basis for disagreeing with the Referee's explicit and implicit credibility findings.

ORDER

The Referee's order dated April 6, 1984 is affirmed. Claimant's attorney is awarded $400 for services on Board review, to be paid by the SAIF Corporation.

JOHN W. WRIGHT, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-03470
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of that portion of Referee Knapp's order which concluded that the SAIF Corporation had not failed to comply with the terms of a prior Referee's order which had set aside a Determination Order and remanded the claim to SAIF for continued processing and payment of compensation. Although there may be other issues tangentially related to the single issue raised by claimant on review, we understand that single issue to be whether Horn v. Timber Products, Inc., 12 Or App 365 (1973), and Taylor v. SAIF, 40 Or App 437 (1979), mandate that, under the facts of this case, claimant is entitled to be paid temporary total disability and permanent partial disability for the same period.

As the Referee correctly observed, the critical difference between the situation presented in this case and the situation in Horn and Taylor is the fact that in this case the Determination Order awarding permanent partial disability was set aside as premature, whereas in Horn and Taylor the claim was reopened for a worsened condition. See also Lee A. Austin, 36 Van Natta 637 (1984).

ORDER

The Referee's order dated September 22, 1983 is affirmed.

ROBERT A. YOUNG, Claimant
Keith Skelton, Claimant's Attorney
Bullard, et al., Defense Attorneys

WCB 82-11592
October 23, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of that portion of Referee Knapp's order which concluded that claimant had not established entitlement to penalties and attorney fees for the employer's alleged unreasonableness in processing his claim. Claimant alternatively requests that this case be remanded for further evidence taking.

Numerous issues were raised before and at the hearing that convened on November 23, 1983. After a half day of testimony, the parties settled the disputed compensability issues. Regarding the remaining issues, claimant's attorney advised the Referee:

> "Now, with reference to the other issues, what we would like to do is attempt to work them out between [the employer's attorney] and myself, the issue of attorney's fees, any penalties or anything of that kind. If we cannot, then we will submit it to you on an agreed statement of facts, and then we'll have you make the decision."

The Referee indicated this arrangement was satisfactory and adjourned the hearing.

The parties subsequently were unable to settle the remaining issues. Also, the parties were even unable to arrive at a mutually acceptable statement of the pertinent facts. On February 7, 1984 claimant's attorney wrote to the Referee, requesting that further testimony be taken. The Referee responded:

> "I have received your February 7, 1984, letter requesting a hearing concerning penalties and attorney fees. However, the parties previously agreed to submit the matter to me and arguments were requested. I find this format satisfactory."

The parties submitted various affidavits, depositions and briefs. The Referee's order dated March 9, 1984 does not specify which, if any, of these documents submitted after the hearing were admitted into the evidentiary record.

The hearings procedure is to be conducted such as to achieve substantial justice. ORS 656.283(6). Where we determine that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee, we may remand for further evidence taking or other necessary action. ORS 656.295(5).

The parties are to be commended for their efforts to settle their differences amicably, without consuming limited hearing resources. However, litigants ought not be penalized with the loss of the right to an evidentiary hearing when settlement efforts prove unsuccessful. That is really the present posture of this case; the parties jointly asked for a continuance to negotiate further; but, when they were unable to agree, claimant invoked his right to be heard and to present his evidence in support of his contentions on which he bears the burden of proof. He should have been accorded that right. We remand for further development of the record.

ORDER

That portion of the Referee's order which concluded that claimant had not established entitlement to penalties and attorney fees is vacated and this case is remanded to the Hearings Division for further proceedings consistent with this order.

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

WCB 81-04335
October 24, 1984
Order on Remand

On review of the Board's order dated July 29, 1983 the Court of Appeals reversed the Board's order.

Now, therefore, the Board's 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.

EDWARD O. MILLER, Claimant
Bloom, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 79-03231 & 83-02511
October 24, 1984
Interim Order of Remand

Glen Falls Insurance Company and its insured, Brander Meat Company, have moved to dismiss claimant's Own Motion Petition and to deny claimant all relief in the referenced companion cases on the grounds that claimant and his wife have engaged in improper ex parte contacts with a member of the Board's staff and have attempted to engage in improper ex parte contacts with the Referee who heard these cases at the hearings level.

Upon its review of the record, the Board finds that the record is insufficiently developed to decide the motion. ORS 656.295(5). Over the objection of claimant's attorney, the Board has determined that the best course is to remand these cases to Referee pro tempore Keith Wilson for the limited purpose of holding an expedited hearing to develop the evidence and to hear argument on the issues raised by the motion to dismiss. The proponent of the motion shall have the burden of going forward and the burden of proof. The factual issues which should be addressed are: (1) Were there improper ex parte contacts between claimant, claimant's wife and any appellate reviewer on the Board's staff; and (2) if so did these ex parte contacts affect the Board's decision-making process in this case. Closing arguments shall be recorded and shall constitute the parties' briefs on the motion. The hearing shall be held on November 14, 1984 at 1:30 pm in the Hearings Division offices in Portland. The transcript shall be forwarded to the Board within two days of the date of the hearing to further expedite this matter.

IT IS SO ORDERED.

TERRY L. STARBUCK, Claimant
Donald Hansen, Claimant's Attorney
Brian L. Pocock, Defense Attorney

Own Motion 84-0398M
October 24, 1984
Own Motion Order

Boise Cascade Corporation requests that the Board exercise its own motion authority and thereby "modify, change or terminate" a former finding and order concerning employer/insurer responsibility. The procedural history of this claim has been stated in various sources and need not be recited for purposes of this own motion order. See Terry L. Starbuck, 34 Van Natta 81 (1982), affirmed Boise Cascade Corp. v. Starbuck, 61 Or App 631 (1983), affirmed 296 Or 238 (1984). Suffice it to say that the

primary issue during the course of the protracted litigation preceding Boise Cascade's own motion request was employer/insurer responsibility for payment of claimant's compensation. The Referee originally set aside the SAIF Corporation's denial of claimant's new injury claim and upheld a denial issued by Boise Cascade, which denied claimant's aggravation claim. The Board concluded that claimant sustained an aggravation of the injury sustained during his employment with Boise Cascade, and based upon this conclusion, reversed the Referee's order and remanded the claim to Boise Cascasde for acceptance and payment of compensation. The Court of Appeals affirmed. Boise Cascade filed a petition for review, and the Supreme Court affirmed, stating in part:

> "True, there is evidence in this case that straining and lifting at the later employment [i.e. while SAIF was on the risk] concurred with the first injury to cause the disability. Had the trier of fact made that finding, the second employer would be liable. But the trier of fact (in this case, the Court of Appeals) concluded otherwise, and we are bound by that finding." 296 Or at 245 (footnote omitted).

As part of its petition for own motion relief, Boise Cascade has submitted a copy of a Court of Appeals order reflecting that Boise Cascade moved the Court of Appeals for reconsideration of its decision in light of the Supreme Court's decision, and that the court denied Boise Cascade's motion.

In its petition for own motion relief, Boise Cascade states:

> "The Supreme Court has said in effect that the Court of Appeals was wrong.
>
> * * *
>
> "When we went to the Supreme Court we argued that the theory of the first claim had really nothing whatever to do with the responsibility of the second and that the second employer's responsibility should depend on whether or not his employment made a contribution to disability, which the second employment in this case clearly did, even though there was no specific event. Essentially, the Supreme Court agreed with that position.
>
> We have given the Court of Appeals an opportunity to modify its decision, and it has not done so."

Boise Cascade asserts that the grant of jurisdiction under ORS 656.278, to "modify, change or terminate former findings, orders or awards," vests the Board with authority to order that SAIF, rather than Boise Cascade, accept responsibility for this claim and pay claimant compensation.

Assuming arguendo that Boise Cascade is correct, and that the legislature intended to vest the Board with authority to grant such relief, an assumption which strains credulity at least under the facts and circumstances presented herein, we believe it would constitute a clear abuse of discretion to exercise our own motion authority in this fashion. To conclude otherwise would certainly "introduce an element of tentativeness," to borrow a phrase, which is definitely not contemplated by ORS Chapter 656 and the review process provided therein. Cf. Fields v. Workmen's Comp. Board. 276 Or 805, 807 (1976).

For the foregoing reasons, Boise Cascade Corporation's request for own motion relief is denied.

IT IS SO ORDERED.

DAVID L. BOSSERT, Claimant
Doblie & McSwain, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-09187
October 25, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Podnar's order which upheld the self-insured employer's denial of chiropractic treatments in excess of four per month.

The Board affirms the Referee's order with the following comment: The Referee based his analysis, in part, on his interpretation of OAR 436-69-201. We find that that rule is not implicated in this proceeding. The self-insured employer received billings for chiropractic treatments in excess of four per month. Rather than invoking the provisions of the rule, the employer issued a formal denial of medical treatments in excess of that number. Claimant requested a hearing to protest that denial. The only real issue at hearing, therefore, was whether treatments in excess of four per month are reasonable and necessary consequences of claimant's accepted injury. The Referee found that claimant had failed to sustain his burden of proving that they are. We agree.

ORDER

The Referee's order dated May 28, 1984 is affirmed.

JACK S. CARROLL, Claimant
Pozzi, et al., Claimant's Attorneys
Bottini & Bottini, Defense Attorneys

WCB 83-00006
October 25, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests, and claimant cross-requests, review of Referee Mulder's order which (1) awarded an additional 32° (10%) unscheduled disability, thereby granting claimant a total award of 64° (20%) unscheduled disability for injury to his low back; and (2) awarded claimant's attorney $500 for services rendered in connection with the employer's denial of an aggravation claim. The employer contends that the Referee's additional award of unscheduled disability is unwarranted; claimant contends that he is entitled to an increased award. With

regard to the attorney's fee, the employer contends the Referee's award is excessive considering the efforts expended and results obtained by claimant's attorney in connection with the denied aggravationn claim. See OAR 438-47-010(2).

On the issue of extent of permanent disability, we affirm the Referee's order. On the issue of a reasonable attorney's fee, we modify and reduce the Referee's award.

Claimant filed an aggravation claim in June of 1983. It was initially accepted by the employer but subsequently denied in August of 1983. Claimant's attorney promptly filed an amended hearing request, designating the employer's denial, as well as penalties and attorney fees, as additional issues for the impending hearing. In early September of 1983, the employer rescinded its denial on the basis of its receipt of a "follow-up medical report" from claimant's physician. When the hearing convened the following month, the only issue in connection with the previously denied aggravation claim was payment of a reasonable attorney's fee. The employer conceded that claimant's attorney was entitled to a modest attorney's fee.

In a letter to the Referee submitted post-hearing, claimant's attorney detailed the efforts expended in claimant's behalf as a result of the employer's denial. He estimated that he expended 2 1/2 to 3 1/2 hours in reviewing medical reports, discussing the possible basis of the employer's denial with claimant, and attempting to determine whether the employer might be subject to penalties/attorney fees for unreasonably denying claimant's aggravation claim. Counsel also indicated that he corresponded with the employer's attorney in order to obtain medical reports.

The criteria for awarding a reasonable attorney's fee in denied claims, ORS 656.386(1), are the efforts expended and results obtained by claimant's attorney in claimant's behalf. Although counsel may have been preparing to make a case for an unreasonable denial, the Referee's award of attorney fees does not appear to be premised upon a finding of unreasonableness, nor does claimant presently make any such contention. The employer voluntarily withdrew its denial. It is reasonable to assume that claimant's amended request for hearing, as well as counsel's contact with the employer's attorney, were instrumental in obtaining acceptance of the aggravation claim. Edward M. Anheluk, 34 Van Natta 205 (1982). Under the facts and circumstances presented, however, we believe that the Referee's award of $500 is excessive, and we modify that award accordingly.

ORDER

The Referee's order dated November 21, 1983 is modified in part. In lieu of the $500 employer-paid attorney's fee awarded by the Referee, claimant's attorney is awarded $200 as and for a reasonable attorney's fee for services rendered in connection with the employer's aggravation claim denial. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $650 for services on Board review in connection with the extent of unscheduled disability issue, to be paid by the self-insured employer.

WILLIAM H. McFADDEN, Claimant
Richardson & Murphy, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-04401 & 83-03215
October 25, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

Industrial Indemnity, insurer for the employer Bechtel Corporation, requests review of that portion of Referee Thye's order which, in effect, set aside its de facto denial of this claim and upheld a denial issued by Argonaut Insurance, insurer for the employer Fought Construction Company. Argonaut cross-requests review of that portion of the Referee's order which imposed a penalty and associated attorney's fee for an unreasonably delayed denial of medical services. Thus, there are two issues on review: (1) whether claimant's December 1981 hospitalization for treatment of osteomyelitis of the right lower leg, and associated disability benefits, are the responsibility of Industrial Indemnity, as a consequence of claimant's June 15, 1981 industrial injury, or whether this compensation is the responsibility of Argonaut as a consequence of claimant's January 25, 1968 injury; and (2) the propriety of the Referee's imposition of a penalty and attorney's fee. Claimant has filed no appearance on Board review.

On the responsibility issue, we affirm and adopt the relevant portions of the Referee's order. Like the Referee, we find Dr. Kimbrough's opinion concerning the probabilities of causation more persuasive than the summary conclusion expressed by Dr. Polo.

On the issue of penalties and attorney fees, we reverse.

When claimant was hospitalized in December of 1981, his 1968 industrial injury (insured by Argonaut) was in an own motion status, i.e., claimant's aggravation rights had expired. See generally ORS 656.273(4). Nevertheless, claimant had the continuing right to receive medical serices for conditions related to his 1968 injury. See generally ORS 656.245; William A. Newell, 35 Van Natta 629 (1983). Consequently, assuming that claimant properly presented a claim for medical services to Argonaut, Argonaut had the obligation to promptly process such a claim in accordance with our decision in Billy J. Eubanks, 35 Van Natta 131 (1983); and, in the event of a denial, claimant had the corresponding right and obligation to timely request a hearing. See Ralph R. Lee, 35 Van Natta 1109 (1983); Donald L. Lentz, 35 Van Natta 1084 (1983).

We are unable to conclude, however, that claimant actually presented a "claim" for medical services to Argonaut, at least one which is sufficient for purposes of imposing a penalty and attorney's fee for unreasonably delayed denial. The Referee reasoned that, because Argonaut was notified by claimant's attorney that claimant was seeking additional compensation for medical services in connection with his 1968 injury, it was unnecessary for claimant to actually present specific medical bills for payment. This is inconsistent with our reasoning in Billy J. Eubanks, supra, in which we stated that a claim for medical services usually takes the form of either a bill for medical services that have been rendered or a request for authorization to render some form of treatment in the future. This case involves a claim for rendered medical services. There is no evidence that either claimant or any one of the various

medical providers submitted the bills to Argonaut for payment. Under these circumstances, there is an insufficient evidentiary foundation to support the Referee's imposition of a penalty and attorney's fee for an unreasonably delayed denial.

There is an additional reason for reaching the same conclusion. The letter which, according to the Referee, triggered Argonaut's duty to accept/pay or deny this claim for medical services, was claimant's attorney's letter of June 7, 1982 addressed to Argonaut, stating: "[Claimant] has had a flair-up of his osteomyelitis and informs me that you have refused to pay the medical bills, including his hospitalization. Would you please contact me so that we may discuss this matter?" Before any response was forthcoming, claimant's attorney decided that it was appropriate to "request a hearing." By letter of June 22, 1982, directed to the Board, claimant's attorney requested claim reopening pursuant to ORS 656.278, the own motion statute. A copy of this request was provided to Argonaut. The following day, counsel for Argonaut advised the Board that it had received claimant's request for reopening pursuant to ORS 656.278, and that it would "appreciate a reasonable amount of time to review the file and determine whether or not any additional medical information is necessary, in order . . . to make an informed response to this request." What followed was an exchange of correspondence and information between claimant's attorney and counsel for Argonaut, directed toward compiling an adequate base of information to enable Argonaut to make some decision concerning claimant's "request for own motion relief." See ORS 656.278(4).

During the remainder of 1982 and through the first few months of 1983, both parties seemed to be proceeding on the assumption that, with regard to claimant's medical expenses, the Board would consider claimant's request for relief pursuant to ORS 656.278. Then, at the beginning of April 1983, claimant filed an expedited request for hearing with the Hearings Division, designating the issues as medical services pursuant to ORS 656.245 and penalties/attorney fees "for delay." There was some confusion concerning whether the medical service issue joined by claimant's hearing request would proceed to litigation expeditiously, or whether that issue would await the outcome of the Board's decision on claimant's request for own motion relief. Indeed, in late April of 1983 a previously set hearing was postponed at the parties' joint request in view of claimant's pending request for own motion relief. The following month, the Board advised the parties that the scheduled expedited hearing had been erroneously postponed in view of the Board's practice and policy of deferring consideration of a request for own motion relief while there were related issues concerning medical expenses pending in the Hearings Division.

On July 28, 1983, Argonaut denied the claim for "temporary total disability and incurred medical expenses as a result of the osteomyelitis flare-up in December." The matter eventually proceeded to hearing in December 1983 in consolidation with claimant's hearing request concerning his June 1981 injury with Bechtel Corporation/Industrial Indemnity.

This is a situation in which the parties, and perhaps the forum to a certain extent, were confused with regard to their respective rights and obligations, including the appropriate

procedural avenues to follow. Claimant was represented by counsel at all material times, and counsel for the respective parties were working together to bring matters to a head. Under these circumstances, we are unable to conclude that claimant's "right to know" interest has been violated, and, therefore, we conclude that penalties/attorney fees are not warranted. Cf. Joyce A. Morgan, 36 Van Natta 114 (1984); Martha A. Baustian, 35 Van Natta 1287 (1983); Patricia M. Dees, 35 Van Natta 120, 123 (1983); Angela V. Clow, 34 Van Natta 1632 (1982).

ORDER

The Referee's order dated February 9, 1984 is reversed in part. That portion which directed Argonaut to pay a penalty and associated attorney's fee for an unreasonably delayed denial of medical services is reversed. The remainder of the Referee's order is affirmed.

WALTER V. MILLER, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-09732
October 25, 1984
Order on Reconsideration (Remanding)

Claimant requests reconsideration of our Order on Review dated September 28, 1984. Claimant requests that the Board remand the case to the Referee to consider extent of disability.

The Referee had declined to rate extent of disability because he found claimant's back condition was a compensable sequala of the accepted injury and that the issue of extent was not ripe. The Board has now found that the back condition is not a compensable sequala of the accepted injury. Therefore, the issue of extent is ripe for adjudication. Accordingly, our Order on Review dated September 28, 1984 is amended to remand the case to the Referee for determination of the extent of claimant's disability.

ORDER

The Board Order on review dated September 28, 1984 is amended to remand the case to the Referee for determination of the extent of claimant's disability. The Board's order, as amended, is republished.

DALE R. DAVID, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-06009
October 26, 1984
Order on Review

Reviewed by the Board en banc.

The insurer requests review of those portions of Referee Pferdner's order granting claimant 30° for 20% scheduled disability to his right wrist. The insurer argues that claimant has failed to meet his burden of proving permanent disability. It also argues that the Referee erred in refusing to admit a medical report into evidence.

The Ten Day Rule

At hearing the parties discovered that neither side had submitted any exhibits because both sides thought the exhibits

submitted in a previous hearing would be used. After an off the record discussion, the Referee admitted the exhibits submitted for the previous hearing without objection from either party. In addition, the insurer sought to have a document, identified as Exhibit 24, admitted into evidence. Exhibit 24 had not been provided to the Referee or to claimant's counsel prior to ten days before the hearing. The document is a letter from Doctor Button which states that claimant had no permanent impairment. Claimant's counsel objected to admission of Exhibit 24. The excuse offered for the late submission of the exhibit was inadvertence. The insurer's counsel, however, offered to make Dr. Button available for a post hearing deposition to allow claimant's counsel an opportunity to cross-examine. The Referee declined to admit the document, offering as a reason his experience that it is difficult to close cases when they have been held open awaiting a post-hearing deposition. While we do not agree with the reason given by the Referee for his failure to admit the proffered exhibit, we do agree with his exclusion of it.

At the time of the Referee's order, former Board Rule OAR 436-83-400, the so-called ten day rule, was in effect. Subsections (3) and (4) thereof were as follows:

> "(3) As soon as practicable and not less than ten days prior to the hearing, each party shall file with the assigned referee and provide all other parties with legible copies of all medical reports and all other documentary evidence upon which the party will rely except that evidence offered solely for impeachment need not be so filed and provided.
>
> "(4) At the hearing the referee may in his discretion allow admission of additional medical reports and other documentary evidence not filed as required by (3) above." (Emphasis added.)

On May 1, 1984 new Board rules became effective. OAR 438-007-005(3) and (4) replaced in context former OAR 436-83-400(3) and (4). The new rule is as follows:

> "(3) . . . (a) Not less than twenty (20) days before the hearing date, or within seven (7) days after mailing of Notice of Hearing, if the Notice of Hearing is mailed less than twenty (20) days before the hearing, the insurer shall file with the assigned referee originals or legible copies of all documents upon which the insurer intends to rely, together with an index . . . The insurer at the time of filing shall provide to other parties copies of the index and copies of any exhibits not in their possession . . . .
>
> "(4) At the hearing the referee may in his or her discretion allow admission of additional medical reports or other documentary evidence not filed as required

by (3) above. In exercising this discretion, the referee shall determine if good cause has been shown for the failure to file within the prescribed time limits, as well as factors of surprise or prejudice to the other parties." (Emphasis added.)

The text of both the old and new rule vests the Referee with discretion to admit evidence submitted in violation of the mechanical portions of the rule. However, the new rule, unlike the old rule, provides specific guidance to the Referee concerning factors to be considered in exercising that discretion.

The policy which underlies both the old and the new rule as well as the entire hearings and review procedures of the Board is expressed by the legislature in ORS 656.012(2)(b) and 656.283(6):

> "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 compensation proceedings, to the greatest extent practicable." ORS 656.012(2)(b).

> "Except as otherwise provided in this section and rules of procedure established by the board, the referee is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure and may conduct the hearing in any manner that will achieve substantial justice." ORS 656.283(6).

OAR 436-83-400(3) and (4) (the old rule), and OAR 438-07-005(3) and (4) (the new rule) are designed to prevent one party from interfering with the search for accurate facts and just conclusions, by carelessness or gamesmanship which prejudices the other party's ability to adequately respond to evidence or which prejudices the Referee's evaluation of the evidence. In exercising their discretion, the Referees are admonished to carefully weigh these competing considerations and those specifically set forth in the new rule and to articulate their reasons for exercising their discretion.

Our de novo review of the record reveals that Exhibit 24 is dated December 3, 1980, but was not submitted to claimant or the Referee until the day of the hearing, March 1, 1982. While we have no reason to doubt that the failure to submit the medical report to claimant was through oversight or inadvertence, nonetheless we find the failure to submit a report which has been in the employer's possession for more than a year before the hearing is carelessness which cannot be excused. Accordingly, we do not consider Exhibit 24.

Our dissenting member alleges that the Board is vacillating in its interpretation of the former Board rule (OAR 436-83-400(3) and (4)) and is at the same time neglecting its duty to decide the issues de novo. Statistics prove that in the vast majority of cases procedural rulings by the referee's are not challenged. It

is generally only in the difficult cases, such as the present case, in which the Referee's rulings on procedural questions are challenged on review. As noted earlier in this order our statutory mandate is to see that "substantial justice" is accomplished. Discretion is provided in the rules because every case is unique and, therefore, rigid procedural rules are not appropriate. We believe that the hard and fast approach advocated by the dissent interferes with, rather than encourages, substantial justice -- both for claimants and employers -- by encouraging increased litigation and by arbitrarily excluding otherwise material evidence which is not prejudicial to any party. A reading of the cases cited by the dissent reveals that we have undertaken a de novo review of the unique facts of each case and have been guided by our overriding concern that substantial justice be accomplished. As the Supreme Court has reminded us, "we are considering the actions of an administrative board designed to be flexible in its search for accurate facts and just conclusions." Bailey v. SAIF, 296 Or 41, 46 (1983).

The Merits

Claimant is a grinder operator who developed symptoms in his right thumb and wrist following an on-the-job incident. His claim was ordered accepted by a Referee. In this proceeding concerning extent of disability, claimant produced no medical evidence that his occupational disease resulted in any permanent disability. He did testify to continuing problems with his wrist and thumb. The Referee held that claimant's credible testimony was sufficient to establish permanent disability. We disagree.

We said in Juena McGuire, 35 Van Natta 1053 (1983):

> "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."

The Supreme Court recently stated:

> "[A] physician's report is not indispensable in a workers' compensation claim. In the case of an 'extent of disability' claim...no physician's report is required to be statutorily sufficient. The worker's or other lay testimony may or may not carry the worker's burden of proving the extent of disability, but the law does not mandate a medical report." Garbutt v. SAIF, 297 Or 148, 151-2(1984).

We do not believe this is a case in which the lay testimony is sufficient to establish permanent disability in the absence of supporting medical documentation. We indicated in McGuire that we would apply the test articulated in Uris v. Compensation Department, 247 Or 420 (1967), to determine whether expert testimony is necessary to establish permanence. That test, in

essence, is whether the medical situation is complex enough to require expert evidence or whether it is simple enough to be resolved by lay testimony.

We find this case to be sufficiently complex to require expert evidence of permanence. Claimant had a sudden onset of pain in his right thumb and wrist, yet his treating physician said he had tendinitis, which he described as a disease. The treating physician operated on claimant's wrist and noted that he was "recovering satisfactorily." Without expert medical evidence we have no way of knowing whether the limitations about which claimant testified are related to his compensable injury or not. This is especially true because the physician opined that claimant was recovering satisfactorily. Accordingly, we find that claimant has failed to sustain his burden of proving any permanent impairment related to his compensable injury.

ORDER

The Referee's order dated March 12, 1982 is affirmed in part and reversed in part. Those portions of the order concerning an overpayment are affirmed. Those portions concerning extent of disability are reversed.

Board Member Barnes Concurring in Part:

I agree with that portion of the majority's decision which concludes that the Referee properly refused to admit an exhibit offered at hearing which had not previously been submitted to opposing counsel as required by the Board's rules of practice and procedure. I express no view on the other issue of the extent of claimant's permanent disability.

Former OAR 436-83-400(3), which was repealed in May 1984, but which was obviously in effect at the time of the March 1982 hearing in this case, required that the parties submit proposed exhibits to the opposing parties and to the Hearings Division as soon as possible, but not less than ten days pre-hearing. In numerous cases decided at least between Minnie Thomas, 34 Van Natta 40 (1982), and Donald J. Young, 35 Van Natta 143 (1983), all of the members of this Board consistently interpreted the requirements of OAR 436-83-400(3) rather strictly: That documentary evidence offered at hearing without having been submitted and exchanged pre-hearing would generally be excluded, subject to a limited good-cause exception when the party in violation of the rule presented cogent reasons for noncompliance.

Then the Board membership changed, and the various approaches of my present colleagues to interpretation and application of this administrative rule have become a classic study in vacillation and confusion. In Walter L. Hoskins, 35 Van Natta 885 (1983), my colleagues began to back-peddle from the Board's consistent prior position, stating that "the phraseology of" our prior decisions "is overly restrictive." 35 Van Natta at 888. Also in Hoskins, my colleagues rather strongly indicated that they would find "oversight" to be good cause for noncompliance with our administrative rule. Ibid.

The retreat from applying the plain meaning of OAR 436-83-400(3) that started in Hoskins turned into a rout in Thomas

B. Ward, 35 Van Natta 1552 (1983). In Ward my colleagues seemingly held that, when a medical report is offered for the first time at hearing, an offer to make the author of the report available for deposition will "cure" the violation of our rule. See 35 Van Natta at 1557.

In this case, the party in noncompliance with former OAR 436-83-400(3) has offered the explanation of "oversight" -- which Hoskins suggests establishes good cause for noncompliance. Also, the party in noncompliance with the rule offered to make Dr. Button, the author of the exhibit in question, available for deposition -- which Ward says can "cure" the rule violation. But without any mention of their own prior pronouncements in Hoskins and Ward, the Board majority here upholds the Referee's exclusion of the disputed exhibit. This history of vacillation suggests to me that the Board should put a "pull date" on all of its rulings regarding the ten day rule, since all prior interpretations apparently have had a finite shelf life.

Perhaps I miss the subtlety. The majority notes that exhibit 24 was "in the employer's possession for more than a year before the hearing." Unless Hoskins has been silently overruled, perhaps the standard is that inadvertence/oversight excuses noncompliance with our administrative rule except when the inadvertence continues for more than a year.

Or perhaps the subtlety involves which party is in violation of former OAR 436-83-400(3). In Hoskins and Ward it was the claimant's attorney that was offering evidence in violation of the rule. In this case it is the employer's attorney that is offering evidence in violation of the rule. Is it the Board majority's intent that there be a more lenient standard for claimant's attorneys and a stricter standard for employer's attorneys?

Or perhaps the ultimate point, which would not be very subtle, is that the Board majority is always going to find a way to affirm the evidentiary rulings of the Referees. At least at this level, Hoskins, Ward and today's decision in this case are all consistent -- the evidentiary rulings of the Referees have been affirmed in all three cases.

If it is the majority's position that one Referee could admit evidence while another Referee could exclude evidence in the face of exactly the same explanation for noncompliance with the Board's rule, I submit that is nothing less than a renouncement of our legal duty. Referees have "discretion" to decide all issues raised at a hearing, whether they be compensability issues, extent-of-disability issues, evidentiary issues, etc. This Board then has the duty to decide all issues raised on review of a Referee's decision; that duty is to decide the issues de novo; and I understand that scope of review also to apply to evidentiary issues raised on review. A majority of this Board certainly has the prerogative to say that it is unable or unwilling to review evidentiary issues de novo, but I submit that to do so would be an abdication of our legal responsibility.

Furthermore, I submit it is a critical element of this Board's statutory role to attempt to homogenize different results reached by different Referees on similar facts. Simply put, either the "oversight" excuse offered in this case should or should not be deemed good cause in all cases for noncompliance

with the administrative rule -- and it is the responsibility of one Board to adopt one position or the other, not the responsibility of thirty different Referees to adopt at least that many positions. Otherwise, why have a Board?

I concluded my dissent in Thomas B. Ward by saying: "I believe the Board's interpretations of OAR 436-83-400 are now chaotic and will lead to subjective and inconsistent applications of that important administrative rule." 35 Van Natta at 1564. The Board majority's decision in this case indicates that the danger of subjective, hormonal and inconsistent decisions is even greater than what I feared at the time of Ward.

My own position can be simply stated. I would affirm the Referee's evidentiary ruling in this case because I believe that, as a matter of policy for all cases, this Board should hold that "oversight" is an insufficient explanation for noncompliance with the Board rule here in question.

RONALD M. SOMERS, Claimant
Richardson & Murphy, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-11066
October 26, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

The SAIF Corporation requests review of Referee Galton's order which set aside its denial of claimant's myocardial infarction claim. The issue is compensability.

Claimant was 46 years old at the time of the hearing. He has been an attorney practicing alone in a general litigation practice since 1962. In addition, claimant was a municipal judge, a bankruptcy trustee and a member of the Oregon Environmental Quality Commission. He was also active in bar-related and community activities. Prior to June 1982 claimant had no known cardiovascular problems and was in generally good health.

In late May 1982 claimant began representing a client whose property was being foreclosed. He discussed the case with the attorney for the adverse party. On June 22, 1982 claimant filed an answer and counterclaim in the foreclosure case on his client's behalf. The answer was filed on the thirty-first day after the service of the summons. On June 24, 1982 claimant's morning mail contained a copy of a default judgment that had been taken against his client in the foreclosure case. Investigation disclosed that the default order had been obtained approximately one hour before claimant had filed the answer. The attorney for the adverse party had not notified claimant of his intent to seek a default order, contrary to long-standing custom and the Oregon Rules of Civil Procedure.

Claimant became immediately and acutely upset over the adverse attorney's actions. Several witnesses related that claimant appeared agitated and uncharacteristically angry over the incident. Claimant related that he was so upset that he was unable to think clearly and had to seek assistance in preparing a motion to have the default order set aside.

On the afternoon of June 24, 1982 claimant was successful in having the default order set aside. After his court appearance for that purpose he visited another attorney, who later related that claimant still appeared to be very upset and under a great deal of stress. Claimant eventually went back to his office that afternoon, a Thursday.

Claimant went home for a short time that evening, then returned to his office and worked until 1:00 or 2:00 a.m. attempting to index his files to determine whether the attorney who had taken the default without prior notice was involved in any of his other cases. Claimant stated he did not sleep well that night.

On Friday, June 25, 1982 claimant spent two or three hours performing his duties as a municipal judge, then went to his office. Claimant did not remember everything he did during the day, but testified that he did not think he followed his usual routine. During the afternoon claimant suffered some gastric distress, for which he took Gaviscon with no relief. Claimant did not eat during the day.

At about 6:30 p.m. on June 25, 1984 claimant conducted a wedding, in his role as municipal judge. After the ceremony he drove the bride and groom to the wedding reception. At the reception claimant ate some food and drank two or more glasses of champagne. He talked with a number of friends and clients at the reception. After the reception he drove the bride and groom back home.

On his way home, claimant stopped to talk with some clients. After spending approximately two and one-half hours with the clients, he arrived at home at about 11:30 p.m. or midnight. He immediately went to sleep.

After sleeping for a short time, perhaps an hour or so, claimant awoke sweating and experiencing severe chest pain, shortness of breath and nausea. He telephoned a doctor for help and was rushed to the hospital where it was determined that claimant had suffered an acute transmural anterior myocardial infarction.

During the course of claimant's treatment, coronary arteriograms showed that claimant suffered from underlying atherosclerosis. His left main coronary artery was clear, however the proximal circumflex coronary artery showed 25% stenosis, the left anterior descending coronary artery was totally occluded and there was a large left ventricular aneurysm with evidence of thrombus.

Claimant made a claim for compensation, which was denied on October 13, 1982. After a hearing, the Referee found that claimant's heart attack was a compensable industrial injury. On review both SAIF and claimant agree that the only issue is medical causation, i.e. whether claimant's job-related stress was a material cause of his heart attack. See Coday v. Willamette Tug & Barge Co., 250 Or 39, 47 (1968). We conclude that the evidence fails to establish medical causation by a preponderance of the evidence.

The Referee gave little or no weight to the opinions of Drs.

Lee, Wasenmiller and Kloster, all cardiologists, and all of whom concluded that claimant's stress did not precipitate his heart attack and that any such cause-and-effect relationship would be "speculative." The Referee rejected the opinions of Drs. Lee and Kloster because he found them to have been based upon incomplete or inadequate histories. Dr. Wasenmiller's opinion was apparently regarded to be inconclusive because his use of the word "speculative" did not rule out claimant's June 24, 1982 stress as a material contributing factor precipitating his June 26, 1982 heart attack.

Dr. Hodge, who testified at the hearing, stated that there was a reasonable medical probability that claimant's stress precipitated his heart attack. However, he later acknowledged that the passage of time (about two days) between the stress and the onset of the heart attack would make the causative relationship less likely, and that claimant's risk factors of cigarette smoking, elevated serum cholesterol and positive family history of cardiovascular disease, coupled with his underlying atherosclerosis, made claimant susceptible to an infarction with or without stress.

We disagree with the Referee's assignment of little or no weight to the cardiologists' opinions. Dr. Lee was one of claimant's treating physicians, as was Dr. Hodge. Neither Dr. Lee's nor Dr. Hodge's written reports or notes indicate that either one of them took claimant's history. Dr. Hodge testified that he did not, and he gave his opinion regarding medical causation in response to a hypothetical question. His positive statement on medical causation is weakened somewhat by his later acknowledgments that other factors could, and probably did, play material roles in causing claimant's heart attack.

Dr. Wasenmiller's written report clearly shows that he was aware of the nature, extent and duration, including several obscure details, of claimant's stressful incident on June 24, 1982. Dr. Wasenmiller opined:

> "It is my impression that [claimant] did, in fact, suffer a significant anterior myocardial infarction on June 26th of [1982]. The etiology of this problem is coronary athero-sclerosis which was undoubtedly present and progressive for several months or years prior to his infarction. Contribution of the emotional stress that [claimant] describes for the three days prior to his myocardial infarction as a factor contributing to the accelleration [sic] of his underlying athero-sclerosis or a precipitant to his myocardial infarction is speculative. [Claimant's] other major risk factors, i.e., hypercholesterolemia, exogenous obesity and cigarette smoking undoubtedly did contribute to the accelleration [sic] of his underlying coronary artery disease."

Dr. Lee gave his opinion based upon Dr. Wasenmiller's written report, which he had read and with which he agreed. He agreed that any connection between the stress and the heart attack would have to be based on speculation.

Dr. Kloster, who specifically stated that he had read Dr. Wasenmiller's opinion, stated that:

> "There is no indication that there was any work-related stress, either physical or emotional, during the hours immediately preceeding [sic] the onset of the symptoms of [claimant's] myocardial infarction. Accordingly, I can find no evidence that his work activity was a material factor provoking or precipitating the acute myocardial infarction by aggravating the preexisting and underlying coronary heart disease."

Dr. Kloster's statement that claimant was not subjected to work-related stress during the hours immediately preceding his heart attack is consistent with the evidence. There is no evidence that claimant was subjected to any unusual stress, work related or not, during the afternoon and evening of June 25, 1982.

The Referee's conclusion that Drs. Lee and Wasenmiller, by use of the term "speculative," do not rule out claimant's stress incident as a cause of his heart attack, with which we do not necessarily agree, does nothing to establish that the stress was a material contributing factor. We find that the preponderance of the persuasive medical evidence fails to establish that claimant's June 26, 1982 myocardial infarction resulted in any material way from the stress generated by the June 24, 1982 default order incident.

ORDER

The order of the Referee dated March 30, 1984 is reversed. The SAIF Corporation's denial dated October 13, 1982 is reinstated and affirmed.

RICHARD L. FENISON, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-10002
October 29, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee T. Lavere Johnson's order which found the claim was not prematurely closed and which granted claimant 144° for 45% unscheduled disability in addition to the 176° for 55% unscheduled disability previously awarded. Claimant alleges premature closure and, in the alternative, that he is permanently and totally disabled. The SAIF Corporation cross-requests review arguing that the Referee's award for permanent disability is excessive.

The Board affirms and adopts those portions of the Referee's order which found the claim was not prematurely closed and which declined to grant claimant an award for permanent total disability.

On the issue of extent of disability, after de novo review of the record and considering the guidelines contained in OAR

436-65-600 et seq., the Board concludes that claimant would be more appropriately compensated by an award of 224° for 70% unscheduled disability in lieu of all previous awards.

ORDER

The Referee's order dated May 4, 1984 is affirmed in part and modified in part. That portion of the Referee's order which granted claimant 144° for 45% unscheduled disability in addition to the 176° for 55% previously awarded is modified to award claimant 48° for 15% unscheduled disability for a total award of 224° for 70% unscheduled disability.

GEORGIA L. PIERSON, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-09450
October 29, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Mongrain's order which set aside its denial of claimant's claim for aggravation of her arm and shoulder injury and ordered it to assume responsibility for medical services. The issue is compensability.

On April 22, 1977 claimant suffered a compensable injury to her right shoulder and elbow. After a failure of conservative treatment, claimant underwent a surgical release of the medial epicondylar area of her right elbow. In May and June of 1978 claimant was evaluated at the Callahan Center. The psychological discharge summary at Callahan Center indicated an "over-focus on physical symptomatololgy, tendency toward social isolation and tendency to gain considerable 'secondary gain' from her injury."

A February 27, 1979 stipulated order granted claimant 35% scheduled disability for loss of use of her right arm and 20% unscheduled disability to her right shoulder.

Claimant returned to Dr. Smith, her earlier surgeon, on June 22, 1981. Dr. Smith observed considerable functional loss in claimant's right shoulder and elbow since he had last seen her in 1978. Dr. Smith could not determine how much loss was functional and how much might be organic. Neither could he recommend any course of treatment.

In September 1981 claimant was examined by Dr. Bernstein, a neurologist, who found no demonstrable neurologic deficit. He stated that his examination and test results were "most suggestive of marked functional overlay."

In July 1982 claimant consulted Dr. Whitney, an orthopedist, who opined, without having seen Dr. Smith's or Dr. Bernstein's reports, that claimant's symptoms appeared to be psychogenic. However, because he was then unable to rule out an organic cause, he treated claimant with medication.

On September 22, 1982 Dr. Whitney noted the Callahan Center evaluation, which he interpreted as a diagnosis of claimant's psychogenic symptomatology. Dr. Whitney was unable to explain any relationship between claimant's complaints and the 1977 injury.

On September 24, 1982 claimant requested that her claim be reopened as an aggravation. The SAIF Corporation denied claimant's claim on October 12, 1982. SAIF also denied responsibility for Dr. Whitney's charges for medical services.

On March 6, 1983 claimant was examined by Dr. James Martin, a psychiatrist. In responding to an inquiry from claimant's attorney, Dr. Martin opined that claimant "most probably" had a functional overlay, that her shoulder and arm pain were "probably in part psychogenic," and "that [claimant] most likely will have problems associated with depression and anxiety prior to the injury and that these were possibly aggravated by that injury."

There followed an exchange in which counsel for claimant and SAIF attempted to clarify Dr. Martin's opinion. Dr. Martin amended his previous statement to read, "[I]t would be my opinion that [claimant] most likely did have problems associated with depression and anxiety prior to the injury and that these were probably aggravated by that injury." (Emphasis added.) He later stated in a letter to counsel for SAIF that he changed "possibly" to "probably" because the latter term "apparently carries a greater degree of certainty...." However, he then indicated that he was not certain of his conclusions in this case, particularly due to the short amount of time he had to work with claimant.

Claimant is required to prove by a preponderance of the persuasive evidence that her condition has worsened, and that such a worsening is due to her 1977 injury. At best, the evidentiary scales are evenly balanced; therefore, we conclude that claimant has failed to sustain her burden of proof.

We agree with the Referee that Dr. Whitney's services are SAIF's responsibility. Dr. Whitney attempted to treat claimant as though her complaint had an organic basis, which was not unreasonable. Claimant is entitled to such treatment under ORS 656.245(1).

ORDER

The order of the Referee dated March 8, 1984 is affirmed in part and reversed in part. That portion of the Referee's order that set aside the SAIF Corporation's denial of claimant's aggravation claim is reversed. The SAIF Corporation's denial insofar as it denied the aggravation claim is reinstated and affirmed. The remainder of the Referee's order is affirmed.

JAMES C. SWATZEL, Claimant
Lindsay, et al., Attorneys

WCB 82-10612
October 29, 1984
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Presiding Referee Daughtry's order which dismissed claimant's request for hearing for want of prosecution. On review, we interpret claimant's contentions as a request to be granted an opportunity to present his case at hearing. We grant his request and reverse the Referee's order.

A hearing request was initially filed in late November 1982. In December 1982 claimant's counsel reiterated claimant's request

for medical reports from the insurer. In February 1983 claimant was directed to submit an application for hearing date or file a status report. No response was forthcoming. In mid-March 1983 claimant's counsel advised the Board that she no longer represented claimant and that claimant would be representing himself. She further advised the Board of claimant's mailing address, a post office box.

On March 23, 1983 an Order to Show Cause why the matter should not be dismissed issued pertaining to claimant's failure to respond to the February status report letter. On April 23, 1983 the Board received a letter from claimant indicating that he would be representing himself and wished to proceed. On May 5, 1983 the Order to Show Cause was vacated.

Receiving no further response from claimant, another Order to Show Cause issued on October 5, 1983. No response was forthcoming within 30 days of the order.

By letter dated November 29, 1983 the insurer reported that it had directed both a certified and regular mail letter to claimant on August 24, 1983 at his post office box. Neither letter had been returned. Stating it had received no response to its request for an up-date of claimant's intentions, the insurer requested that the matter be dismissed.

On December 13, 1983 an Order of Dismissal issued. On December 20, 1983 the Board received a letter from claimant dated December 15, 1983. Responding to the October Order to Show Cause, claimant indicated that a mid-August move from his place of residence and a subsequent October move had prevented him from receiving his mail until late October. He had not instructed that his mail be forwarded. Claimant also advised that he had recently been involved in an auto accident. Reasserting his strong commitment to his case, claimant requested that a hearing date be scheduled.

On December 22, 1983 the insurer requested that the Order of Dismissal remain in force. The insurer disputed claimant's contention that he was not receiving mail at his former address during the time in question, enclosing a receipt of its certified letter addressed to the post office box indicating claimant signed for the letter on August 31, 1983. Furthermore, the insurer argued that even if claimant did not receive the Order to Show Cause until late October, his delay in providing a response until mid-December was considerable.

On January 13, 1984 the Board received a letter from claimant, dated January 10, 1984, indicating that he had been working for three months and had just been able to secure the services of a medical specialist to support his claim. Claimant did not offer any further explanations regarding the claim's lack of progress from May-December 1983 or his failure to respond to the October 1983 Order to Show Cause until mid-December 1983.

On January 26, 1984 the Referee set aside his dismissal order and reinstated claimant's request for hearing. The Referee directed that the case be set for hearing.

On January 31, 1984 the insurer requested that the Order of Reinstatement be vacated, noting that the order had issued more than 30 days from the Order of Dismissal. On March 5, 1984 the

Referee found that he was without jurisdiction to issue his Order of Reinstatement. Therefore, the Referee interpreted claimant's January 10, 1984 letter as a request for Board Review of the December 13, 1983 Order of Dismissal.

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. OAR 436-83-310.

We are persuaded that claimant has demonstrated good cause why his request for hearing should not be dismissed. Although there is conflicting information whether claimant was receiving mail at his post office box beginning in August 1983, we have decided to give claimant the benefit of the doubt. We take this action particularly because claimant has demonstrated a willingness to respond to the Show Cause Orders issued in this matter. Granted, the responses have lacked promptness, but they have addressed claimant's concerns and expressed his desire to prosecute his claim. Considering that claimant is unrepresented and unsophisticated in Workers' Compensation procedures, we find that an order of dismissal would not be appropriate. Claimant is entitled to have an opportunity to present his case.

ORDER

The Referee's Order of Dismissal dated December 13, 1983 is reversed. This matter is remanded to the Hearings Division for an expedited hearing.

GLEN M. CARTER, JR., Claimant
Macdonald, et al., Attorneys

WCB 83-10045
October 30, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Shebley's order which: (1) upheld a Determination Order which granted no unscheduled permanent disability award; (2) upheld the SAIF Corporation's denial of claimant's claim of aggravation of his low back injury; and (3) upheld the SAIF Corporation's denial of responsibility for claimant's headaches and neck complaints. The issues are: (1) extent of permanent disability; (2) compensability of claimant's aggravation claim; and (3) compensability of claimant's headache and neck complaints.

Claimant suffered a compensable low back injury on December 17, 1982. He was treated conservatively by Dr. Sears, a chiropractor. In February 1983, while still under Dr. Sears' care, claimant reinjured his back at home. On March 18, 1983 Dr. Sears released claimant for regular duty work and stated that claimant was medically stationary and had no permanent impairment as a result of his back injury. A Determination Order dated April 12, 1983 closed claimant's claim with no award of permanent disability.

None of Dr. Sears' records in evidence mention that claimant complained of or was treated for headaches or neck pain. Claimant testified that he told Dr. Sears that he was experiencing headaches and neck pain, and that Dr. Sears told him that those symptoms were not related to his low back injury. According to claimant, Dr. Sears did not treat him for neck pain or headaches.

On October 17, 1983 claimant sought treatment from Dr. Toyas, a chiropractor. X-rays ordered by Dr. Toyas and interpreted by Dr. Blanche, apparently a radiologist, showed a normal cervical and lumbar spine and minimal scoliosis of the lower thoracic spine. Dr. Toyas noted claimant's chief complaints to be low back and neck pain and headaches, which claimant related began immediately after his December 1982 low back injury. Dr. Toyas deferred treatment until an orthopedic evaluation could determine the severity of claimant's back injury.

In a report dated December 15, 1983 Dr. Kaiser opined that claimant had intervertebral disc disease of L5-S1, based upon the x-rays available to him. Dr. Kaiser felt that any impairment caused by claimant's back condition was "slight." The report does not mention headaches or neck pain. We note that although Dr. Kaiser's report is dated December 15, 1983, the record indicates that his examination was conducted prior to December 14, 1983.

Claimant was examined by Orthopaedic Consultants on December 14, 1983. The panel concurred that claimant's condition was stationary and that the physical examination showed no abnormalities. The panel opined that claimant had no loss of function from either his neck or his back, and that claimant's past headaches and neck complaints were not related to the low back injury.

Dr. Toyas stated in a letter to claimant's attorney that it was possible for claimant's low back injury to involve headaches and neck pain.

Claimant testified at the hearing that his symptoms had resolved and that he could perform all of his usual activities.

The Referee's order does not specifically address the issue of the extent of claimant's permanent disability. Implicitly, the Referee, by affirming the Determination Order, must have concluded that claimant was not permanently disabled. On de novo review, the Board agrees that claimant has no permanent disability resulting from his low back injury.

On the issue of the compensability of claimant's aggravation claim, the Referee relied upon Oakley v. SAIF, 63 Or App 433, 436 (1983), for the proposition that objective medical evidence is required to prove an aggravation claim. Finding no such evidence in the record, the Referee concluded that claimant had failed to carry his burden of proof. Subsequent to the entry of the Referee's order the Oregon Supreme Court decided Garbutt v. SAIF, 297 Or 148 (1984). Garbutt expressly rejected the Oakley court's statement that medical evidence is statutorily required in aggravation cases. See ORS 656.273(7).

On the evidence as a whole, we are not persuaded that claimant's condition worsened since the last arrangement of compensation on April 12, 1983. At best, claimant's testimony is that his condition stayed more or less the same until he eventually sought treatment from Dr. Toyas. Without some other evidence on this point, claimant has failed to sustain his burden. Only Dr. Toyas addressed the issue, and he expressly stated that he did not know claimant's condition on April 12, 1983 and, therefore, could not give an opinion. We, therefore, agree

with the Referee, although for a different reason, that claimant did not meet his burden of proof on his aggravation claim.

On the issue of the compensability of claimant's headaches and neck pain, the Board agrees with the Referee's conclusion. We note that the Referee found claimant to be credible and that claimant testified that he told Dr. Sears that he was experiencing headaches and neck pain when he first presented for treatment. Claimant volunteered, however, that Dr. Sears told him that his headaches and neck pain were not related to his compensable low back injury. This admission is consistent with the other medical evidence that considers this issue.

ORDER

The Referee's order dated March 26, 1984 is affirmed.

WILLIE KING, Claimant
Warren & Allen, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-03810
October 30, 1984
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 submitted a 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.

RONALD G. MAHONEY, Claimant
Svoboda Associates, Claimant's Attorneys
Brian Pocock, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-01430
October 30, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Foster's order that granted claimant an increase of 32° for 10% unscheduled low back disability for a total of 128° for 40% unscheduled disability. The issue is extent of claimant's unscheduled disability.

The 36 year old claimant was injured when struck by a falling tree while employed as a bucker on March 28, 1978. Admitting x-rays showed multiple spinous process fractures in the lumbar area, multiple rib fractures and pneumothorax. After claimant's chest injuries were stabilized, he underwent a decompression laminectomy at L4-5 and L3-4-5 fusion with bilateral Harrington Rod internal fixation from L2 to the sacrum. Claimant's recovery was slow but steady. As a result of spinal nerve injuries associated with the fractures, claimant also experienced left and right footdrop.

In February 1979 claimant began a program of vocational rehabilitation. In August 1979 an attempt was made to surgically

remove the Harrington Rods. Surgeons were able to remove only the left rod, the right one being totally encased in fusion bone. As a result of the permanently emplaced right rod, claimant has ankylosis of four lumbar vertebrae.

Claimant continued his vocational rehabilitation program. His monthly summaries show steady progress in his training as an aircraft mechanic. On October 4, 1979 claimant was declared medically stationary as of August 27, 1979.

Claimant successfully completed his retraining program on March 19, 1981 and became permanently employed full time as an aircraft mechanic on April 27, 1981.

By Determination Order dated April 24, 1981 claimant was granted an award of 96° for 30% of the total allowable for unscheduled disability to his low back, 20.25° for 15% scheduled disability for loss of use of his right foot (lower leg) and 13.5° for 10% scheduled disability for loss of use of left foot (lower leg). Claimant requested a hearing, contending that he was entitled to a greater award of both scheduled and unscheduled permanent partial disability.

Claimant did not appear at the hearing. Based upon the documentary evidence submitted, the Referee concluded that there was an insufficient basis for increasing the amount of claimant's scheduled disability. Claimant does not suggest otherwise on Board review.

Based upon the same evidence, however, the Referee concluded that claimant was entitled to an increased award of unscheduled disability. We disagree. After considering all of the evidence and the guidelines contained in OAR 463-65-600 et seq., and comparing this case with cases that granted similar awards, e.g. Betty G. Olson, 36 Van Natta 827 (1984) (30%); Leonard F. Larson, Jr., 35 Van Natta 829 (1983), aff'd mem. 68 Or App 924 (1984) (25%); Esther M. Anderson, 35 Van Natta 1296 (1983), aff'd mem. 68 Or App 384 (1984) (20%), we conclude that claimant was most appropriately compensated by the award of 96° for 30% unscheduled disability granted by the April 24, 1981 Determination Order.

ORDER

The Referee's order dated March 27, 1984 is affirmed in part and reversed in part. That portion of the order which affirms claimant's awards for scheduled disability is affirmed. That portion of the order which grants claimant an award of additional unscheduled disability is reversed.

MICHAEL T. BAKER, Claimant
David Force, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-01201
October 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Foster's order which upheld the direct responsibility employer's denial of an occupational disease claim for respiratory problems due to toxic chemical exposure.

Claimant contends that his exposure to pentachlorophenol, or

to sodium hydroxide, or to both was the major contributing cause of a series of upper respiratory infections and a period of interstitial pneumonitis followed by a sensitivity to airborne irritants, diagnosed as reactive airway disease.

Since 1978 claimant primarily worked inside as a dry-belt grader with plywood. For two periods, in the winters of 1980-81 and 1981-82, he was assigned work in the shipping department where he occasionally had to work in exposed areas and was exposed to pentachlorophenol. He claims he suffered upper respiratory problems due to the exposure. Claimant last worked in the shipping department in March 1982.

Claimant consulted Dr. Sheldon Wagner, physician and toxicologist, at the Oregon State University Department of Agricultural Chemistry. Dr. Wagner examined claimant and reviewed the studies and literature on exposure to pentachlorophenol. An Environmental Protection Agency study concluded that there were no long term effects of exposure to pentachlorophenol, even among workers showing mild upper respiratory responses to exposure. He reported that workers exposed over long periods of time have shown some increased complaints of mild upper respiratory complaints but no increased risk of pneumonitis. He opined that claimant's illness could not be related to exposure to pentacholorophenol. Dr. Montanaro, Assistant Professor of Medicine at Oregon Health Sciences University, agreed with Dr. Wagner's conclusion.

Claimant worked as a relief dryer tender during the late summer and fall of 1982. Cleaning the plywood dryers every other Saturday was part of his job. To clean the dryers, the dryer tenders put sodium hydroxide in a 50% aqueous solution from a drum into a pressure tank, filled the tank with water, closed the tank and pressurized it. The solution was then sprayed on the interior walls of the dryers where it foamed and softened the wood pitch and other residues. The dryer tenders then removed the foam and residues with water. When the pressure tank was empty, one of the dryer tenders turned a pressure relief valve which vented the compressed air and traces of the contents of the tank into the environment where the men were working. There was no evidence of the amount of sodium hydroxide solution that was put into the pressure tank, how much water was added or how much was left in the tank when it was vented, whether on this occasion or others. Inadequate safety precautions relating to protective clothing resulted in a citation by the Accident Prevention Division of the Workers' Compensation Department in April 1983, after which the employer discontinued use of the sodium hydroxide solution for this purpose.

One Saturday in August 1982, after using the sodium hydroxide solution, claimant developed unexplained symptoms resembling food poisoning, from which he recovered completely. Claimant was exposed accidentally to the plume of mist that emanated from the pressure relief valve on Saturday, October 30, 1982. He showed some immediate mild symptoms of exposure to sodium hydroxide, but they subsided. Over the next six weeks, claimant's condition deteriorated in a complex pattern. On December 15, 1982 claimant insisted on obtaining chest X-rays, which revealed that he had pneumonia or pneumonitis. Claimant was hospitalized twice during December for interstitial pneumonitis of undetermined etiology. A bronchial biopsy showed emphysema, subacute interstitial lung disease, moderate acute and chronic inflammation and minimal

fibrosis of the lung. Claimant eventually recovered fully and, according to all the doctors, shows no permanent lung injury .

In January 1983 claimant consulted Dr. Buck, an allergist. Dr. Buck found claimant was mildly allergic to dog and cat dander and house dust, and that claimant's history indicated that his interstitial pneumonitis was neither a Type 1 allergic reaction, nor a Type 3 nor Type 4 immunological reaction to chemicals. No one discussed Type 2 reaction, which is a complex biological response to an infectious agent. Mold and fungus infections were ruled out as causes of the interstitial pneumonitis.

Drs. Montanaro and Wagner reviewed the lab tests and the history of claimant's complaints and determined independently that claimant's interstitial pneumonitis was probably caused by mycoplasma, an organism that Dr. Montanaro characterized as between bacteria and virus in nature. Dr. Wagner related that this type of lung disease is often called "walking pneumonia." Both doctors described the symptoms of mycoplasma pneumonitis as nearly identical with the course of claimant's symptoms. Both doctors referred to the "cold agglutinins" test done on claimant which revealed a biological response to a bacterial infection. The test did not identify exactly which organism was responsible for the disease, but it did indicate the presence of some infectious organism. Both doctors also reported that mycoplasma infections respond best to steroid therapy and poorly to antibiotics, which was the experience of the claimant.

Dr. Lorenz, claimant's primary treating physician, opined that claimant's exposures to pentachlorophenol and sodium hydroxide were more than 51% causative of the interstitial pneumonitis. He based his opinion on part of Dr. Buck's report, claimant's response to bronchodilators and steroids, and the employer's unsafe practices in use of sodium hydroxide. He also noted that the interstitial changes in claimant's lungs were consistent with noninfectious etiology. The part of Dr. Buck's report that was ignored was the mild allergy to cat dander and housedust; claimant admitted at hearing that he has a cat and that Dr. Wagner had advised him to take prophylactic measures to protect himself. The response to bronchodilators and steroids is the standard course in diagnosed mycoplasma pneumonia or pneumonitis, according to Dr. Wagner, and cannot be said to be indicative of toxic chemical exposure. The unsafe practices at the workplace for which the employer was cited were not "due to high levels of this agent," referring to sodium hydroxide, but were for improper safety attire; no test of sodium hydroxide levels was conducted at the workplace by anyone. The interstitial changes in claimant's lungs were described by Dr. Wagner as classic indicators of mycoplasma infection, and could not be ascribed primarily to toxic chemical exposure.

Because Dr. Lorenz's opinion appears to ignore laboratory test results and crucial parts of other reports, we find his opinion to be less persuasive than Dr. Wagner's on the issue of the causation of claimant's disease. We note further that Dr. Lorenz's assertions that the interstitial pneumonitis response to steroids and the interstitial changes in the lungs were consistent with toxic exposure did not preclude them as responses to mycoplasma infection.

Most convincing is the lack of symptoms that Drs. Montanaro and Wagner said should be present if the exposure to sodium hydroxide were a precipitating factor. It is noted that claimant felt progressively worse during the course of the months of November and early December, but that was more consistent with the development of mycoplasma pneumonitis than a toxic exposure to sodium hydroxide, according to Drs. Kintz, Wagner, Vitums, Buck, Larson, and Montanaro.

Claimant additionally puts forward the proposition that the inhalation of the sodium hydroxide was a sufficient insult to his pulmonary defense mechanisms that the mycoplasma was able to disable him with interstitial pneumonitis. Drs. Wagner and Montanaro called it unsubstantiated speculation that toxic chemical exposure and injury would lead to weakness which could lead to interstitial pneumonitis. One of claimant's treating physicians, Dr. Vitums, a pulmonary specialist, concurred.

We are more persuaded by the opinions of the specialists in this case who examined claimant, compared his symptoms with other disease or injury processes and found there was an insufficient medical connection to establish causation by exposure to toxic chemicals, than by the opinion of claimant's treating internist who did not express an opinion on causation until sixteen months after claimant was discharged from the hospital. On de novo review, we find that claimant has failed to carry his burden of proving by a preponderance of the evidence that his on-the-job exposures to pentachlorophenol or sodium hydroxide or pentachlorophenol and sodium hydroxide were the major contributing cause of his interstitial pneumonitis and reactive airway disease. Accordingly, we affirm.

ORDER

The Referee's order dated May 7, 1984, is affirmed.

DONALD M. BREWER, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08258
October 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Johnson's order which increased claimant's award of unscheduled permanent partial disability from 32° for 10% to 160° for 50%. Claimant cross-requests review of that portion of the Referee's order which affirmed the Determination Order insofar as it set claimant's medically stationary date. The issues on review are: (1) whether the claim was prematurely closed; and (2) the extent of claimant's permanent disability.

Claimant suffered a compensable injury to his upper back, neck and shoulder on December 11, 1982 when he was struck between the shoulder blades by a 60 pound hydraulic jack. His initial treating physician, Dr. Todd, an orthopedist, noted that claimant had preexisting lumbar and lumbosacral spondylolysis and spondylolisthesis and a laminectomy at L3-4 by history. Dr. Todd treated claimant conservatively.

Prior to being released by Dr. Todd, claimant began treating with Dr. Howard, a chiropractor. Claimant evidently did not return to Dr. Todd after the initial treatment.

On May 13, 1983 claimant was examined by Dr. Tilden, a chiropractor, at SAIF's request. Dr. Tilden opined that claimant was medically stationary and that there was no measurable loss of function due to the 1982 injury, which he evidently viewed as being to the neck and shoulder only. He stated that there was minimal impairment due to claimant's preexisting low back condition.

Claimant was then examined by Dr. Pasquesi, an orthopedic surgeon, on June 7, 1983. In Dr. Pasquesi's opinion, claimant had "probably reached a stationary stage and . . . would probably fit most closely into Category III for dorsolumbar complaints." He went on to recommend a neurological evaluation before claim closure. He stated that, if the neurological examination supported claim closure, claimant "would have an additional impairment of 10 percent in the unscheduled area for his cervical, dorsal and left arm complaints . . . ."

On June 13, 1983 claimant was examined at Callahan Center. Dr. Storino, neurologist, stated that the results of his neurological evaluation were all within normal limits. He opined that claimant's impairment was minimal and that claimant was "approaching medically stationary status."

On June 17, 1983 Dr. Howard, claimant's treating chiropractor, wrote that he agreed with Dr. Pasquesi's evaluation, including his suggestion that a neurological evaluation be done.

On June 21, 1983 Dr. Ash conducted a neurological examination. His report is vague. On June 29, 1983 Dr. Ash wrote that he was unable to arrive at a definitive diagnosis. He found the lack of organic findings to sustain claimant's physical complaints to be "enigma[tic]." Finally, on July 18, 1983 Dr. Ash wrote that he agreed with Dr. Pasquesi's conclusions. He unequivocally stated that claimant was medically stationary.

On August 18, 1983 another neurosurgeon, Dr. Helle, found no objective neurological findings to support claimant's complaints of pain. He saw the chance of tumor or disc disease as "slight, but not zero," and on that basis recommended a myelogram.

Claimant's claim was closed by a Determination Order dated August 26, 1983 that set claimant's temporary disability termination date as July 28, 1983 and granted claimant an award of 32° for 10% unscheduled disability to his low back.

Claimant had a myelogram on November 17, 1983. In Dr. Helle's opinion, the myelogram showed organic reasons for claimant's low back and neck pain, however, it did not indicate the need for surgery.

Claimant has a history of a back injury in approximately 1974, which resolved with conservative care, and a back injury in 1976 which resulted in a laminectomy at L3-4. Claimant also suffers from preexisting lumbar and lumbosacral spondylolysis and spondylolisithesis due to a congenitally abnormal L5 lamina. Claimant testified that at the time of the 1982 injury this underlying condition was asymptomatic.

The record is silent as to whether any of claimant's prior back injuries were compensable or resulted in any award of permanent disability.

Claimant contends that he was not medically stationary until after he was released from the hospital after his November 17, 1983 myelogram. The Board agrees with the Referee that the preponderance of the persuasive evidence shows that claimant was medically stationary as of July 18, 1983.

The Referee granted claimant an increase in unscheduled permanent disability of 40% for a total of 50% unscheduled permanent disability to his low back, neck, left shoulder and left arm. In so doing, the Referee "relied heavily upon the extensive physical findings of Dr. Pasquesi . . . and upon claimant's credible testimony."

Claimant testified that he is restricted in his ability to bend and stoop, that he is unable to perform in his former occupation as a truck driver, and that he suffers from constant pain in his low back, neck, left shoulder and left arm. Claimant's work history is confined to the automotive and transportation field. Claimant is 41 years old and has a high school education by G.E.D. He is limited to light work, and is unable to use his left arm and shoulder in pushing or pulling. There is some suggestion of functional difficulty; however, claimant's emotional and psychological condition appears normal, as does his mental capacity. We do not find claimant's testimony helpful in establishing the degree of his physical impairment. See Garbutt v. SAIF, 297 Or 148, 152 (1984).

The medical opinions are only somewhat enlightening on the question of claimant's physical impairment. Doctors Ash and Helle, the neurologists, gave no opinion on the subject. Dr. Tilden, chiropractor, and Dr. Storino, Callahan Center's medical consultant, both opined that claimant's impairment was minimal. Dr. Pasquesi, upon whom the Referee principally relied, stated that claimant "would probably fit most closely into Category III for dorsolumbar complaints." We can only speculate as to what Dr. Pasquesi means by "Category III for dorsolumbar complaints."

Dr. Pasquesi went on to say, however, that claimant "would have an additional impairment of 10 percent in the unscheduled area for his cervical, dorsal and left arm complaints . . . ." This finding is consistent with those of Doctors Tilden and Storino.

After considering all the evidence, including claimant's testimony relating to the impairing effect of his chronic pain, and the guidelines contained in OAR 436-65-600 et seq., and comparing this case with cases that granted lesser amounts of unscheduled disability, e.g. Charles G. Tallard, 36 Van Natta 886 (1984) (25%); David H. Hansen, 36 Van Natta 325, appeal dismissed (1984) (20%); Betty G. Olson, 36 Van Natta 827 (1984) (30%); Leonard F. Larson, Jr., 35 Van Natta 829 (1983), aff'd mem. 68 Or App 924 (1984) (25%), we conclude that claimant would be most appropriately compensated by an award of 96° for 30% unscheduled disability.

ORDER

The order of the Referee is modified to grant claimant an award of 96° for 30% unscheduled disability to his low back, neck and shoulder in lieu of and not in addition to all other awards. The remainder of the Referee's order is affirmed.

OTTO E. DUBELL, Claimant
Olson Law Firm, Claimant's Attorney
John Svoboda, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-03244
October 31, 1984
Order on Remand (Remanding)

This case is on remand from the Court of Appeals. The court's order states:

> "[T]he case is remanded for the taking of evidence in regard to a job description presented to claimant following the hearing of this matter and while the matter was on appeal. Further, the referee shall make recommended findings of fact and conclusions of law. The record as supplemented by the new evidence, together with the referee's recommended findings and conclusions shall be filed within 90 days of the date of this order."

The court's order is dated October 12, 1984. Accordingly, the Board remands the case to the assigned Referee for proceedings, evidence taking and recommended findings and conclusions consistent with the court's order. The Referee shall forward the completed record to the Board within 60 days of this order.

IT IS SO ORDERED.

CHARLES E. FISCHER, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-06763
October 31, 1984
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review dated October 16, 1984.

The request is granted. Although we adhere to the reasoning of our prior order, we now note that on review, SAIF requested relief only relative to double time loss payments for the period from August 11, 1982 through October 22, 1982. The Determination Order on the wrist claim awarded time loss only through October 21, 1982, however. Accordingly, we modify our prior order to limit relief to the period from August 11, 1982 through October 21, 1982, inclusive.

ORDER

The Board's Order on Review dated October 16, 1984 is modified in part as modified is hereby republished. The Referee's order dated January 19, 1984 is reversed only to the extent that it awarded claimant additional compensation for temporary total disability for the period from August 11, 1982 through October 21, 1982, inclusive. The remainder of the Referee's order is affirmed.

LELA E. GAITHER, Claimant
Callahan, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06537
October 31, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Thye's order which set aside its denial of medical services. SAIF contends that claimant's current back problems are attributable to a fall in the bathtub at home and not to her 1970 industrial injury.

Claimant's aggravation rights in connection with her 1970 injury have expired. She requested that the Board exercise own motion authority and reopen her 1970 claim for the payment of additional temporary and/or permanent disability in connection with her worsened low back condition. By order dated August 17, 1983, the Board deferred acting upon claimant's own motion request pending resolution of the medical services litigation in this proceeding. We have this day issued a separate order in Own Motion No. 83-0181M denying claimant's request for relief.

In April 1970 claimant sustained an injury to her neck, upper back and low back when she slipped and fell on her buttocks. She was seen initially by Dr. Flaming, who diagnosed an acute neck and back sprain. Claimant was hospitalized for one week and placed in traction, which apparently gave her some relief. She returned to work in mid-May 1970 and then quit in early July, partly because she felt that the work was causing her some continued physical distress in her upper back and neck. She subsequently went to work at a cannery. She continued to experience headaches, pain between her shoulder blades and pain in her right shoulder and upper arm.

From 1970 through 1977 claimant was examined and treated by various physicians, primarily for complaints of pain in her neck, mid back and low back. Various reports, including x-ray reports, identify osteoarthritic changes in claimant's mid and upper dorsal spine. Degenerative changes in the cervical spine were also eventually identified.

Claimant was also noted to suffer from exogenous obesity, and she apparently had a tendency to ingest excessive medication. Weight reduction was frequently encouraged by examining and treating physicians. In December 1977 claimant was examined by Dr. Hoda, an orthopedic surgeon. Her chief complaint was muscle spasm, constant headaches and pain from her neck to her lower back. Dr. Hoda discussed the fact that claimant had been extensively studied and that no abnormalities had been found to require corrective measures. He suggested that claimant attempt to control her muscle spasms and pain with a transcutaneous nerve stimulator.

In November 1978 claimant began working as a psychiatric aide at Dammasch State Hospital. She worked in that position until August 1982. Her job duties included supervising patients, counseling and administering medication. Although this job apparently involved some physical activity in terms of assisting patients with their daily activities and moving about, claimant testified that this job involved much less physical exertion than her previous employment.

On the morning of August 26 or 27, 1982, as claimant was

finishing taking a bath at home, she slipped and fell back into the tub and landed on her buttocks. She experienced an immediate increase in back pain, which progressively worsened during the day. Claimant went to work the day that she fell, but stayed home the next day. Claimant contacted her physician, Dr. Newberg, who prescribed muscle relaxants and physical therapy. Claimant's pain persisted, and she was unable to return to work.

Claimant was hospitalized in October 1982 for bed rest with traction, anti-inflammatory therapy and physical therapy. Dr. Newberg's report of history and physical examination indicates an assessment of a probable facet syndrome. According to claimant's testimony, her primary complaints were in her left upper back, left lower back and her left leg. An x-ray report indicates degenerative changes at multiple levels of claimant's spine, with the most change at the L5-S1 level. Claimant was hospitalized for approximately 12 days. On discharge she was advised to limit her activities, and she continued her muscle relaxant and pain medications.

Claimant was again hospitalized in January 1983 for treatment of increased back pain. According to claimant's testimony, she awakened during the night, turned over in bed intending to get up, and experienced the onset of increased pain in her upper left back and neck. Claimant was hospitalized for about nine days. No new x-ray studies or other diagnostic procedures were performed during this hospitalization.

A January 14, 1983 report from Dr. Chester to claimant's attorney states the diagnoses of chronic pain, myofascial distress syndrome with upper thoracic, cervicobrachial and low back extensions, chronic depression, and progressive spinal deformation, compression and arthrosis. He opined that claimant's general condition had worsened since the last claim closure of June 17, 1974 -- by the terms of which claimant was awarded 32° for 10% unscheduled back disability and 9.6° for 5% scheduled right arm disability. In answer to the question of whether claimant's April 1970 injury continued as a material contributing cause of this worsened condition, Dr. Chester stated:

> " * * * * I can state yes, with the extension that the injury of 1974 and the reaction patterns, which occurred with that first incident, and initiated by that accident and its resolution, forms the pattern upon which her many episodes of recurring back pain and associated symptoms have recurred and have expanded into a more extensive pain syndrome. There have been multiple incidents that served as aggravating foci for [claimant], and her life situation has become quite complex since her 1970 injury."

On January 9, 1983 claimant was examined by Orthopaedic Consultants who diagnosed chronic cervical, dorsal and lumbar strain, by history, degenerative disc disease at L5-S1, severe functional overlay and obesity. In their opinion, claimant's increased neck and back symptoms were caused by her August 1982 slip and fall in the bathtub and were unrelated to her 1970 industrial injury.

The depositions of Drs. Murphy and Chester were taken approximately one week before the hearing. Dr. Murphy testified, essentially, that it was possible that claimant's 1970 injury predisposed her to reinjury:

> "Q: * * * If an individual has a long-standing 12 year history of low back problems and apparently continues to have symptoms throughout that period of time -- and I'm going to ask you to assume that as being true, that she had symptoms pretty much continuously since 1970 -- would that not make the likelihood of this type of injury greater than someone with just perhaps a normal back, a healthy back?
>
> "A: These are all assumptions. Certainly that's possible. I would think that the activity that she described could also be sufficient enough of an explanation as to why she presented in the emergency room."

During his testimony, Dr. Chester explained his above-quoted statement concerning the possible causal relationship between claimant's April 1970 injury and her 1982 increased pain:

> " * * * [T]he first injury to [claimant's] back known to me is that one of April 1970 and it's not the only one. There are many separate incidents which have occurred since that time. The injury of 1970 was apparently involved with a very prolonged resolution, taking months to years to actually resolve itself.
>
> " . . . [W]hen a person has gone through a very protracted period of symptoms such as back pain, muscle spasms and the like and these resolve themselves to some degree, it doesn't take a great deal to cause that whole symptom complex to reinstate itself to be present again.
>
> "You would not have to have a major injury to do that. It could be a minor injury, and it's as if those reactive patterns are neurological memories. This is fairly clear in pain literature now that a small incident might cause an excessive reaction, physiologically. In other words, it looks like they're far more reactive than it should be say given a new injury, but it simply calls forward the old response and it's a highly complex issue, but that's basically what I was referring to when I said those things."

With regard to the degenerative changes in claimant's spine reflected by the various x-ray studies since 1970, Dr. Chester considered that there had been a "dramatic change" in claimant's spine: "So there's been again a ten to twelve years of a

continuous process of spinal disruption, if you will. The architecture's quite changed." Dr. Chester agreed, albeit hesitantly, that claimant's obesity contributed to increased degeneration of the spine. Dr. Chester concluded that claimant had a "very mechanically unsound spine at this point, and that it would not take very much to disrupt it or make it symptomatic."

Dr. Chester's testimony reflects that claimant's symptoms had waxed and waned considerably following her hospitalization in January 1983. Claimant believes that her condition is worse than it was before the October or January incidents, at least in the sense that she was able to control her discomfort to a greater extent in the past.

Although the discrepancy is slight, we note that Dr. Chester apparently was not aware that, prior to the April 1970 injury, claimant had experienced some upper back pain for which she apparently had received treatment. In the interim between claimant's 1970 injury and August 1982, claimant had been involved in no accidents and had sustained no other traumatic injuries to her back. Her pain has been essentially continuous and chronic since her 1970 injury varying, at times, in location and often varying in intensity.

There is no record of medical treatment from the end of 1977 until claimant's admission to the hospital in October 1982. It is apparent, however, that Dr. Newberg treated claimant on an out-patient basis after the August 1982 bathtub episode.

There is no question that the August 1982 bathtub incident is a material contributing cause of claimant's current condition. Contrary to SAIF's apparent assertions, however, this does not relieve SAIF of continuing responsibility for claimant's condition if her original April 1970 injury remains a material contributing cause. See Grable v. Weyerhaeuser Co., 291 Or 387, 401 (1981).

A "material cause" is apparently something more than a minimal or de minimis cause, Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972), but something less than the primary or major cause, Summit v. Weyerhaeuser Co., 25 Or App 851 (1976). A considerable range lies in between those goal posts giving us only a very general standard to guide judgment in individual cases. Reasonable minds can, and frequently do, differ in deciding whether a given amount of causation is enough to be "material causation." Compare Ruth A. Coddington, 35 Van Natta 761 (1983), reversed Coddington v. SAIF, 68 Or App 439 (1984), with George Brasky, 34 Van Natta 453, aff'd mem Brasky v. SAIF, 61 Or App 226 (1982); see also Wilma H. Ruff, 34 Van Natta 1048 (1982).

Our review of this record fails to persuade us that claimant's 1970 industrial injury remains a material contributing cause of her continuing pain syndrome. Since her injury, claimant's spine has undergone marked degenerative changes, and there is little persuasive evidence to indicate that the progression of this degenerative process is attributable in material part to the 1970 injury. The degenerative process was in progress when claimant sustained her 1970 injury, and it has continued to progress at all levels of claimant's spine. Claimant

has experienced continuing symptoms of neck and back pain since her industrial injury. However, this injury was a relatively minor strain, and early in the history of the claim, it was noted that there was a functional component to claimant's continuing symptomatology. Claimant was able to work on a regular basis beginning in November of 1978 and, although she was not free of pain, did not require medical attention until the fateful bathtub episode in August 1982. By all accounts, this bathtub incident was at least as traumatic as claimant's 1970 industrial injury. Claimant's obesity, obviously unrelated to her injury, has definitely contributed to her continuing pain syndrome and possibly contributed to the degenerative disease process.

Orthopaedic Consultants are firmly of the opinion that claimant's August 1982 bathtub incident is the cause of her current complaints. Dr. Murphy's opinion on the causation question is not entirely clear; however, viewing his depositional testimony in the light most favorable to claimant, it suggests the conclusion that her 1970 injury may have contributed to her January 1983 hospitalization. Dr. Chester, essentially, is of the opinion that, as a result of her 1970 injury, claimant was predisposed to reinjury and, in this sense, her 1970 injury is a material contributing cause of her current condition.

Claimant is required to prove by a preponderance of the persuasive evidence a continuing, material relationship between her 1970 industrial injury and her current condition. Claimant must establish the probability, i.e., that it is more likely than not, that this material relationship is present. Claimant must prove more than just the possibility of the requisite causal connection. Lenox v. SAIF, 54 Or App 551, 554 (1981); Gormley v. SAIF, 52 Or App 1055, 1060 (1981). At best, the evidentiary scales are evenly balanced; therefore, we conclude that claimant has failed to sustain her burden of proof.

ORDER

The Referee's order dated January 24, 1984 is reversed, and the SAIF Corporation's denial dated June 28, 1983 is reinstated and affirmed.

JOJI KOBAYASHI, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-06757
October 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Leahy's order which upheld the insurer's partial denial of claimant's present left leg problems and which upheld a Determination Order granting no permanent disability. In addition, claimant seeks penalties and attorney's fees for unreasonable denial. Claimant also alleges that the Referee erred in considering the Determination Order. The insurer requests that we approve a stipulation made on the record as to the amount of overpayment created pursuant to the Determination Order.

FINDINGS OF FACT

Claimant is a 33 year old man who was working as an aide in a convalescent home on May 31, 1981 when he slipped on some jello

and fell, landing on his left knee. The insurer accepted the claim. Soft tissue swelling was noted. On June 29, 1981 Dr. James reported that claimant was complaining of pain under the kneecap. Dr. James felt no crepitus and noted no swelling. He diagnosed a contusion and opined that there was an extreme amount of functional overlay. He noted, however, that falls on the kneecap may cause severe pain.

Claimant attended the Callahan Center in August 1981 for evaluation of left knee pain, left leg weakness and hemianesthesia of the left leg. Dr. Medved, the Center Medical Examiner, was unable to find an organic basis for claimant's complaints. The Center psychologist, Dr. Henry, opined that claimant had a fictitious disorder. He also commented that claimant had a longstanding personality disorder characterized as an avoidant personality. Claimant was discharged from the Center because the treatment team felt that continued treatment would reinforce claimant's symptoms and make them more legitimate.

On October 9, 1981 Dr. James reported that he was unable to find any orthopedic pathology concerning claimant's knee. He thought claimant's problems were largely psychological. Dr. James released claimant to work on October 22, 1981.

Claimant attempted to return to work at a care center on October 31, 1981 but only worked until November 17, 1981 when he reportedly walked off the job.

Claimant saw Dr. Esau, a chiropractor, in February 1982. Dr. Esau opined that claimant had obviously sustained a severe orthopedic injury which caused degeneration. He noted that he intended to refer claimant to an orthopedic surgeon.

Orthopaedic Consultants evaluated claimant in March 1982. Claimant reported to the panel that he was experiencing pain under the kneecap and swelling of the knee on exertion. Claimant also complained of a deformed foot which he said had begun turning in in November 1981. The panel noted obvious interference with knee and ankle motions. The panel opined that claimant was not medically stationary and recommended psychological evaluation.

On March 9, 1982 Dr. Geist examined claimant and reported that he was unable to determine whether claimant's ankle and foot problem was caused by an organic pathology. On March 10, 1982 Dr. Aflatooni, a psychiatrist, wrote a report based on his attendance at the Orthopaedic Consultant's examination as well as a separate evaluation. He opined that claimant has a conversion disorder. He noted that claimant's symptoms have allowed him to avoid his usual physical activities and to receive support from the environment which he might otherwise not receive.

On March 23, 1982 Dr. Todd, an orthopedist, examined claimant. He noted that claimant held his knee straight and held "his left foot in the most severe plantar flexion and inversion I have ever seen in a nontraumatic foot." Dr. Todd noticed severe atrophy of muscles underneath a knee brace which claimant was wearing. On examination he discovered that claimant's foot is held in a dynamically balanced position so that if Dr. Todd tried to move it in either direction claimant's muscles resisted. Dr. Todd observed that when claimant was dressing he straightened his foot to get his pants on. Claimant also changed the position of

his foot to put his loafers on. He then moved it back to the deformed position. Dr. Todd opined that claimant had a psychological problem.

In June 1982 Dr. Voiss, a psychiatrist, reviewed claimant's file for the insurer and reported that in his opinion claimant's current disabilities were psychologically caused. He opined that the physical complaints concerning the left foot could not be caused by the type of knee injury suffered by claimant.

On July 14, 1982 the insurer issued the following "partial denial":

> "All of the recent medical examinations would indicate that the left knee originally bruised and strained in May, 1981, is not the primary or materially contributing cause of your present problems. It would appear that your knee is no worse than it was when you were originally determined to be stationary and able to return to work on October 31, 1981."

Claimant requested a hearing on July 27, 1982 to protest the partial denial.

On August 10, 1982 the insurer submitted the claim for closure. The closure form indicates that the insurer paid time loss benefits through July 14, 1982, the date of the partial denial.

A Determination Order issued on August 26, 1982 which granted claimant time loss benefits from May 31, 1981 through October 31, 1981. No award for permanent disability was granted. Claimant requested a hearing on September 7, 1982 to protest the Determination Order. The request for hearing requested that the hearing be consolidated with the hearing to protest the partial denial.

On November 4, 1982 Dr. Voiss wrote the insurer noting that he had received additional reports which documented that claimant had severe psychological problems prior to his on the job injury. These included diagnoses of childhood schizophrenia. Dr. Voiss opined that claimant's knee injury in no way contributed to claimant's underlying psychological condition.

In March 1983 Dr. Aflatooni again examined claimant. He opined that claimant has no psychosis. He believed that claimant was not malingering and that claimant's foot problems were not under claimant's voluntary control. Dr. Aflatooni opined that claimant's foot condition began as a functional problem but that different treatment might have prevented dependency on crutches and canes which he believed contributed to deformity in the left foot.

At hearing the Referee indicated that he understood that the matters in issue were the partial denial and a request for penalties and attorney's fees. Claimant's attorney responded that a Determination Order had issued after the partial denial upon which claimant had also requested a hearing. He said "I think, really, you're going to find based upon the evidence it's all part

and parcel of the denial." The insurer's attorney indicated that there was an overpayment of temporary disability benefits if the Determination Order was correct. He suggested that claimant's attorney stipulate to the amount overpaid pursuant to the Determination Order. Later in the hearing, claimant's attorney so stipulated.

Claimant testified at hearing that his leg had begun to turn in during September 1982. He testified that his condition was unchanged since the time he left the Callahan Center. On cross-examination he said his foot was already turning in when he went to the Callahan Center. He testified, that he had even reported that his foot was turning in to Dr. James who saw claimant in the emergency room and treated him for a short time after the on the job injury. Claimant was presented with reports from the University of Oregon Health Sciences Center which indicated that he told doctors there he had been hospitalized four times in the county hospital. Claimant denied that he had ever made such a statement. He also denied other matters reported in the Health Sciences Center reports.

Dr. Voiss was the only other witness at hearing. He testified that claimant would have been as disabled if he had never had the industrial injury. He explained:

> "Q. Well, Doctor, if he hadn't injured the leg in May, 1981, would his left leg be swollen up and look like it looks today?
>
> "A. Maybe yes, maybe no.
>
> "Q. How can you say that? Why isn't the right leg swollen up if you feel it has nothing to do with the injury in May, 1981.
>
> "A. Because what happens is when you have this kind of situation such as Dr. Aflatooni describes as a conversion reaction, the person goes back--the event becomes a rationalization for the expression of a sense of being crippled, disabled, unable to function, unable to walk and so forth. But it becomes the rationalization that allows those feelings to be expressed. They're expressed, then in that leg.
>
> "What happens with persons with this kind of dysfunction is that emotionally they begin to operate better. They don't have--whether it's [claimant's] alcoholism, or whether it's suicide attempts, or in and out of hospitals, whatever it may be, they organize themselves psychologically and emotionally around this particular idea.
>
> "What you see in this crippling, if you will, or his distorted leg is the somatic statement that he is crippled, helpless, et cetera. This relates to his development and his previous emotional crippling."

The Referee found that claimant had failed to prove that there was a causal connection between claimant's left leg and ankle condition and the accepted injury to his knee. He granted no award for permanent disability to the left knee because he found no evidence of any permanent impairment to the knee. He also noted that the evidence does not support a causal connection between claimant's industrial injury and his psychological condition.

ISSUES

On review, claimant urges that the partial denial be set aside. He contends: "The issue remains whether claimant's probable conversion reaction is causally linked to the industrial accident." Claimant also requests a penalty for unreasonable denial based on the theory that the denial was unreasonable under Safstrom v. Riedel International, Inc., 65 Or App 728 (1983). Claimant also contends that the claim should be reopened as of the date of the denial for payment of temporary disability benefits and medical services. Finally, claimant argues that the Referee erred in considering the Determination Order because the parties had agreed on the record not to litigate that issue. The insurer urges that the Board affirm the Referee's order, but specifically requests that we ratify the stipulation concerning the amount of overpayment.

OPINION

To reach the issue of the merits of the partial denial, we must first determine the procedural validity of the partial denial under Safstrom, supra and the cases which follow it. In Safstrom, claimant suffered an industrial injury which was accepted by the insurer. Several months later the insurer issued a partial denial which purported to deny further time loss and medical services benefits because the insurer believed claimant's symptoms were no longer caused by his industrial injury. The court found that the condition which the insurer denied was the same condition which it had earlier accepted. The court noted that a denial of medical benefits does not terminate the obligation to continue to pay time loss nor the obligation to process the claim to closure. The court said that the effect of the partial denial was to circumvent the claim closure provisions of ORS 656.268, thus preventing the Evaluation Division from determining whether claimant had any permanent disability due to his compensable injury. It noted, however, that a partial denial might be appropriate where the evidence established discrete compensable and noncompensable conditions and the compensable condition has resolved. See Aquillon v. CNA Insurance, 60 Or App 231 (1982).

Roller v. Weyerhaeuser Company, 67 Or App 583 (April 11, 1984) followed Safstrom. In Roller, claimant suffered an industrial injury and later developed diabetes. The diabetes was accepted pursuant to a Referee's order. Two years later the employer issued a partial denial of future responsibility for the diabetes on the ground that the diabetes had reached the condition it would have reached if the injury had not occurred. The court held that the partial denial was improper because it attempted "to terminate future responsibility before the extent of claimant's disability has been determined." Roller, supra at 585. The court said that the diabetes condition had been accepted and, therefore,

claimant is entitled to time loss and medical benefits. The court noted that the employer was free to litigate the issue raised by the partial denial at the time of closure. It also noted that after a Determination Order the employer was free to deny specific medical treatment or future aggravations on the ground that they do not result from the injury.

The most recent case involving the validity of a partial denial is Maddocks v. Hyster Corporation, 68 Or App 372 (1983). In Maddocks, claimant apparently had an accepted claim for a muscle disease. Three months after the claim was made, the employer issued a partial denial which purported to accept responsibility for time loss only through a certain date and for any permanent impairment. A Determination Order issued shortly thereafter. The court cited Safstrom and Roller for the proposition that the partial denial was of no force and effect. Because the Determination Order had issued and because the Determination Order was litigated, the court considered it and found claimant entitled to no award for permanent disability.

We understand these cases to stand for the proposition that if a claimant has a single accepted condition or an accepted condition which cannot be separated from other conditions, an employer/insurer may not issue a partial denial of liability for continued medical services, time loss or permanent disability due to the accepted condition without first processing the claim to closure. However, both Safstrom and Aquillon, supra, suggest that it may be permissible to issue a partial denial where the accepted condition is discrete from another condition which is at issue. Both cases also suggest that a partial denial of a discrete condition is only permissible when the compensable condition has resolved. The suggestions in both cases were dicta. In Safstrom the court found that the condition which was the subject of the partial denial was the same condition as the accepted conditon. Safstrom, supra at 730-31. In Aquillon, the court found that the condition which was the subject of the partial denial was so inextricably involved with the accepted condition that the two conditions could not be separated. Aquillon, supra at 235-36. Consequently, in neither case was the court required to determine under what conditions a partial denial would be valid. We have no difficulty with the courts' suggestion that where there are discrete compensable and non-compensable conditions, it is permissible to issue a partial denial of the non-compensable condition. We have difficulty, however, with the suggestion that such a partial denial is permissible only when the accepted condition has fully resolved. The practical effect of the latter suggestion would be to make the workers' compensation insurer the insurer of any medical condition which a claimant asserted was caused by an industrial injury or occupational disease between the time the claim was accepted and the time it is finally closed. We do not believe that the court intended to create such a situation. We note that the Board and the courts have allowed partial denials of discrete non-compensable conditions to pass without comment where the compensable condition has not fully resolved. Price v. SAIF, 296 Or 311 (1984); Patricia Long, 36 Van Natta 21 (1984); Gertrude E. Spady, 36 Van Natta 621 (1984). In Price, claimant had an accepted low back strain which was not stationary when he developed a heart condition. SAIF then issued

a partial denial of the heart condition. Subsequently, the low back condition became stationary and a Determination Order issued. The compensability of the heart condition as well as the extent of claimant's disability due to the low back condition went to hearing and the Referee overturned the partial denial. He declined to rate extent. The Board reversed the Referee's order, upheld the partial denial and remanded the case to the Referee to rate the extent of claimant's disability. Noble Price, 35 Van Natta 190 (1983). Claimant appealed, and the Court of Appeals dismissed the appeal as premature. The Supreme Court accepted review and held that the portion of the Board's order which upheld SAIF's partial denial of the heart condition was appealable. The court noted that partial denials are recognized and litigated in practice and are recognized by administrative rule. It then quoted from the Oregon State Bar's Manuel, Workers' Compensation (Oregon CLE 1980) which poses a hypothetical in which a claimant has an accepted low back condition and then develops a neck condition which claimant believes is related to the on the job injury. The hypothetical does not indicate whether the low back condition is stationary. "'By administrative rule and custom, it [the insurer] is obligated to issue a denial of the condition using the same form and giving the same notice of hearing rights as in a denial of a claim in the first instance.'" Price, supra 296 Or at 315 (quoting Oregon State Bar Committee on Continuing Legal Education, Workers' Compensation §24.24 (1980). The court concluded:

> "We deem SAIF's denial, and the Board's affirmance of the denial, of the heart condition to be a partial denial, and it is, therefore, appealable." 296 Or at 316.

In Spady, supra the insurer issued a letter which at one and the same time accepted claimant's claim for asthma and denied her claim for other conditions. We stated:

> "We have often commented in other cases about ambiguities in what is being claimed and what is being denied. In this case the employer's claims processing company is to be commended for its efforts to avoid that kind of ambiguity." 36 Van Natta at 622.

We believe that it is the better policy to allow insurers to issue partial denials of conditions which are allegedly discrete from an accepted condition even when the accepted condition is not fully resolved or is not stationary. This satisfies the concern expressed in Safstrom that partial denials not be used as vehicles for circumventing a claimant's right to claim closure of an accepted claim. It is also consistent with the Supreme Court's holding in Price which allows an appeal of a partial denial to proceed while processing of the accepted portion of the claim continues at a lower level. Finally, it satisfies our concern that insurers be encouraged to specify clearly what conditions are accepted and what conditions are denied.

In this case, claimant initially bumped his knee at work. The contusion to the knee is the condition which was accepted. As the claim progressed, the focus of claimant's complaints gradually moved from the knee to the ankle and foot. Although the partial denial does not make it clear, it is apparent from the context

that what the insurer was attempting to deny was the foot and ankle condition which had developed after the knee injury was accepted and the psychological condition which preexisted the compensable injury. We find the foot and ankle condition and the psychological condition sufficiently discrete from the knee injury that the partial denial was proper under Safstrom and its progeny. We do not believe that the fact that there is some suggestion that the knee condition was still painful at the time of the partial denial is sufficient to invalidate the partial denial.

On the merits of the partial denial, we agree with the Referee that claimant has failed to prove by a preponderance of the evidence that his compensable injury was a material cause of his foot and ankle condition. Claimant has also failed to prove that the compensable injury was a material cause of his psychological condition or of a worsening of his psychological condition.

We disagree with claimant's argument that the Referee erred in considering the Determination Order. We find no indication that the parties agreed that it should not be considered. In fact, claimant's attorney raised the issue at the beginning of the hearing. On the merits, we agree with the Referee that the Determination Order should be affirmed.

The insurer did err in ceasing to pay temporary disability benefits as of the date of the partial denial. It should have continued paying temporary disability benefits until claimant was released to work, actually returned to work, or was determined to be medically stationary and the claim closed under ORS 656.268(3), or a Determination Order issued. Jackson v. SAIF, 7 Or App 109 (1971). However, because the Referee upheld the Determination Order which granted no temporary disability benefits for that period and because we affirm the Referee on that issue, there is nothing due upon which a penalty may be assessed.

Finally, we approve the stipulation found in the record concerning the amount of overpayment.

ORDER

The Referee's order dated October 11, 1983 is affirmed.

WALTER R. LaCHAPPELLE, Claimant
Evohl Malagon, Claimant's Attorney
Keith Skelton, Defense Attorney

WCB 83-02247 & 82-04518
October 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Baker's order which found claimant permanently and totally disabled. The insurer also assigns as error the Referee's refusal to reopen the record following the hearing for consideration of an additional exhibit. The issues on review are extent and the Referee's refusal to consider the additional exhibit.

We affirm the Referee's order with the following comment: The Referee cited Frame v. Crown Zellerbach, 63 Or App 827, modified, 65 Or App 801 (1983); for the proposition that "[t]o be gainful, employment must bear a reasonable relationship to a

worker's prior earnings." Opinion and Order at 2. We do not believe that is the meaning of Frame. Frame concerned the question of whether the claimant was eligible for a vocational rehabilitation program even though he possessed skills which would enable him to work at a job paying substantially less than his pre-injury job. The court found that for purposes of eligibility for vocational rehabilitation, the ability to do work at the minimum wage is not necessarily gainful employment which would preclude eligibility for vocational rehabilitation assistance. In a permanent total disability case, the issue is whether the claimant is precluded "from regularly performing work at a gainful and suitable occupation." ORS 656.206(1). We do not believe that the reasoning applicable to eligibility for vocational rehabilitation is applicable to a permanent total disability case. The focus of the Frame decision is restoring the worker to a condition of self-support. Given that goal, the court did not feel it would be reasonable to preclude a worker who was earning substantially more than the minimum wage prior to his injury from vocational rehabilitation. It seemed to believe that a part of the goal of rehabilitation was to restore a claimant to a job at a rate of pay which was reasonably comparable to his previous rate of pay. 63 Or App at 831. While the purpose of vocational rehabilitation is to restore the claimant, the purpose of permanent total disability is to maintain the claimant when he is totally precluded by his injury from supporting himself. While it may be unfair to preclude an injured worker from vocational rehabilitation which would restore him to his pre-injury rate, it is not unfair to deny claimant the maintenance benefits of a permanent total disability award when he is capable of earning a living, even at a rate below his pre-injury earning rate.

Despite our disagreement with the Referee's application of Frame, we agree that claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

ORDER

The Referee's order dated March 21, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the insurer.

CHARLES W. ROLLER, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-00383
October 31, 1984
Order on Remand

On review of the Board's Order on Review dated September 28, 1982 the Court of Appeals reversed the Board's order and remanded to the Board with instructions to reinstate the Order of the Referee dated May 18, 1982.

Now, therefore, the Board's order dated September 28, 1982 is vacated and the Referee's order dated May 18, 1982 is republished and affirmed.

IT IS SO ORDERED.

JOHN A. WHITE, Claimant
Elton T. Lafky, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-10307
October 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Michael Johnson's order which awarded claimant 96° (30%) unscheduled disability on review of a Determination Order dated October 20, 1980, which awarded claimant no additional compensation for permanent disability. A Determination Order which originally closed this claim in December of 1978 granted claimant an award for 64° (20%) unscheduled disability. SAIF contends that the evidence fails to establish an increase in claimant's permanent disability since the time of the first claim closure and, therefore, the Referee erroneously increased claimant's permanent disability award. We agree and reverse.

One of the most perplexing problems in this case is the fact that the most recent medical or chiropractic reports concerning claimant's injury-related condition reflect claimant's status in October of 1980, and the hearing was held in April of 1984, three and a half years later. Construing all of the evidence, including the testimony given by claimant and his wife, in the light most favorable to claimant, we make the following findings and conclusions.

Claimant was employed as a hod carrier at the time of his injury. Although claimant's testimony suggests a specific incident or episode characteristic of a traumatic injury, contemporaneous medical reports describe the gradual onset of mid back pain which became incapacitating in early May of 1978. An acute back strain was diagnosed, and claimant was treated conservatively by Dr. Craske, an osteopathic physician. Dr. Craske stated that claimant suffered a chronic thoracic disorder which prevented him from continuing his very heavy work as a hod carrier.

Claimant was examined by Dr. Hoda, an orthopedic surgeon, on referral by Dr. Craske. Dr. Hoda diagnosed recurrent sprain and strain of the upper back and recommended that claimant be trained in an occupation not requiring heavy lifting.

Claimant was admitted to the William A. Callahan Center in August of 1978. The first mention of low back pain is made in the reports of claimant's examination during this admission. The consensus of the medical examiners at the Callahan Center was that claimant could return to gainful employment but should avoid work requiring heavy bending and lifting in view of the residual impairment resulting from his industrial injury. Claimant was considered physically capable of performing work in the light-medium category. It was stated that he probably should avoid heights as well as working with his arms overhead.

Dr. Hoda reviewed the findings and conclusions stated by the medical examiners at the Callahan Center, and he indicated his total agreement. He also stated that a job change to light-medium work was indicated.

Dr. Craske referred claimant for examination by another

orthopedic surgeon, Dr. Poulson, in November of 1978. Dr. Poulson's report indicates that claimant had been referred for evaluation of his neck and lumbar pain. Based upon his examination of claimant, Dr. Poulson expressed the opinion that claimant was capable of performing medium to heavy work, and that he definitely should avoid the very heavy work of a hod carrier. He stated, "I think very few spines can survive under this type of activity."

The claim was closed by Determination Order dated December 4, 1978, which awarded compensation for temporary total disability and 64° for 20% unscheduled disability for injury to claimant's "mid back." This Determination Order became final by operation of law.

The record establishes that claimant returned to carrying hod, contrary to the recommendations expressed by every examining and treating physician. Predictably, claimant was only capable of performing this work activity for three weeks. He experienced a worsening of his back condition, and he reported to Dr. Moore, a chiropractic physician, for treatment. Dr. Moore's report of April 28, 1980, states that claimant's back, "progressively worsened to a point much worse than the original injury," and that claimant was incapable of working at that time. Claimant was treated with conservative chiropractic manipulation and physiotherapy and was instructed to wear the lumbar corset that was previously fitted for him. Claimant was told to remain off work, and Dr. Moore stated his opinion that claimant should not return to employment as a hod carrier.

Claimant was examined by Dr. Poulson on May 5, 1980. In a report dated August 6, 1980, Dr. Poulson stated that, as a result of his worsened condition, claimant experienced "the same complaints" of lumbar and cervical spine pain. Dr. Poulson stated his findings from the May 5, 1980 examination, which reflected some decrease in the ranges of motion of claimant's dorsal lumbar spine, as compared with Dr. Poulson's examination in 1978. That report indicates that Dr. Poulson last examined claimant July 17, 1980, and at that time physical therapy appeared to be improving claimant's condition.

Dr. Poulson completed a Form 828 on September 11, 1980, indicating a last treatment date of August 19, 1980 and a medically stationary date of May 5, 1980. Dr. Poulson reported that claimant was released for "modified work." Limitations listed were avoidance of repetitive bending and lifting and no lifting "over 50 pounds at a time and infrequently." Dr. Poulson remarked that claimant was receiving chiropractic treatment and that his condition appeared to be improving. He indicated that claimant was scheduled to return at or about the first of the following month and that, at that time, Dr. Poulson expected to recommend claim closure. He also stated that claimant probably would have "a minimum amount of impairment." No further medical reports from Dr. Poulson are contained in this record.

On or about September 19, 1980, claimant was examined by Dr. Todd, another orthopedic surgeon, on referral by Dr. Moore. Dr. Todd's report states that after claimant returned to work, his pain progressively worsened, and that because claimant had been off work since May 3, 1980, "his comfort has improved and his back has more or less quite [sic] hurting him." Dr. Todd's stated

impression was severe low back pain associated with extremely heavy carrying, improved with rest. Dr. Todd found no evidence of a surgically manageable lesion and stated that claimant might benefit from the use of a Raney flexion jacket as well as "cross-training into a job" not requiring heavy lifting. Dr. Todd stated that problems with claimant's back could be anticipated so long as he engaged in heavy lifting.

By a Form 828 dated September 26, 1980, Dr. Moore indicated that claimant's condition was improving with conservative chiropractic treatment and that he was requesting claim closure.

SAIF referred claimant for examination by the Orthopaedic Consultants, who reported on October 1, 1980 that when claimant returned to work as a hod carrier despite medical advice to the contrary, "he found that increasing distress was appreciated in the lower back, tending to emphasize this as compared to thoracic pain which was prominent earlier . . . . " As of the date of the Consultant's examination, claimant was treating with his chiropractor once a week and apparently was "symptom free in large part unless he overdoes." The Consultants diagnosed chronic lumbosacral strain and a compression fracture of the D6 vertebra. The compression fracture was considered not industrially related. The Consultants stated their agreement with the earlier recommendations of the physicians at the Callahan Center concerning the need for and propriety of vocational rehabilitation. Their assessment of the total loss of function of claimant's back, and the loss of function due to his injury, placed claimant's impairment in the minimal category.

The claim was reclosed by Determination Order on October 20, 1980, which awarded claimant additional temporary disability but no additional permanent disability.

In early 1981 claimant left Oregon and moved to Texas in order to find employment. He started a job drilling for oil but was only able to perform this type of work for approximately one month. He was unable to continue this employment, which he described as being as heavy as hod carrying. He attempted work as a car salesman, but apparently enjoyed little or no success in this endeavor. He apparently drove a truck for a period of time, which he found more compatible with his physical limitations. Claimant testified to his belief that he would be physically capable of truck driving if he could locate a steady job. Claimant eventually returned to Oregon in order to be with his father, who was gravely ill.

At the hearing claimant described his limitations and his continuing back problem. Claimant's testimony was corroborated by his wife. Claimant's back problems as of the time of the hearing in April of 1984 were located in the mid and upper back. He also experiences neck pain and headaches. He continues to use a back brace, which he wears "a couple times a month just when my back gets to hurting me real bad." He also has worn it while driving a truck "a few times." Whenever he performs any physical labor, he experiences back pain.

The Referee concluded that claimant's condition was worse at the time of hearing than it was at the time of the Determination Order which originally closed his claim with an award for 20% unscheduled disability. He based this finding, in part, upon the

difference in Dr. Poulson's recommendations concerning claimant's work limitations in 1978 and 1980, i.e. the difference between "medium to heavy work" and "modified work with a lifting limitation of 50 pounds." He also based his conclusion upon his understanding that claimant testified to wearing his back brace "at all times while driving" and frequently on other occasions in order to alleviate his pain. We understand claimant's testimony as indicating less extensive use of his back brace.

We conclude that claimant experienced a temporary worsening of his injury-related back condition when he returned to work as a hod carrier in the spring of 1980. This symptomatic worsening was predictable considering all of the medical admonitions against claimant's return to this type of work. As indicated by the reports authored by Dr. Todd and the Orthopaedic Consultants shortly before reclosure of the claim, claimant's exacerbation of back pain had essentially resolved with rest. None of the evidence, including claimant's credible testimony, warrants the conclusion that claimant presently suffers from permanent disability which is greater than that from which he suffered in December of 1978, when his claim was originally closed. Prior to the original claim closure, it was recommended that claimant be limited to work in the light to medium category. This is consistent with the later reports of Dr. Poulson, who recommended work in the medium category, as well as Dr. Todd's assessment that claimant not engage in work requiring heavy lifting. Dr. Poulson's report of minimal impairment in September of 1980, and the Consultants' similar report the following month, are consistent with the 20% unscheduled disability awarded by the prior Determination Order. Although claimant apparently experienced an exacerbation of his low back symptomatology in 1980, as of the time of hearing, this problem apparently resolved and the only residuals of which claimant complained were associated with his mid and upper back. These complaints are consistent with the problems claimant was experiencing prior to the original closure of the claim, which formed the basis of the award for 20% unscheduled disability.

In conclusion, the record fails to provide any basis for concluding that, as of the time of hearing in April of 1984, claimant's condition is any worse than it was when his claim was originally closed. Therefore, we reverse the Referee's additional award of permanent disability. See James B. Johnson, 35 Van Natta 47 (1983), affirmed Johnson v. Industrial Indemnity, 66 Or App 640 (1984).

ORDER

The Referee's order dated April 26, 1984 is reversed. The Determination Order dated October 20, 1980, which awarded claimant no additional compensation for permanent disability, is affirmed.

WILLIAM M. BIRD, Claimant
Martin Reeves, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB TP-84011
October 18, 1984
Order Denying Approval of Disputed Claim

Claimant and the SAIF Corporation have submitted a "Stipulated Order Withdrawing and Settling Claim" to the Board for approval. We find the proposed stipulation agreement violates the prohibition against releases. ORS 656.236. Consequently, we decline to grant approval.

The agreement states that claimant filed a Form 801 on or about January 13, 1984 alleging that he sustained a work-related neck and back injury on or about November 23, 1983. The claim apparently stemmed from a motor vehicle collision with a third party. According to the agreement, claimant has neither sought nor received workers' compensation benefits.

In order to fully pursue his legal remedies against the third party, claimant agreed to withdraw his claim and waive any and all of his rights to medical care, temporary/permanent disability benefits, aggravation benefits and own motion relief. In return, SAIF agreed to release any third party rights it might have.

ORS 656.236(1) states that no release by a worker or his beneficiary of any rights under ORS 656.001 to 656.794 is valid. Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable. ORS 656.289(4).

The proposed stipulation fails to address the issue of whether a bona fide dispute exists over the compensability of the claim. The agreement neither states that conclusion nor recites facts which would lead to the conclusion that such a dispute exists. Accordingly, the proposed stipulation agreement is invalid.

ORDER

The parties' Stipulated Order Withdrawing and Settling Claim is not approved.

HERSCHELL R. PITTS, Claimant
Richardson & Murphy, Claimant's Attorneys
James Richardson, Attorney
Schwabe, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 80-03994, 82-05466 & 82-00902
November 5, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Mulder's order which set aside its denial of a widow's claim for asbestosis. On review, SAIF contends the claim was untimely filed or, in the alternative, it was not the responsible party. On

We find that we have jurisdiction.

By order dated March 14, 1983, the Referee found that the claim was timely filed and that SAIF was the responsible party. In a letter which accompanied the order, the Referee advised the parties that he intended to hold a conference call concerning an award of attorney fees. In his letter, the Referee confirmed his representation to SAIF's counsel that SAIF's appeal rights would run from the date of his supplemental order. The Referee specifically requested that no appeal be taken from his March 14, 1983 order.

A Referee may reopen the record and reconsider his decision before a notice of appeal is filed or, if none is filed, before the appeal period expires. Reconsideration may be made upon the Referee's own motion. OAR 436-83-480(1). We find the Referee's letter, which accompanied his March 14 order constituted a motion to reconsider his March 14 order, as well as an order abating it.

In a Supplemental Order, dated April 5, 1983, attorney fees were awarded. The Supplemental Order specifically referred to the March 14 order. Therefore, pursuant to the dictates of the April 5 order and the intentions expressed in the Referee's March 14 letter, appeal rights commenced from the date of the Supplemental Order.

Apparently, one or more of the parties and their attorneys did not receive copies of the April 5 order, because on June 1, 1983 the Referee issued the following order:

> "It appearing that one or more parties and/or attorneys either were not sent or did not receive copies of the Supplemental Order of April 5, 1983 in the above matter, and it further appearing that review rights were thus prejudiced:
>
> " IT IS HEREBY ORDERED that review rights are effective the date of this Order."

On June 3, 1983 SAIF requested review of all three orders.

ORS 656.289(3) states a Referee's "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."

In Armstrong v. SAIF, 67 Or App 498 (1984), the court held it had jurisdiction of a petition for review from a second Board order where evidence showed the Board's first order was not mailed to the parties and, therefore, did not become a final order.

The present case is analogous to Armstrong. In his June 1 order, the Referee finds that his order of April 5 was either not sent or not received by one or more parties and/or attorneys. Additionally, the Referee finds review rights have been

the parties. The Referee's finding of the apparent oversight in mailing stands unchallenged. Under these circumstances, we find that the Referee's Supplemental Order of April 5, 1983 was not final at the time the order of June 1, 1983 was issued, that the June 1 order, while inartfully worded, constituted a republishing of the April 5 order. Therefore, the Referee had jurisdiction on June 1, 1983 and SAIF's request for review was timely and proper.

Having found we have jurisdiction, we now address the claim itself. We agree with the Referee that the claim was timely filed. However, we disagree with the Referee's analysis.

Claimant's husband worked for an insulating board company in various positions from 1935 until January 1975. The evidence established that he could have been exposed to asbestos sometime between 1935 and 1971. The employer was insured by SAIF from the 1930's until 1966 and by Farmers until 1974. The employer was self-insured until 1975 when it was sold. The decedent's condition was diagnosed as asbestosis and adenocarcinoma in early 1980. His occupational disease claim was filed soon after and denied by the self-insured employer's administrator. Apparently, there was no appeal taken from this denial. The decedent died November 18, 1980. Claimant filed her claim for widow's benefits on November 11, 1981.

An occupational disease claim is void unless the claim is filed within 5 years after the last employment exposure and within 180 days from the date the claimant becomes disabled or is informed by a physician that the claimant is suffering from an occupational disease, whichever is later. ORS 656.807(1) For occupational disease claims involving asbestosis or asbestos-related diseases, the last employment exposure portion of the filing limitation is extended to 40 years. ORS 656.807(4). However, if an occupational disease results in death, a claim may be filed within 180 days after the date of death. ORS 656.807(2).

The Referee found that the claim was not barred for untimeliness, relying upon the rationale of Fossum v. SAIF, 293 Or 252 (1980). In Fossum, the widow had filed within 180 days of her spouse's death, but more than five years after his last employment exposure. The insurer contended that the claim was not timely because it had not been filed within five years after the last employment exposure pursuant to ORS 656.807(1). The Fossum court held that the claim was timely. The court concluded claims of widows are independent of worker's claims and, in accordance with the clear and unambiguous language of ORS 656.807(2), must be filed within 180 days of the worker's death. Even if an ambiguity existed, the court reasoned the ambiguity must be construed in favor of compensation. In the present case, the Referee concluded that parallel reasoning persuaded him that the widow's claim was not untimely.

We find Fossum distinguishable. In Fossum, the widow had filed within the 180 day time limit of ORS 656.807(2). The insurer was attempting to further curtail the 180 day statutory limit. Here, the widow has not complied with the 180 day limit, but contends the "ambiguous" statute should be liberally construed to support an extension of the statutory time limit for the filing of her occupational disease death claim.

We do not find ORS 656.807(2) to be ambiguous. In occupational disease claims resulting in death, a survivor has 180 days from the date of the worker's death within which to file a claim. Here, the widow did not file her claim within 180 days of her spouse's death. Therefore, a strict application of ORS 656.807(2) leads to the conclusion that the claim was untimely. However, such a conclusion ignores the dictates of ORS 656.807(5).

It is claimant's contention that the provisions of ORS 656.265 are incorporated into occupational disease claims through ORS 656.807(5) which provides that procedures concerning occupational disease claims shall be the same as provided for accidental injuries. ORS 656.265(4)(a) states that a claim is barred unless the employer had knowledge of the injury or death or the insurer or self-insured employer had not been prejudiced by failing to receive notice. Claimant argues the employer had knowledge of the worker's condition by virtue of the decedent's 1980 occupational disease claim. In addition, claimant contends no prejudice has been shown. Therefore, according to claimant's argument, her claim should not be barred as untimely.

We agree that the exceptions of ORS 656.265 apply to the processing of occupational disease claims. In Gronquist v. SAIF, 25 Or App 27, 31, rev den (1976), the court held that a widow of an asbestos worker was entitled to a hearing on the question of whether she had good cause for her failure to file her claim within 180 days as prescribed by ORS 656.807(2). In Gronquist, the court seemed to be holding that the exceptions to a late claim filing under ORS 656.265 were incorporated into ORS 656.807. This assumption was made clear by the Supreme Court in Inkley v. Forest Fiber Products Co., 288 Or 337, 347 (1980) which stated that "we can think of no reason to deny occupational disease claimants the same excuses for late or deficient filing as are available to injured workers."

We believe the intent behind ORS 656.807(5) was to limit the application of accidental injury statutes to only the processing of occupational disease claims. e.g.) claim filing, interim compensation, issuance of denials and determination orders. However, we are bound by the Inkley and Gronquist line of cases which apply the exceptions for untimely filed injury claims to occupational disease claims. See also, Robinson v. SAIF, 69 Or App 534 (1984).

Accordingly, we must determine whether the present situation lends itself to the exception for untimely filing, pursuant to ORS 656.265(4)(a). Although the employer had notice of the decedent's 1980 occupational disease claim, the evidence does not preponderate that the employer had notice or knowledge of the decedent's death from asbestosis. However, the insurers have the burden of proving prejudice from the claim's late filing. Inkley, supra, 288 Or at 348; Robinson, supra; Satterfield v. Compensation Dept., 1 Or App 524 (1970). Since the insurers have failed to persuade us that they have been prejudiced by the claim's approximately 180-day late filing, we find that the claim shall not be barred for untimeliness.

We reverse the Referee's finding concerning responsibility. We find that Farmers should be the responsible party, not SAIF as the Referee concluded. Under the last injurious exposure rule, where the onset of disability does not occur during a period of potentially causal employment, liability is assigned to the

insurer on risk at the last employment at which the working conditions were such that the conditions could have caused the worker's disability. Bracke v. Bazaar, 293 Or 239, 248 (1982). In applying the last injurious exposure rule to claims for occupational disease, the issue is not which employment actually caused the disease, but which employment involved conditions which could have caused it. Fossum, supra. 293 Or at 256.

Our review of the record reveals that the decedent worker's employment exposure while Farmers was the insurer could have caused the development of his lung cancer. Our review further reveals that the decedent's later exposure while the employer was self-insured could not have caused the development of the disease. Thus, pursuant to the last injurious exposure rule, Farmers, the insurer on risk during the last employment exposure which could have caused the compensable condition, should be held responsible.

ORDER

The Referee's order dated June 1, 1983, which incorporates by reference his orders of March 14, 1983 and April 5, 1983, is affirmed in part and reversed in part. That portion which found that the SAIF Corporation was the responsible party is reversed. SAIF's denial is reinstated and affirmed. Farmers Insurance's denial dated June 16, 1982 is set aside and the claim is remanded to Farmers for further processing. The remainder of the Referee's order is affirmed. Claimant's counsel shall receive $300 for services on Board review to be paid by Farmers Insurance.

LAWRENCE A. FIRKUS, Claimant
St. Andrew Legal Clinic, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-10060
November 8, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Peterson's order which found that it unreasonably resisted the payment of compensation by delaying approval of elective surgery. SAIF also assigns as error the admission into evidence of documents submitted after the tenth day before hearing.

Claimant withdrew item 11D on review, and it was not considered. We note that the documents submitted by claimant after the tenth day before hearing were all documents in the insurer's file long before the hearing date, except the evidence of the actual medical costs of the procedure which was approved by the insurer. We find there was no prejudice to the insurer. Accordingly, the Referee did not err in admitting the documents.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 1, 1984, is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the SAIF Corporation.

FLOYD B. PARAZOO, Claimant
Olson Law Firm, Claimant's Attorney
David Horne, Defense Attorney

WCB 83-04537
November 8, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Quillinan's order that affirmed Employers of Wausau's denial of claimant's aggravation and medical service claims and refused to award a penalty and attorney fees for untimely denial. The issues are: (1) Wausau's responsibility for medical services; (2) compensability of claimant's aggravation claim; and (3) penalty and attorney fees.

Claimant suffered a neck and head injury on December 7, 1973 when he struck his neck and head on a switch panel. Successive litigation resulted in claimant being granted an award of 320° for 100% of the total allowable for permanent partial disability for injury to his central nervous system. Claimant has not worked since his injury and was 71 years old at the time of the hearing.

As a result of his compensable injury, claimant suffers from dizziness and vertigo. He also suffered from neck pain. X-rays taken at the time of the 1973 injury showed extensive preexisting cervical osteoarthritis.

On February 27, 1980 claimant sought treatment for his neck pain from Dr. Davis, chiropractor. Dr. Davis reported that claimant's condition had worsened since he had last seen him in 1977. He sent claimant to Dr. Campagna for a neurological evaluation. On March 4, 1980 Dr. Campagna reported spondylolisis at C5-6 and C6-7, but made no specific recommendations for treatment. His examination report was received by Wausau on or about April 14, 1980.

Dr. Campagna next examined claimant on November 11, 1982. Noting that claimant complained of increasingly severe neck pain, Dr. Campagna recommended cervical traction and physical therapy. An electroencephalogram was negative for neurological deficit. On December 6, 1982 a cervical myelogram showed spurring consistent with claimant's known degenerative osteoarthritic condition. Disc herniation was not suspected, although it was not definitely ruled out.

On December 10, 1982 Dr. Campagna performed an anterior spinal decompression at C5-6. Surgical exploration revealed no nerve root involvement or any other objective neurological deficit.

On April 28, 1983 Wausau denied responsibility for Dr. Campagna's medical bills for the December 1982 surgery. The Referee found that, based upon the medical evidence, there was a reasonable difference of medical opinion about the efficacy of the cervical decompression surgery, given the lack of objective neurological findings, but that the surgery was not unreasonable. However, the Referee found that the surgery was not reasonably related to claimant's injury and upheld Wausau's denial. On de novo review we agree with the Referee.

The Referee found that Dr. Davis's brief chart note of February 27, 1980 was sufficient notice, when coupled with Dr. Campagna's examination report of March 4, 1980, to constitute notice of an aggravation claim. Dr. Davis's statement, although

brief, does state that claimant was worse than on his most recent visit three years earlier and specifies the ways in which claimant's condition appeared to be worse. We agree with the Referee that sufficient information was conveyed to constitute notice of an aggravation claim. We also agree with the Referee that claimant did not prove by a preponderance of the evidence that his condition had actually worsened since the last arrangement of compensation in March 1979. Thus, claimant's aggravation claim must fail.

Nevertheless, claimant urges that he is entitled to a penalty because Wausau did not deny claimant's aggravation claim for almost three years. The Referee agreed that a penalty was appropriate, but declined to award one because there was no compensation due to which the penalty could attach. Kosanke v. SAIF, 41 Or App 17 (1979). The basis of the Referee's decision was claimant's failure to raise the issue of his entitlement to interim compensation. See Joanne Russell, 35 Van Natta 821, 1082 (1983) (Referee lacks jurisdiction to decide issues not raised at hearing).

Claimant contends that his open-ended request for penalties and attorney fees is sufficient to place the matter in issue. Claimant's request for hearing was directed at the issue of the failure of the insurer to pay for medical services pursuant to ORS 656.245. The issue of aggravation, although raised at the hearing, was considered over the insurer's objection. Because of our decision on the merits of claimant's aggravation claim, the insurer's objection to consideration of the aggravation issue is moot.

Because of the decisions on the merits of the various aspects of claimant's case, the only possible source of compensation arguably due to which a penalty could attach is interim compensation. That issue was not raised at the hearing. Claimant's open-ended, general prayer for a penalty and attorney's fee is not sufficient to place the insurer on adequate notice of what evidence it is expected to offer to meet claimant's claims. See Richard Pick, 34 Van Natta 957, 34 Van Natta 1016 (1982). Were we to find that claimant had adequately raised the issue at the hearing, we would nevertheless conclude that there was no proof that the duty to pay interim compensation ever attached. There is no evidence in the record that Wausau ever received a medically verified statement of claimant's inability to work on account of his worsened condition. ORS 656.273(6). Dr. Davis's and Dr. Campagna's reports in February and March 1980 do not address the issue of claimant's ability, or lack thereof, to work.

ORDER

The order of the Referee dated February 17, 1984 is affirmed.

EDWARD O. MILLER, Claimant
Bloom, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 79-03231 & 83-02511
November 13, 1984
Consolidated Order Denying Motion to Dismiss and Rescinding Interim Order of Remand

Glen Falls Insurance Company and its insured, Brander Meat Company, have moved to dismiss claimant's own motion petition and to deny claimant all relief in the referenced companion cases on the ground that claimant and his wife have engaged in improper ex parte communications with a member of the Board's staff and have attempted to engage in improper ex parte communications with the Referee who heard these cases at the hearing level.

A summary of the facts of these cases and the procedural posture of the case that resulted in a second full hearing on the merits are found at Edward O. Miller, 35 Van Natta 286 (1983), and need not be dealt with at length here. In essence, the previous Board order referred the own motion matter to the Referee for recommendations pursuant to then OAR 436-83-820 (now OAR 438-12-005), remanded case number 79-03231 to the Referee for a rehearing pursuant to ORS 656.295(5) and assigned case number 83-02511 to the Referee to take evidence on a denied claim for medical services under ORS 656.245. The medical services claim had been erroneously submitted as a Board's own motion petition.

Claimant's wife testified at the second hearing that she had had at least five and perhaps as many as ten telephone conversations with a member of the Board's staff while case number 79-03231 and the own motion matter were being reviewed by the Board. According to the testimony, one or more of these conversations involved claimant's wife describing various financial and other hardships that claimant and his wife were suffering during the time the case was on review. A fair reading of the transcript of claimant's wife's testimony regarding these ex parte communications is that claimant's wife's motive was to attempt to influence a speedy and favorable decision on claimant's claims. We note that claimant and his wife also contacted or attempted to contact numerous other officials in both the legislative and executive branches of state government.

Glen Falls and Brander contend that claimant's own motion petition should be dismissed and that he should be denied relief on his two other claims because the ex parte communications compromise the integrity of the workers' compensation system in general and would allow this claimant to benefit on account of overreaching behavior.

On October 24, 1984 the Board issued an Interim Order of Remand remanding these consolidated cases to Referee Pro Tempore Keith Wilson for the sole purpose of taking evidence relative to the nature and effect, if any, of the ex parte communications. This special hearing was set for November 14, 1984.

Since issuing the Interim Order of Remand, the Board has considered further the remedy sought by Glen Falls and Brander, i.e. dismissal of the Own Motion petition and denial of all other relief to claimant. We have done so in light of the Board's statutory authority and the available remedies for ex parte communications in contested cases before administrative agencies in general.

ORS 183.462 provides:

> "The agency shall place on the record a statement of the substance of any written or oral ex parte communications on a fact in issue made to the agency during its review of a contested case. The agency shall notify all parties of such communications and of their right to rebut the substance of the ex parte communications on the record."

ORS 183.462 purportedly applies to this Board. See ORS 183.315(1).

ORS 183.462 requires that an agency make the substance of all ex parte communications a part of the record on review. Therefore, the ex parte communications and the other parties' responses thereto, if any, are to be considered by the agency in making its decision. The only remedy under the Oregon law for dealing with ex parte contacts in contested case adjudication is the disclose and refute remedy of ORS 183.462. There is no statutory authority that we have found that permits an agency to dismiss a case on account of improper ex parte communications.

ORS 656.295 sets the standards for review of contested cases by this Board. ORS 656.295(3) provides that the record of the hearing is to be prepared and certified by the Hearings Division. ORS 656.295(5) states:

> "The review by the board shall be based upon the record submitted to it under subsection (3) of this section and such oral or written argument as it may receive. However, if the board determines that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee, it may remand the case to the referee for further evidence taking, correction or other necessary action."

This Board is statutorily prohibited from considering any evidence not submitted to it by the Hearings Division. See Bailey v. SAIF, 296 Or 41, 45 (1983). It has been held an abuse of the Board's discretion to consider in its review evidence not adduced at the hearing, even where the parties agreed to the procedure. Muffett v. SAIF, 58 Or App 684, 687 (1982). Thus, notwithstanding ORS 183.462, this Board may not add ex parte communications to the record on review or in any other way consider them. Under the Workers' Compensation Law there is not even the disclose and refute remedy available generally under the A.P.A. See Stadelman v. Builders Board, 62 Or App 1, 4-6 (1983) (ORS 183.462 procedure improper where rule prohibited consideration of evidence not introduced at hearing.)

We have been unable to find any other authority under Oregon law relating to remedies for improper ex parte communications in contested case adjudications. Glen Falls has argued that the Board has the discretion to dismiss an own motion petition for any reason. Although ORS 656.278(1) does not specifically enumerate

dismissal as one of the actions the Board may take in an own motion matter, such an exercise of our discretion is implicitly authorized by the statute. We conclude that it is within the discretion of the Board to dismiss claimant's own motion petition. However, we find no authority, statutory or otherwise, that permits us to deny a claimant his rights under ORS 656.283 or ORS 656.295 solely for the reason that claimant or someone acting on claimant's behalf engaged in improper ex parte communications with a member of the Board's staff.

We have concluded that such ex parte communications as there may have been in these cases were by their nature irrelevant. The disclosure of the communications at the hearing gave Glen Falls and Brander the opportunity to respond to their argument.

Although it is within our discretion to dismiss claimant's own motion petition because of improper ex parte communications, we view that remedy as unduly harsh under the circumstances. See PATCO v. Federal Labor Relations Authority, 685 F2d 547, 564 n.30 (D.C. Cir. 1982). We have no authority to dismiss the remaining components of these cases, even if we were so inclined.

We decline to exercise our discretion such as to dismiss the own motion petition, and we lack authority to grant the remainder of Glen Falls's/Brander's motion. There is, therefore, no purpose in holding another hearing. Accordingly, the Order on Remand dated October 24, 1984 is hearby rescinded. The motion of Glen Falls/Brander to dismiss claimant's own motion petition and deny claimant further relief is denied.

IT IS SO ORDERED.

ALBERT D. RICHEY, Claimant
Peter Hansen, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 82-09856
November 14, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Underwriters Adjusting Company requests review of that portion of Referee St. Martin's order granting claimant an award of permanent total disability in lieu of the 64° for 20% unscheduled disability for injury to his low back granted by Determination Order dated June 28, 1983, which increased claimant's total permanent partial disability award to 192° for 60%. Claimant cross-requests review of those portions of the Referee's order that sets the effective date of claimant's permanent total disability and grants the insurer an offset against permanent total disability benefits for all periodic payments of permanent partial disability benefits due under the June 28, 1983 Determination Order.

Claimant was injured on October 6, 1975 when the truck against which his ladder was leaning was driven off, causing claimant to fall about 15 feet to a concrete floor. As a result of this initial injury and its sequela, claimant has had five surgeries to his lumbar spine, all performed by Donald T. Smith, M.D.

Claimant's first surgery, on March 1, 1976, involved decompression laminectomies at L3-4, L4-5 and L5-S1. Claimant was released for return to work on June 15, 1976. On September 30, 1976 a Determination Order closed claimant's claim with an award

of 32° for 10% permanent unscheduled disability for injury to his low back. Claimant appealed the Determination Order. Referee McCleod's March 18, 1977 order increased claimant's award of permanent partial disability to a total of 96° for 30%.

In August 1977 claimant had his second surgery, which involved a discectomy at L4-L5 and a bilateral Harrington rod fusion from L4 through S1. Claimant recovered uneventfully and returned to work. By January 1978 it became apparent that claimant could no longer perform his heavy diesel mechanic work. On January 27, 1978 claimant sought treatment for severe back pain and near total loss of range of motion. Claimant's condition was successfully treated with traction. It was suspected at that time that claimant had a ruptured disc above his previous fusion.

Claimant began a vocational rehabilitation program for retraining as a refrigeration repairman in September 1978, however, the program was terminated in January 1979, apparently because the necessary courses to complete the program were no longer being taught. In March 1979 claimant returned to work as a diesel mechanic.

On April 27, 1979 claimant was diagnosed as having a ruptured disc at L3-4. A Determination Order dated May 7, 1979 awarded claimant no additional permanent disability. Claimant had a brief period of hospitalization beginning May 29, 1979.

On October 11, 1979 claimant had his third back surgery, a decompression laminectomy at L2-3 and L3-4. One year later, on October 13, 1980 claimant had his fourth surgery, a lumbar laminectomy and removal of a herniated disc at L2-3.

In June 1981 claimant returned to work at light duty, but was laid off shortly thereafter because of lack of work. Another Determination Order, dated October 29, 1981, increased claimant's award of permanent partial disability another 10%, making his total award 128° for 40%. In November 1981 claimant began another vocational rehabilitation program in office machine repair. Dr. Smith released claimant for the rehabilitation program, which involved potential frequent lifting of up to 50 pounds.

In June 1982 claimant's vocational program was interrupted when his back condition worsened. The program was ultimately terminated in November 1982 when it became apparent that claimant required additional back surgery. On December 6, 1982 claimant was operated on for the fifth time, undergoing surgery for a right decompression laminectomy at L2-3 and removal of a herniated, extruded disc.

Claimant was found medically stationary by Dr. Smith on April 14, 1983. Dr. Smith opined that claimant's physical impairment was moderately severe to severe. He stated: "Unless a suitable vocational arrangement can be made, I believe that Mr. Richey does have a strong point to be made that he may otherwise be considered totally and permanently disabled."

The Orthopaedic Consultants panel stated in its June 2, 1983 report that claimant was stationary, but that continuing symptomatolgy was to be expected. The panel rated claimant's

impairment as severe. On June 28, 1983 a Determination Order granted claimant an additional 20% permanent disability, increasing his total award to 192° for 60%.

Claimant returned to his vocational assistance program. On June 30, 1983 his counselor stated that the requirements of the office machine repair training program exceeded claimant's physical limitations. However, efforts were made to determine whether claimant could continue the program using a modified work station. After contacting 38 potential employers, the counselor reported in September 1983 that even with a modified work station continuation of the program was not feasible for claimant. As of the date of the hearing, claimant's counselor had not identified a definite vocational goal for claimant.

Claimant was age 49 at the time of the hearing. He has constant back pain aggravated by activity. When he arises in the morning he is unable to straighten his back for from one-half hour to three hours. He uses four different types of back brace, depending upon his activities. His pain radiates into both legs. Both of his legs have given out and he has fallen on occasion due to his left leg give away.

At the time of the hearing, claimant had not seen Ms. Goodwin, his vocational counselor, for about two months. He had made no employer contacts for about the same period of time and had sent out no resumes. He checks the help wanted ads in the newspaper about once a week, but had found no ads for jobs he felt he could perform. In the six months prior to the hearing, claimant had contacted six to eight employers he knew hired handicapped workers, but had not become employed. Claimant stated that it was his belief that his vocational counselor had a better chance of finding him employment than he did on his own.

Mr. McNaught, a vocational rehabilitation expert called by claimant, opined that it was futile for claimant to attempt to find work on his own. His review of the hearing exhibits and an interview with claimant led him to opine that claimant had no transferable skills, given his physical limitations.

Ms. Goodwin, claimant's counselor, testified that her primary focus had been on placing claimant in some kind of vocation where he could use his considerable mechanical skills, although she testified that it was her conclusion that claimant's past demonstrated skills did not transfer to the types of work she was considering for claimant. Claimant would, in Ms. Goodwin's opinion, require the same type of entry training as any other person entering a new vocational field.

Ms. Goodwin stated that although claimant has expressed few of his own ideas about alternate employment, he had cooperated fully with her in development of her ideas. She viewed claimant as always being honest and straightforward. She stated she had not suggested that claimant send resumes or contact the Employment Division or possible government employers. Ms. Goodwin believed that there were three job possibilities within claimant's physical abilities that she was exploring. She had not, however, informed any of the potential employers about claimant's history of five low back surgeries. She responded affirmatively when asked if the three possibilities were speculative.

The insurer contends that claimant is not excused from the

requirement of ORS 656.206(3), that he prove by a preponderance of the evidence that he has made reasonable efforts to obtain employment, and that the efforts demonstrated were not reasonable.

Under the so-called "futility" doctrine, a worker who is physically incapacitated to such an extent that a search for employment would be meaningless need not show that he or she has made an effort to become employed. See Butcher v. SAIF, 45 Or App 313 (1980). Notwithstanding Mr. McNaught's opinion to the contrary, we do not believe the evidence shows that it is futile for claimant to attempt to find employment within his physical limitations.

The Board is persuaded, however, that claimant has made reasonable efforts to become employed and, in spite of his efforts, has been unable to do so. Claimant has made two attempts to become retrained, failing in both through no fault of his own. His vocational counselor has been unable to identify a vocational goal within claimant's limitations after several months of effort. Those she was exploring at the time of the hearing were speculative, at best. Claimant's reliance on his counselor's expertise in identifying vocational possibilities is hardly unreasonable. Claimant has fully cooperated with his counselor at all times. The Board concludes that claimant has proven by a preponderance of the evidence that he has complied with ORS 656.206(3). The insurer does not dispute the evidence that claimant is severely disabled. We concur with the Referee that claimant is permanently and totally disabled as a result of his industrial injury and the subsequent surgeries.

Claimant contends that the Referee erred in fixing the date of claimant's award as of June 28, 1983, the date of the last Determination Order. Claimant cites William B. Johnson, 36 Van Natta 98, 104 (1984), for the proposition that the proper date to begin claimant's award is his medically stationary date. Johnson establishes no such rule of law; in Johnson the Referee did not indicate when the claimant's award was to be effective. Based upon the evidence, the Board established the effective date as of the time claimant was medically stationary. We find that the evidence in this case persuades us to reach the same result as that reached in Johnson. Claimant's treating physician found claimant to be medically stationary on April 14, 1983 and at that time suggested permanent total disability. The evidence shows that claimant's situation did not change either medically or vocationally after April 14, 1983. We, therefore, find that claimant was permanently and totally disabled as of that date. The Referee's order will be modified accordingly.

ORDER

The order of the Referee dated February 16, 1984 is modified to grant claimant an award of permanent total disability as of April 14, 1983. In all other respects the order is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by Underwriters Adjusting Company.

BEVERLY J. WATKINS, Claimant
Pozzi, et al., Claimant's Attorneys
Moscate & Byerly, Defense Attorneys

WCB 83-08840
November 14, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Fink's order which awarded claimant an additional 80° for 25% unscheduled disability on review of a Determination Order entered pursuant to ORS 656.268(5), which awarded no additional permanent disability compensation. Claimant previously had received an award of 64° for 20% unscheduled disability for this injury to her neck. The employer contends that claimant is not entitled to an additional unscheduled award. We agree and reverse.

Claimant sustained a neck injury while working for the employer as a grocery checker. The claim was accepted and eventually closed by a Determination Order which awarded 32° for 10% unscheduled disability. The parties entered into a stipulation in early January of 1981, according to the terms of which claimant was awarded an additional 32° unscheduled disability for a total unscheduled award of 64° for 20%.

Claimant initially returned to work as a grocery checker. She was unable to engage in this employment due to the lifting involved, which caused neck symptoms. The employer gave her lighter duty, which consisted of counting promotional cash dividends. This light duty work lasted until September of 1981, at which time claimant's employment was terminated.

Claimant testified that she earned $7.15 per hour as a grocery checker, and that the light duty work paid substantially less, by approximately $3 or $4 per hour. Reports from a rehabilitation consultant in early 1981 indicate, however, that claimant's pre-injury wage was $8.60 an hour; that in March she was earning $6.50 an hour performing the light duty work; and that in April she was earning in excess of $7 per hour. Because claimant was gainfully employed when she was initially referred to the rehabilitation consultant, any plan for vocational assistance was deferred. When claimant's light duty work was terminated, she returned for further vocational evaluation and assistance.

Claimant had worked for the previous 15 years as a grocery checker. Her prior vocational background consisted of brief employment as a clerk in a women's apparel store.

Claimant enrolled in an authorized training program to learn the skills of a hairdresser/cosmetologist/manicurist. Claimant was very successful in this endeavor. She completed her training program, passed her state board examination and became licensed to work in beauty care. With the assistance of the rehabilitation consultants, she obtained employment as a hairdresser, doing primarily cosmetic and manicuring work. Claimant's claim was reclosed with an award for temporary total disability from January 19, 1982 through April 1, 1983, and no additional compensation for permanent disability.

As of the time of hearing, claimant was working regularly at a beauty salon doing hairstyling and manicures. She is able to perform this work without any physical distress. There is no

lifting involved. She testified that she works a 30 and one-half hour week. She earns $4 per hour or $122 per week. She earns very little in tips at her present job. If she brings in more than $300 a week, she gets paid a commission equal to 55% of the amount over $300. There have only been four occasions on which she brought in enough to earn a commission. She does not receive any fringe benefits such as medical or dental insurance. The potential for increasing her income exists if claimant is willing or able to increase her clientele; however, it does not appear that claimant's interests lie in this direction. She testified that if she gets too busy during the day she begins to experience "pressure" which causes neck symptoms.

Claimant testified that if she was still employed as a grocery checker, she would be earning $10.70 per hour, and that the benefits package available through that employment is valued at an additional 90 cents per hour. She had obtained this information through the grocery checkers' union prior to the hearing.

The Referee awarded claimant an additional 25% unscheduled disability after reviewing all of the evidence concerning claimant's physical limitations and the relevant social/vocational factors. Claimant was 53 years old at the time of hearing. Claimant attended high school to the tenth grade; however, when she was initially referred to the rehabilitation consultants, she was assisted in obtaining her GED and did so. The Referee noted that claimant was precluded from performing any type of work involving lifting, prolonged standing, or prolonged use of her arms in an extended or flexed position. Claimant testified that she had discontinued her recreational activities of golfing and bowling. The Referee also took into consideration the differences between claimant's present income as a cosmetologist, her pre-injury wage and what she might be earning as a grocery checker if she had continued in that employment.

Although we agree that the difference between claimant's pre-injury wage and her present wage is a relevant factor in determining this claimant's loss of earning capacity, see Jacobs v. Louisiana-Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549 (1972), we believe the Referee placed too much emphasis upon this particular factor in deciding whether claimant had established her entitlement to an additional award of unscheduled disability.

ORS 656.268(5) provides for a redetermination of a claim upon completion or termination of an authorized vocational rehabilitation program. In Hanna v. SAIF, 65 Or App 649 (1983), the court stated its understanding of the process for reevaluation of permanent disability upon claim closure pursuant to this provision:

> "ORS 656.268(5) provides that a new determination be made when a worker ceases to be enrolled in a program of vocational rehabilitation. The new determination would necessarily be based on the medical and other evidence available at that time, including that concerning the success or failure of the vocational rehabilitation

> program. A claimant's disability may be determined to be more or less than previously supposed after vocational rehabilitation, even absent a change in his medical condition. A change in a claimant's condition is not required to obtain a redetermination of extent of disability on termination of a program of vocational rehabilitation." 65 Or App at 652 (footnote omitted).

In Billy Joe Jones, 36 Van Natta 1230, 1231 (1984), we recently stated:

> "On reclosure of a claim pursuant to ORS 656.268(5) we evaluate the claimant's unscheduled disability based upon presently existing facts and circumstances, but we take into consideration prior awards or prior adjudications of unscheduled disability as part of the evaluation process."

The Referee's order in this case seemingly fails to take into account the fact that since the parties stipulated that claimant sustained a 20% unscheduled disability, she has increased her potential earning capacity in at least two ways. Since the parties' January 1981 stipulation, claimant has received her GED. More significantly, however, since that time claimant has acquired the skills, as well as the licensing, required to perform work as a hairdresser, cosmetologist or manicurist. As a result, she has obtained employment in this field.

As defined by ORS 656.214(5), earning capacity is "the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience." Considering this definition of earning capacity, we believe the evidence of record warrants the conclusion that claimant's earning capacity has increased, rather than decreased, since the parties' stipulation awarding 20% unscheduled disability. Under these circumstances, we find that claimant is not entitled to an additional unscheduled award.

ORDER

The Referee's order dated March 23, 1984 is reversed. The Determination Order dated July 18, 1983, which awarded no additional permanent disability is affirmed. Claimant's total permanent disability award to date is 64° for 20% unscheduled disability for injury to the neck.

RICHARD H. JENKINS, Claimant
Allen & Vick, Claimant's Attorneys
Stoel, et al., Defense Attorneys

WCB 83-09211
November 15, 1984
Order on Review (Remanding)

Reviewed by Board Members Ferris and Barnes.

The self-insured employer requests review of Referee Neal's order which set aside its denial of claimant's "upper back and arm condition" and remanded this claim for acceptance and payment of compensation for claimant's "cervical condition and cervical radiculopathy." As a threshold matter, it is necessary to determine what has been claimed and what has been denied.

Claimant has worked for the employer for approximately 19 years. In June of 1978 he became a combination welder. He performed this job until February of 1983, when he became a spot welder. Spot welding requires a somewhat different type of physical exertion than combination welding. As a spot welder claimant is required to stand for most of the work day, leaning forward with his arms held out in front of him, or to the side, with some amount of weight in his hands. Occasionally claimant is required to lift and hold in place a heavy object, such as one weighing 50 pounds.

Approximately six weeks after claimant began work as a spot welder, he began to notice numbness in the fingers of both hands, primarily on the left. In time this became rather painful, to the point that he would be awakened during the night. One night claimant experienced severe pain in the area of his left armpit, which radiated down the arm to the left elbow. He saw a physician at a Kaiser Clinic. Claimant was fearful that he was experiencing the symptoms of a heart attack. This physician assured him that he was not, and the only medical advice rendered was that claimant should "stand up straight." Apparently, two weeks later the Kaiser Clinic called claimant and advised that he should return in order to be examined by a neurosurgeon, and the possibility of surgery was mentioned. Claimant became apprehensive and sought the services of a chiropractor, Dr. Christensen.

When claimant was examined by Dr. Christensen, he presented with left and right-sided numbness and tingling of the arms and fingers. Dr. Christensen diagnosed a chronic moderate cervical strain/sprain with associated spondylosis and "degenerating joint disease." Dr. Christensen's July 29, 1983 report to the employer states:

> "He is a combination welder and the positions he handles the parts to be welded have caused neck and upper back discomfort. Left hand feels 'arthritic' in middle fingers -- hard to bend, swollen, painful."

Claimant completed a Form 801, identifying his left and right arms and fingers as the affected portions of his body. The employer referred claimant for examination by Dr. Nathan, a hand specialist. Dr. Nathan ordered nerve conduction studies, which were performed in September 1983. These demonstrated moderately severe bilateral carpal tunnel syndrome, greater on the left than the right, involving both motor and sensory fibers. Dr. Nathan opined that claimant's carpal tunnel syndrome was idiopathic in nature, not caused by his employment.

The employer thereafter denied claimant's claim for "pain and numbness of both hands, arms, fingers and wrists." Claimant timely requested a hearing contesting this denial.

In November 1983 claimant was examined by Dr. Parsons, a neurosurgeon, on referral by Dr. Christensen. The chief complaint noted was pain and numbness in the left arm and hand. Dr. Parsons stated four diagnoses: Degenerative cervical osteoarthritis; congenital fusion at the C6-7 interspace (previously noted by Dr. Christensen); possible intermittent cervical radiculopathy; and bilateral carpal tunnel syndrome. Dr. Parsons' report states:

> "I do believe that this patient does have bilateral carpal tunnel syndrome, as indicated in the report of Doctor Peter Nathan and substantiated by nerve conduction studies. I feel that he also has cervical osteoarthritis and, with lifting at work, gets some degree of cervical radiculopathy on the left. His symptoms are not bad enough to warrant consideration of a myelogram and possible surgical treatment. Since his work does seem to be aggravating his cervical osteoarthritis in producing some radicular symptoms, I feel it would be wise if he could be placed in a position that did not involve repeated lifting at his job.
>
> "I have warned him that if he notices more persistent pain or if he notices progressive weakness in the grip of his left hand, that he would require further medical evaluation."

When the hearing convened, claimant's attorney conceded that the condition diagnosed as bilateral carpal tunnel syndrome was not compensable and that claimant was "making no claim for carpal tunnel syndrome, as such." Claimant's attorney further stated:

> "The claims we are making today would be for the balance of what we believe the underlying cause of claimant's problem is which would be a chronic cervical strain and sprain which was diagnosed by Dr. Christensen . . . and, also, radicular symptoms down claimant's arms caused by aggravation of his osteoarthritic condition which was diagnosed by Dr. Parsons . . . ."

In his opening remarks, counsel for the employer stated:

> "As we've noted, the issue is the compensability [of] claimant's claim for pain and numbness in both hands and arms. We should note what items are not in issue. The claimant has a congenital fusion or sometimes referred to as a block vertebra at C6-7 [sic]. He has a previous whiplash injury with a bone chip involved.

> He has a lower back problem and he has a knee problem. Both the lower back and the knee problem are being handled separately in separate claims and they are not involved here. We also have a degenerative cervical osteoarthritis.
>
> "The medical evidence in this case shows that claimant's symptoms in the arms and hands [are] a result of the carpal tunnel condition. That is, claimant concedes it is not compensable. We would suggest that any cervical involvement is also unrelated to the job but is an idiopathic degenerative condition from the aging process itself."

As indicated above, the Referee understood the issue to be compensability of claimant's "upper back and arm condition," and she set aside the employer's denial insofar as it denied medical treatment for claimant's "cervical condition and cervical radiculopathy."

On review the employer contends, as a threshold matter, that the Referee erroneously perceived this claim as one for a neck/upper back condition, rather than one for an arm/hand condition, the symptoms of which possibly were caused by an underlying pathology of claimant's cervical spine. We conclude that the parties did not share the same understanding of what was being claimed. Claimant may have intended to state a claim for the first time at hearing for payment of compensation relative to the condition of his neck and upper back. In the absence of objection by the employer, this would be a claim, the compensability of which could be decided by the Referee. See Thomas v. SAIF, 64 Or App 193 (1983); see also Robert G. Irvin, 35 Van Natta 1363 (1983). If we were satisfied that the employer understood, at the hearing, that claimant was indeed seeking compensation for a neck/upper back condition, we would have no hesitation to review the merits of the Referee's decision. It is certainly less than clear, however, based upon respective counsel's opening remarks that claimant intended to make a claim for a separate neck/upper back condition, or that the employer understood that claimant intended to make a separate claim.

Up until the time the hearing convened, it appears that both parties were proceeding on the assumption that the claim was for a bilateral arm/hand condition, one possible diagnosis of which was carpal tunnel syndrome. Dr. Christensen had diagnosed a cervical strain/sprain with associated spondylosis and degenerative joint disease, but this appeared to be his diagnosis and explanation for claimant's hand/arm symptoms. It was not until Dr. Parsons stated his impression that claimant also had a cervical osteoarthritis condition with some degree of cervical radiculopathy that any physician stated a basis for a separate claim for a neck condition. We think that claimant's attorney's opening remarks concerning the "underlying cause" of claimant's problem are too vague to constitute notice to the employer that claimant was making a claim for a separate neck or upper back condition.

Considering this state of affairs, we conclude that the case has been improperly, imcompletely and insufficiently developed, and we find that the only fair and appropriate disposition is to

remand to the Referee for further proceedings, including the possibility of further evidence taking. ORS 656.295(5), (6).

ORDER

The Referee's order dated March 26, 1984 is vacated, and this case is remanded to the Referee for further proceedings consistent with this order.

KIRK E. KENWARD, Claimant
Francesconi & Cash, Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 83-00482 & 83-04371
November 15, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee St. Martin's order which upheld the insurer's partial denial of his current back treatment. On review claimant contends the denial could be interpreted as a permanent denial of future medical treatment guaranteed claimant pursuant to ORS 656.245 and, therefore, should be modified.

The Board affirms the order of the Referee with the following comment. Following our de novo review, we find that the insurer's denial pertained to current medical treatment and was not a permanent denial of future medical treatment. Consequently, no modification is necessary.

ORDER

The Referee's order dated May 2, 1984 is affirmed.

JAMES C. SWATZELL, Claimant
Lindsay, et al., Defense Attorneys

WCB 82-10612
November 15, 1984
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review (Remanding) dated October 29, 1984. In addition to contending claimant is not entitled to a hearing, the insurer asserts that neither party had requested an expedited hearing.

The insurer's request is granted. We continue to believe claimant is entitled to a hearing. However, that portion of our order which required an expedited hearing was gratuitous inasmuch as neither party requested one. It is the policy of this Board to concentrate on issues raised by the parties without volunteering decisions on issues not raised. Michael R. Petkovich, 34 Van Natta 90 (1982). On reconsideration, we conclude that the hearing shall be scheduled in accordance with standard operating procedures by the Hearings Division.

ORDER

On reconsideration, the Board adheres to and republishes its Order on Review (Remanding) dated October 29, 1984, except that the Hearings Division shall schedule the hearing in accordance with its standard operating procedures.

TIMOTHY H. TATOM, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-06611
November 15, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of those portions of Referee T. Lavere Johnson's order which awarded claimant 20% (64°) unscheduled permanent partial disability for a neck and left shoulder injury and 10% (19.2°) scheduled permanent partial disability for loss of use of the left arm. Both awards were in lieu of a September 27, 1982 Determination Order which awarded no permanent disability. On review, SAIF contends both awards should be reduced or eliminated.

We affirm and adopt that portion of the order of the Referee concerning claimant's award for left arm disability. We modify that portion of the order which awarded claimant 20% unscheduled permanent disability.

As of the date of hearing, claimant was 30 years of age. He developed neck, left shoulder and arm pain while working as a trim saw operator. Claimant's duties included heavy lifting and turning of lumber. His condition has been variously diagnosed as "overuse syndrome," thoracic outlet syndrome, carpal tunnel syndrome and cervical-scapular strain.

Orthopaedic Consultants felt that claimant could return to his original occupation without limitations. The Consultants opined that claimant suffered no permanent impairment. Dr. Gaiser, claimant's former treating physician, agreed with the Consultants' findings.

Dr. Poulson, claimant's recent treating physician, felt that claimant's impairment was mild and took the form of recurrent pain. Dr. Poulson opined that claimant should not return to his prior occupation because it involved "quite heavy" work. It was Dr. Poulson's recommendation that claimant engage in medium work and avoid repetitive bending and lifting. Dr. Poulson further advised claimant to avoid long periods of stooping and working with his head bent down over a work table.

Dr. Murdock, thoracic surgeon, felt that if claimant had thoracic outlet syndrome, it was a preexisting condition. Dr. Murdock recommended that claimant not engage in activities which would produce his symptoms.

Dr. Mundall, neurologist, diagnosed probable left carpal tunnel syndrome and suspected mild left cervical muscle contraction pain. Dr. Mundall opined that claimant's shoulder, neck, axilla and chest pain was due to a mild strain.

Claimant credibly testified that he suffers a constant, aching pain in his neck, left shoulder and left arm. If he is unable to move around, he experiences a burning sensation in his shoulder. His arm and hand sometime become numb. Claimant's middle back lacks mobility and his head feels "real heavy on [his] shoulders and on [his] neck." Claimant, his mother and his father credibly testified that claimant's chronic symptoms had limited his activities. For example, claimant's gardening, lawn mowing,

reading, swimming, bowling, biking, car repair, and hunting activities have either been curtailed or eliminated.

Claimant has a high school education and attended a community college for three months. He worked as a short order cook for seven to eight years. Claimant has also worked in a variety of sales positions. In addition to his year's experience as a trim saw operator, claimant has worked on a farm and done some logging. As of the date of the hearing, claimant had not been regularly employed for approximately 18 months.

We are persuaded that claimant has suffered permanent impairment and is entitled to an award of unscheduled disability. However, we find a 20% award to be excessive.

Pursuant to OAR 436-65-600 et seq., we consider claimant's age, education, work experience, adaptability, mental capacity, emotional state, labor market findings, and physical impairment, including residual pain, in rating the extent of claimant's disability. After completing our de novo review and considering the above guidelines, we conclude that an award of 10% unscheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated April 30, 1984 is modified in part and affirmed in part. In lieu of the Referee's award, claimant is awarded 10% (32°) unscheduled disability, which is his total award for his neck and left shoulder injury. The remainder of the Referee's order is affirmed. Claimant's attorney's fee shall be adjusted accordingly.

MARVIN L. COBURN, Claimant
Callahan, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB TP-84012
November 20, 1984
Third Party Order

The paying agency, United Pacific Insurance, has petitioned the Board for "redistribution" of the proceeds of a third party recovery obtained by claimant.

Claimant was involved in a motor vehicle accident while working in the course of his employment in December of 1982. In addition to filing his workers' compensation claim, claimant elected to proceed against the allegedly negligent third party in a civil action for damages. ORS 656.154; 656.578. Claimant's workers' compensation claim was accepted and processed by his employer's industrial insurer, the paying agency herein. The claim was accepted as disabling. Claimant's treating physician, Dr. Cook, and a consulting neurosurgeon, Dr. White, indicated that, as a result of his industrial injury, claimant would sustain no permanent impairment. In June of 1983 the industrial insurer issued a notice of claim closure awarding compensation for temporary total disability from December 14, 1982 through June 8, 1983, less time worked.

Negotiations for settlement of claimant's third party action ensued between claimant and the third party. A settlement offer of $10,500 was made by the third party insurer. Claimant's attorney communicated this offer of settlement to United Pacific. See ORS 656.587. Claimant's attorney requested that United Pacific compromise its lien in order to allow claimant to receive a larger portion of the third party settlement. See ORS

656.593(1). United Pacific agreed to reduce its lien from approximately $4,200 to $3,000 and approved the settlement.

The settlement proceeds were distributed in accordance with the statutory formula as modified by the agreement between claimant's attorney and United Pacific. See ORS 656.593(3). Claimant's attorney was paid an attorney's fee in an amount which was $100 less than that to which he would have been entitled in the event of a distribution strictly in accordance with the statutory formula. Claimant received $4,000, and the paying agency received $3,000.

Claimant thereafter sought review of United Pacific's notice of closure by requesting a Determination Order. ORS 656.268(3). By a Determination Order dated December 8, 1983, the Evaluation Division affirmed the notice of closure. Claimant thereafter requested a hearing pursuant to ORS 656.268(6) and 656.283, designating extent of permanent disability as the issue. The attorney that represented claimant in the third party action did not represent claimant in connection with the proceedings under the Workers' Compensation Law. These two attorneys, however, are partners in the same law office. Apparently upon completion of the civil matter, claimant's "personal injury attorney" referred claimant for representation in connection with his workers' compensation claim to the "workers' compensation attorney" in the office.

As part of the pre-hearing disclosure requirements, OAR 438-07-015, claimant's workers' compensation attorney provided United Pacific's attorney with copies of two medical reports from Dr. Cook. These two medical reports are dated May 13, 1983 and August 3, 1983, and are both addressed to claimant's personal injury attorney. Neither one of these reports indicates that a copy had been provided to United Pacific and, in fact, copies were not provided. The first time that the industrial insurer, or any of its representatives or agents, had knowledge of these reports was when they were provided copies by claimant's workers' compensation attorney in August of 1984.

A hearing convened on August 20, 1984. The sole issue raised by claimant's attorney was extent of unscheduled disability resulting from the industrial injury. The employer/insurer raised an additional issue, as previously stated in a letter to the Referee, concerning its entitlement to "an offset of proceeds from a third party settlement which was negotiated and entered into in October of 1983." Counsel for United Pacific explained that at no time prior to the transmission of Dr. Cook's May and August 1983 reports had it been aware of the existence of these reports and their contents; and that had it been so aware, it would not have agreed to a reduction of its lien.

Claimant moved to dismiss the issue raised by United Pacific on the grounds that the Hearings Division did not have jurisdiction to consider any issue relative to distribution of the proceeds of claimant's third party recovery. The Referee took claimant's motion under advisement and proceeded to take testimony on the "offset" issue as well as the issue of extent of permanent disability. After the hearing, the Referee advised the parties to petition the Board directly for resolution of the dispute concerning distribution of claimant's third party recovery. United Pacific submitted its petition to the Board. The Referee

subsequently entered an order addressing the issue of claimant's unscheduled disability. Upon motion of United Pacific, the Referee abated her order pending resolution of the third party dispute by the Board. United Pacific subsequently provided the Board with a copy of the oral proceedings before the Referee. We have considered and made a part of this record all of the exhibits submitted to the Referee, as well as the transcript of oral proceedings provided by the employer/insurer.

Initially, we note that claimant was correct in his assertion that the Referee had no jurisdiction to rule on the issue raised by the employer/insurer, which concerns the proper distribution of the proceeds of claimant's third party recovery. ORS 656.593; Marvin Thornton, 34 Van Natta 998 (1982). Therefore, the Referee correctly advised the parties to petition the Board for resolution of this dispute.

At the hearing, the testimony relevant to the third party distribution issue was given by claimant, claimant's personal injury attorney and United Pacific's workers' compensation claims supervisor. Claimant's attorney testified that he explained the statutory distribution formula to claimant, and that claimant indicated he wished to receive, at the very least, $4,000 out of the proceeds of the third party settlement. If the settlement proceeds were distributed strictly in accordance with the statutory formula, claimant would receive slightly in excess of $2,300. Claimant's attorney discussed distribution with two of the insurer's representatives, including the claims supervisor who testified. Claimant's attorney advised the insurer that his client "needed $4,000 . . . out of the case," and, therefore, that he was requesting the insurer to reduce its lien. He also indicated that he intended to reduce his attorney's fee slightly. He testified that he did not recall the insurer's representatives asking him for any medical reports. His recollection of the conversations that took place was that the main consideration was whether or not the claimant/plaintiff would be able to establish third party liability and, therefore, whether there would be any third party funds in the event the civil action proceeded to trial. As far as a discussion of claimant's medical condition was concerned, claimant's attorney characterized this discussion as "some casual terms [about] what my client's condition was." It appears that he believed the two reports from Dr. Cook may have already been in the industrial insurer's possession. Claimant's attorney did not recall any specific conversations concerning the possible need for future medical attention, "or anything of that nature."

The insurer's claims supervisor confirmed that claimant's attorney had indicated that the chances for establishing third party liability were about 50-50. He testified, however, to a more detailed conversation with claimant's attorney concerning the likelihood of future expenditures for medical care and a possible permanent disability award. He testified that in the course of this discussion, claimant's attorney mentioned a July 1, 1983 report from Dr. White, which claimant's attorney read over the phone. This report appears in the record. It discusses the presence of arthritic changes in claimant's cervical and thoracic spine, which were considered to be preexisting. Dr. White indicated that the extent of claimant's disability was "small" regardless of the cause, and that he did not believe any active treatment was warranted. He did state, however, that, in the

event claimant should develop additional symptoms, he should be referred for additional treatment. He also stated, "Arthritic changes do advance in most cases. One might even make an argument for the present trauma having had some role in accelerating that advance in the future." Dr. White indicated that claimant was capable of performing his employment as a truck driver "without significant difficulty."

The insurer's claims supervisor testified that, after hearing the contents of that report, he felt "fairly comfortable from a medical standpoint going ahead and reducing our lien and settling the case, without worrying too much about future costs, a high likelihood of permanent disability if a hearing request should result after closing of the claim." The claims supervisor did not recall whether he asked claimant's attorney if he had any additional medical reports in his possession, specifically, any medical reports from Dr. Cook. The last report that the insurer's claim file contained from Dr. Cook was in the form of a July 15, 1983 office note entry. Because the insurer had received no additional billings from Dr. Cook, it was assumed that no additional examination had been conducted and, accordingly, no additional report generated. The claims supervisor also assumed that, if there had been a report in addition to or more recent than the July 15, 1983 chart note, any such report would have been included in the discussions with claimant's attorney concerning claimant's medical condition.

The claims supervisor testified that initially, claimant's attorney indicated that claimant wanted to receive at least $5,000 out of the settlement proceeds. The $4,000 figure apparently was arrived at subsequently through negotiations. After his initial conversation with claimant's attorney, the claims supervisor conferred with the casualty manager, requesting input. The casualty manager apparently recommended that an attempt be made to recover at least $4,000 of the insurer's lien. The claims supervisor decided, however, based upon claimant's attorney's representations concerning the contingencies involved in establishing third party liability, as well as the apparently "limited medical situation," that he would agree to reduce the insurer's lien to $3,000 in order to avoid the possibility of an unfavorable verdict and consequential loss of third party reimbursement to any extent.

The claims supervisor clearly testified that if he had been aware of the contents of Dr. Cook's May and August 1983 reports, he would have considered it "much more likely" that claimant might receive an award for permanent partial disability and, therefore, he would not have agreed to compromise the insurer's lien. We understand the claims supervisor's testimony to state that if he had been cognizant of Dr. Cook's two reports, he would not have agreed to <u>any</u> reduction in the insurer's lien and would have demanded full reimbursement from the settlement proceeds.

Claimant's testimony indicates that he did not understand that, in addition to receiving a portion of the settlement proceeds, he would continue to receive workers' compensation benefits. Claimant apparently believed that the $4,000 or $5,000 payment out of the settlement proceeds would be the only compensation for his injury.

We do not know whether claimant's attorney attempted to

minimize the perception of claimant's possible injury-related disability during his negotiations with the industrial insurer, in an effort to convince the insurer to compromise its lien. We do not believe, however, that claimant's attorney intentionally concealed or failed to disclose Dr. Cook's medical reports based upon a belief that, if the insurer had these reports in its possession, the insurer might be influenced adversely to claimant's interests. We do believe that it was incumbent upon claimant's attorney to make a full disclosure of all medical reports in his possession. An obvious consideration in a paying agency's decision to authorize or approve a third party settlement offer, whether or not the paying agency is requested to compromise its statutory lien, is the existing evidence of the claimant's medical condition. The paying agency is entitled to assume that the claimant has made a full disclosure of medical information which is in the claimant's possession, and the claimant is required to make such a disclosure. Otherwise, the paying agency is unable to make an informed decision as to what may be a "just and proper" share of the proposed settlement proceeds. See ORS 656.293(3). It is obvious in this case that claimant's personal injury attorney failed to make such a disclosure during the negotiations in October of 1983. The reasons for this failure to disclose, however, are less clear. As stated, we do not believe there was an intentional concealment; we do believe, however, that counsel should have been more attentive to this duty.

Based upon the claims supervisor's testimony that he would not have compromised the insurer's lien if he had been aware of Dr. Cook's May and August 1983 reports, it might be appropriate to grant the insurer's request for "redistribution" and allow a credit for any amount of permanent disability the insurer might be obligated to pay, up to the amount by which its lien was reduced. There are other factors, however, which persuade us that this would not be an appropriate disposition. A primary consideration in the insurer's decision to compromise its lien was the possibility that, if claimant's third party action was not settled, no pool of funds would be available for distribution and partial reimbursement of the insurer's lien. As we have previously stated, "Nothing in the statutes governing third party actions guarantees or even contemplates that an industrial insurer will always have its statutory lien fully satisfied out of the proceeds of a third party recovery." James H. Roberts, 34 Van Natta 1603, 1605 (1982). As the insurer's claims supervisor testified in this case, when the paying agency is requested to reduce its lien in order to effectuate a reasonable settlement, "That's where the question of liability becomes more important, rather than exposure . . . ."

In addition, the fact that claimant's personal injury attorney failed to disclose Dr. Cook's May and August 1983 reports does not, in and of itself, compel the conclusion that the third party settlement proceeds should be redistributed, in the absence of an apparent, material difference between the medical information which was available to the paying agency and the information contained in the undisclosed reports. Dr. Cook's July 15, 1983 office note entry, which the industrial insurer did have in its possession, indicated that claimant was continuing to experience persistent symptoms as a result of his December 14, 1982 motor vehicle accident. The symptoms reported on claimant's examination at that time were continuing headaches nearly every morning, stiffness on the right side of his neck, and

paravertebral stiffness and pain in claimant's upper thoracic spine, especially between the shoulder blades. It was reported that claimant was able to drive his truck, but that it was necessary for him to get out and rest two or three times between Salem, Oregon and Seattle, Washington. Dr. Cook's assessment at that time was, "Suspect a significant exacerbation of the previously described DJD [degenerative joint disease] in his lower cervical, upper thoracic spine. Doubt that this will resolve very soon but the patient continues to attempt to work which I think is to his credit. Advised just to use heat, aspirin, massage, recheck with me as needed."

This May 13, 1983 report which is in issue describes claimant's motor vehicle accident and the course of treatment provided by Dr. Cook up to and including the time of claimant's release to return to work with no limitations in February of 1983. This report gives a description of the apparent neurological problems claimant began to experience thereafter, which prompted Dr. Cook's referral to Dr. White, the neurosurgeon. The insurer presumably was aware of Dr. White's examination and his findings in the spring of 1983. Dr. Cook concluded this report by stating, "His injury is far from resolved. I cannot tell you what long term complications it will have but I think Dr. White would have more information for you."

His May 1983 report adds little, if any, information that was not already available to the industrial insurer in October of 1983 by way of the reports from Drs. White and Cook which were in the insurer's possession, including Dr. Cook's July 15, 1983 office note entry. Dr. Cook's August 3, 1983 report, the other undisclosed document, does not reflect any examination more recent than the July 15, 1983 examination. In fact portions of this report were obviously narrated on the basis of Dr. Cook's July examination. The continuing symptoms described in this report were also described in Dr. Cook's July 15 office note entry. The additional, and arguably different, information contained in this report is the following:

> "I think it is clear that these problems are related to his accident and that while obviously not of enormous magnitude, represent what seems like a return of perhaps 70 percent to 80 percent of his full function. I would anticipate that over the period of several more months his soft tissue spasm and stiffness and tenderness will slowly improve. It is my understanding that [claimant] is doing the same work that he did before his accident but not without difficulty and also because he is a highly motivated determined man. My suggestions for specific treatment would be heat, rest, and low dose aspirin, breaking up his long trips as needed and rechecking with me if symptoms either fail to slowly improve or in fact worsen."

Arguably, the most significant difference between Dr. Cook's statements in this report and prior statements is his comment that claimant's continuing problems represent what seems like a return

of 70 to 80 percent of his full function. Dr. Cook also indicated, however, his expectation that claimant would continue to improve during the ensuing months. This latter comment is consistent with his earlier indications that no permanent impairment would be expected to result from claimant's injury.

Even considering the additional information contained in Dr. Cook's May and August 1983 reports, we believe that the picture that emerges is still one of a "limited medical situation," with the prospect of any permanent disability award, let alone a "large disability award," being minimal.

If we were to conclude that there was a material difference between claimant's medical condition as presented by the information in the industrial insurer's possession in October of 1983 when the third party settlement was negotiated, and medical information which was in claimant's possession but undisclosed to the industrial insurer, we would also conclude that the insurer's request for "redistribution" should be granted. Our assessment of the difference in this case, however, is that it is slight and insufficiently material to alter the terms of the distribution that was agreed upon. We find that the questionable third party liability was a more compelling consideration in the industrial insurer's decision to reduce its lien and thereby avoid the possibility of obtaining no reimbursement at all. Considering these facts, we find it appropriate to leave the parties where they stand. Therefore, the paying agency's petition is denied.

ORDER

United Pacific Insurance Company's petition for "redistribution" of the proceeds of claimant's third party recovery is denied.

WELDON E. HUNT, Claimant
Stunz, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-01598
November 20, 1984
Order on Review

Reviewed by Board Members Lewis and Barnes.

Claimant requests review of Referee Knapp's order which affirmed the February 17, 1982 Determination Order which did not award him unscheduled permanent partial disability for a right groin condition. On review, claimant contends he is entitled to a permanent disability award and is entitled to further temporary total disability benefits.

The Board affirms and adopts the order of the Referee with the following comment. The issue of claimant's entitlement to temporary total disability benefits was not raised at hearing and thus, is not properly before us. Michael R. Petkovich, 34 Van Natta 98 (1982).

ORDER

The Referee's order dated April 27, 1984 is affirmed.

MICHAEL KING, Claimant
Oscar Nealy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-03020
November 20, 1984
Order of Dismissal

The SAIF Corporation has moved to dismiss claimant's request for review on the ground that it is untimely and therefore the Board is without jurisdiction.

Referee Mongrain issued an order in this matter on August 31, 1984. Claimant mailed his request for review on October 1, 1984 and the Board received claimant's request for review on October 2, 1984. SAIF represents that it did not receive a copy of the request nor did it receive actual notice that claimant was requesting review until it received notice from the Board on October 25, 1984. In order for the request to be timely, it must not only be mailed to the Board within 30 days of the Referee's order, it must also either be mailed to the insurer within 30 days or the insurer must have actual notice of the request within 30 days. Argonaut v. King, 63 Or App 847 (1983). We find that claimant's request for review was not timely. Accordingly we are without jurisdiction. Claimant's request for review must be dismissed.

ORDER

Claimant's request for review is dismissed. The Referee's order dated August 31, 1984 is final by operation of law.

GIORDANO ZORICH, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Cheney & Kelley, Defense Attorneys

WCB 83-02234 & 83-02235
November 26, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Safeco Insurance Company requests review of that portion of Referee St. Martin's order which set aside its denial of responsibility and awarded $500 in attorney fees. The SAIF Corporation cross-requests review of the Referee's award of a penalty and $3,000 in associated attorney fees for failure to pay interim compensation, failure to accept or deny within 60 days and failure to request an ORS 656.307 order. The issues on review are responsibility and penalties and attorney fees.

Claimant was a sheetrock installer with a history of low back injuries. All the back injuries mentioned in the record were related to his jobs. Safeco covered his employer at the time of the October 1978 injury. Between October 1978 and January 1982, claimant had two lumbar laminectomies and removal of disc fragments from the right side of the L5-S1 joint and fusion of the joint. Claimant returned to work in January 1982 without limitations at his former employment. He worked for his former employer for three months, then went to work for SAIF's insured. He suffered occasional pains in his back and took one or two days off per month. During the month of October 1982, claimant noticed what he perceived as a recurrence of his back pains. The pain increased steadily over a two week period, and finally reached the point where he left work early on a Thursday. He anticipated that the time off work and the weekend would be sufficient to return

his back to a tolerable condition. On Sunday he could no longer tolerate the pain and sought treatment at the hospital. The hospital reported the examination to SAIF on a Form 827 on November 5, 1982, identifying claimant and SAIF's insured. The form also showed a claim number that SAIF identified as a Safeco claim number.

Claimant returned to his attending physician, Dr. Carr, who took him off work. Claimant was referred to Dr. Berkeley, who opined on November 12, 1982 that the complaints were a direct result of the 1978 injury. On November 17, 1982 Dr. Carr opined that claimant was much worse than he had been when released to work in April 1982 and that he was unsure of the cause. On December 7, 1982 Dr. Johnson, the operating neurosurgeon, opined that claimant was suffering an exacerbation of the symptoms from the 1978 injury. Around this time claimant began having left leg pains which he had never had before. On December 13, 1982 Dr. Johnson performed a myelogram which revealed a defect at the L5-S1 joint on the left side. Claimant was referred to Dr. Raaf who reported that claimant began having left leg pains around the first of December and recommended surgery to add L4 to the lumbosacral fusion mass. On January 31, 1983 Dr. Johnson performed another laminectomy and discovered free disc fragments on the left side, which he removed. At the same surgery, Dr. Carr explored the fusion and found it to be intact. Thereafter, on February 11, 1983, Dr. Johnson opined that the need for surgery in January 1983 was due to a new injury sustained by claimant in October 1982. Subsequently, in April and July 1983, Dr. Carr opined that the January 1983 surgery was required as a result of an injury sustained in October 1982 and that there was no aggravation of the 1978 injury or its residuals.

On March 4, 1983 Safeco denied responsibility for the injury and notified claimant and SAIF that it was requesting a .307 order. On April 12, 1983 SAIF requested Safeco's entire claim file on this case. On April 19, 1983 SAIF requested an interview with claimant to obtain information necessary to make a proper determination. Claimant was interviewed on May 6, 1983, and the transcript of the interview reveals that the SAIF investigator required claimant to recite the dates and purposes of his various surgeries and then tried to pinpoint a specific lifting incident as the precipitating cause of the January 1983 surgery. Claimant was not able to identify a single incident as the cause of his back pains, but he was able to identify a period in which the pain took on a different character:

> "Once in a while I'll take a day off and it was fine, you know, except towards the end there -- oh, about a month or two or three weeks before I went to the hospital the pain got real bad and I took two or three days off, and then it just didn't do any good 'till finally I just went to the hospital -- the pain -- the pain started going down my leg which it never did before, see . . ." and
>
> "my back started hurting me a lot more than it did before, you know, but the difference was that the pain started down the leg . . ." and

"Okay. Pain in the right leg before. Did you ever have it in the left leg before?/No . . . ." (Emphasis added.)

On May 6, 1983 SAIF denied compensability and on May 9 notified claimant and Safeco of the denial. Because SAIF denied compensability, a .307 order was not issued. SAIF continued to deny compensability until hearing, when SAIF's counsel stated the issue was responsibility.

Safeco made temporary total disability payments until October 1, 1983, when claimant returned to work without restrictions.

On review we find that, before the myelogram, the doctors were unsure of the etiology of claimant's complaints and reasonably assumed that they were related to the three previous surgeries. The appearance of new symptoms involving the previously asymptomatic left leg and the objective findings of the myelogram, confirmed by surgery on January 31, 1983, caused the two surgeons to reconsider their opinions of the cause of claimant's condition. They considered the sudden change in symptoms in October 1982 as an indicator of a new injury at that time. After the surgery, no doctor suggested that the pain in claimant's back was due to an aggravation of the 1978 injury. Considering claimant's consistent recital of a change in symptoms and the hindsight opinions of the operating surgeons, we believe that claimant has established that a new injury occurred in October 1982 for which SAIF is the responsible insurer.

We note that a substantial portion of the hearing and the briefs on review were devoted to the failure to establish a single incident as the cause of the injury. SAIF's point is well taken that ordinarily an injury is the result of some memorable incident. However, this claimant had a history of back pain and surgeries and he ascribed his pain, as did his doctors at first, to an exacerbation of the prior injuries and their residuals. Dr. Carr saw claimant on October 27, November 1, and November 8, 1982, and documented the continuing increase of the pain. He finally related the beginning of disability to October 13, 1982, as the date claimant first noticed the pain. It was only after the new symptoms failed to resolve and objective testing and surgery revealed fresh injury that anyone became interested in the cause of this particular onset of symptoms. Claimant's work exposed him daily to the risk of this type of injury and there is no evidence to suggest that he might have suffered this injury off the job. That he cannot point to a particular date and time and say it all began there as a result of a particular activity or incident does not prevent the finding of a new injury. See Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Walter R. Cowdrey, 36 Van Natta 1298 (1984); Bill B. Dameron, 36 Van Natta 592 (1984). We find the evidence preponderates in favor of the finding of new injury because of the objective findings and claimant's consistent recital of the sudden onset of new symptoms beginning near the middle of October.

SAIF was assessed a penalty and attorney fee for failure to pay interim compensation. SAIF received an 827 on November 5, 1982. SAIF identified a Safeco claim number on that form, and it appears that SAIF determined that Safeco was handling the claim as an aggravation. We find that under these circumstances the 827

was not notice to SAIF of a claim against it. In January 1983 SAIF transmitted some documents to Safeco because claimant had requested that all correspondence be forwarded to Safeco. SAIF contends that it first learned of a claim of new injury on March 9, 1983, when they received claimant's hearing request form, which was mailed on March 7, 1983. SAIF determined that Safeco was paying time loss and decided they had no duty to pay interim compensation pending acceptance or denial. SAIF notified claimant of its denial on May 9, 1983, which it conceded was two days beyond the sixty day limit but which it claimed was due to the unavailability of claimant to provide needed information.

After March 7, 1983 SAIF had fourteen days to accept, deny, or begin interim compensation payments pending acceptance or denial, regardless of Safeco's actions; therefore, SAIF owes interim compensation from the date of notice until the date of denial. Bono v. SAIF, 66 Or App 138 (1983); Darrell Messinger, 35 Van Natta 161 (1983). For failure to pay interim compensation from the date of notice until its denial, SAIF is assessed a penalty of 25% of the interim compensation due. We agree with the Referee that claimant's attorney should be awarded a fee associated with the penalty for failure to pay interim compensation, but we find the amount awarded is excessive. We find that an appropriate attorney fee award is $500.

We find SAIF's two-day delay in denying was reasonable considering that it was actively investigating the claim and claimant's availability delayed the investigation. Accordingly, no penalty is warranted for late denial.

There are responsibility cases in which it is unclear whether the claimant has suffered a compensable injury, but in this case the opinions of both treating surgeons after myelography and surgery were unrefuted that claimant suffered either a new injury or an aggravation at the time of the denial. The medical reports available in May 1983 and the consistent reports of claimant indicate that claimant suffered an aggravation or a new injury in October 1982. SAIF conceded at hearing that the issue was responsibility, because counsel at opening statement characterized the claim as properly one for aggravation. We find that SAIF's refusal to enter into a .307 order in May 1983 was unreasonable. The purpose of the ORS 656.307 order is not to fix responsibility but to ensure orderly compensation of the claimant pending resolution of the issue of responsibility. SAIF did not satisfy the spirit or the letter of .307 by denying compensability of the claim. SAIF v. Moyer, 63 Or App 498, review denied, 295 Or 541 (1983). Because we have already penalized SAIF for failure to pay interim compensation, we are unable to assess an additional penalty. Gary L. Clark, 35 Van Natta 117 (1983).

Claimant's attorney was helpful at hearing in setting out the issues and providing current caselaw. He appeared to be directing his case principally at SAIF as the responsible insurer. In his brief on review, claimant's attorney points out that the Referee has correctly applied the rule of Starbuck, supra, but claimant argues that the facts indicate that there is a new injury, a position with which we agree. Thus, claimant's attorney was instrumental in overturning SAIF's denial and is entitled to a fee.

ORDER

The Referee's order dated March 30, 1984 is reversed in part

and modified in part. That portion of the Referee's order which set aside Safeco's denial and ordered it to pay $500 in attorney's fees, and which upheld the SAIF Corporation's denial is reversed. Safeco's denial is reinstated and the $500 fee assessed against Safeco is set aside. SAIF's denial is overturned. The claim is remanded to SAIF for processing according to law. That portion of the Referee's order which required SAIF to pay interim compensation, a penalty and associated attorney's fee is modified. SAIF shall pay to claimant interim compensation from March 7 until May 9, 1983, plus a 25% penalty plus an associated attorney fee to claimant's attorney of $500. Claimant's attorney is also awarded $1,000 for services at hearing and $750 for services on Board review, to be paid by the SAIF Corporation.

NEVA W. BREHMER, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00590
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Nichol's order which assessed it penalties for: (1) unreasonably failing to make timely payments pursuant to a Referee's order; (2) unlawful termination of temporary benefits; and (3) unreasonably failing to comply with a Determination Order. On review, SAIF contends its conduct was neither unreasonable nor unlawful and that it was surprised and prejudiced by claimant's raising the "compliance with the Determination Order" issue on the day of the hearing.

The Board affirms the order of the Referee with the following modification regarding the "compliance with the Determination Order" issue. In conducting our review, we have considered the April 18, 1984 Determination Order only for purposes of determining when the Determination Order issued. Substantive issues concerning the Determination Order, such as extent of permanent and temporary disability, were not ripe for hearing nor before us on review. Accordingly, since the sole function of the Determination Order in this matter was to establish the official date of its issuance, SAIF was not surprised nor prejudiced by its admittance into evidence.

Temporary benefits should continue until a Determination Order issues, unless claimant has returned, or been released to return, to regular work. Jackson v. SAIF, 7 Or App 109 (1971). In order to justify terminating temporary benefits, the release for a return to work should be clear and unambiguous. John R. Daniel, 34 Van Natta 1020 (1982). If the release is unclear, further clarification is necessary.

We agree with the Referee that it was unclear whether claimant had returned to work or was released for work. Therefore, SAIF was not justified in terminating claimant's temporary benefits as of August 2, 1983. Consequently, time loss should have continued until the issuance of the April 18, 1984 Determination Order.

Although we find SAIF's conduct unreasonable, we would not describe its conduct as an unreasonable failure to comply with a Determination Order. Rather, we perceive SAIF's conduct as an

unlawful termination of temporary benefits for which it is assessed a penalty of 25% of the time loss due from the effective date SAIF terminated time loss payments through the date the Determination Order issued. (August 3, 1983 - April 18, 1984).

This modification has no effect on the total amount of the penalty nor the accompanying attorney fee.

We also affirm that portion of the order which assessed SAIF a penalty for unreasonably failing to make timely payments pursuant to a previous Referee's order.

ORDER

The Referee's order dated June 18, 1984, as modified, is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

GRACIA C. CARTER, Claimant
Pozzi, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-07190
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Neal's order that set aside its May 19, 1983 back-up denial of claimant's psychiatric/psychological condition. The issue is compensability.

Claimant was 49 years old at the time of the hearing and had a history of low back problems dating back until at least 1972. Claimant has had numerous other medical problems not related to her low back. She began working for the employer in outside sales in 1963. In 1979 she had been the statewide sales manager for six years. On March 22, 1979 claimant injured her back entering a taxicab on her way to the airport to return to Oregon from a Las Vegas, Nevada regional sales meeting.

Upon claimant's return to Oregon, she was hospitalized for seven days for conservative treatment for acute lumbosacral strain. She was discharged from the hospital on April 4, 1979 and continued to be treated conservatively by Dr. Richard Borman, osteopath, through June 13, 1979.

On October 2, 1979 the Orthopaedic Consultants panel examined claimant and noted extreme functional overlay interfering with the examination. Psychiatric evaluation was recommended.

In November 1979 claimant came under the care of Dr. Gambee, an orthopedic surgeon. On at least nine separate occasions between November 15, 1979 and March 26, 1981 Dr. Gambee specifically noted claimant's psychologically-depressed state.

The insurer referred claimant to Guy A. Parvaresh, M.D., for a psychiatric evaluation. In his November 28, 1979 examination report he opined that claimant exhibited clinical signs and symptoms indicating psychoneurotic depressive reaction. He concluded:

"[I]t is my clinical opinion that it is the psychoneurotic disorder which has camouflaged and prolonged [claimant's] convalescence from an otherwise benign injury, rather than the injury having contributed to any significant degree to the psychiatric disorder. At any rate, aside from the causation of the illness, I believe adequate psychiatric intervention will certainly assist [claimant] to deal with her back instability and return to gainful employment."

On January 4, 1980 Dr. Gambee precribed Elavil, an antidepressant. On January 8, 1980 Dr. Gambee wrote to the insurer:

"I think you mis-interpret [sic] Doctor Parvaresh's report. He points out that [claimant's] industrial accident does contribute to her chronic depression. He also points out that she has had problems with depression all the way along.

"Nonetheless, I repeat, she was employed prior to this industrial accident and she is not able to work at this time. I think that you have to assume responsibility for treatment of this individual."

On March 5, 1981 Dr. Gambee stated:

"This woman continues to be significantly depressed and I really can not [sic] sort her out in terms of depression, that is whether she is depressed because of the back trouble or she has back trouble because she is depressed. Nonetheless, I have been convinced throughout that she has at least some organic basis for her back disease and that this inability to work has aggravated her antecedent depression."

Although it is not totally clear from the record, from the context it appears that the insurer initially accepted claimant's claim and later denied it. Claimant requested a hearing on the denial. On May 4, 1981 Referee McCullough approved a stipulation executed by the claimant, her attorney and the attorney for the employer/carrier. In relevant part the stipulation provides:

"1) Claimant sustained an apparently compensable injury to her back while entering a taxi cab following a meeting in Las Vegas on her way to the airport after the conclusion of a regional sales manager's meeting.

"The claim was initially accepted and disability and medical benefits extended.

"2) Some time thereafter, the carrier questioned the compensability of the claim

and initiated certain medical and factual investigation. In the meantime, claimant had returned to work and had continued working for a period of time until she was discharged by her employer.

"3) Following conclusion of its investigation, the carrier has decided that claimant's claim is indeed compensable and that she is entitled to the benefits pursuant to law under the Oregon Workers' Compensation Act.

"4) . . . The employer/carrier has submitted the claim for determination, and claimant of course reserves her right to contest the anticipated Determination Order with respect to the amount of compensation for disability and reserves her aggravation rights."

The stipulation also provides that claimant would be paid temporary disability and that her attorney would be paid an attorney fee. In exchange for the concessions made by the insurer, claimant dismissed her request for hearing with prejudice.

Following the stipulation, the insurer received three medical reports stressing the psychological component of claimant's condition -- on June 10, 1981, December 3, 1982 and January 26, 1983. On May 19, 1983 the insurer denied responsibility for claimant's psycholgical problems.

The Referee ruled that:

"By accepting claimant's claim without specifically reserving the right to question the compensability of her psychological component, which was the predominant problem at the time, I find that the employer is now precluded from issuing a denial of the psychiatric condition. . . . " (Citations omitted.)

We agree with the Referee that the employer/insurer is barred by the May 4, 1981 stipulation from later denying the psycholgical component of claimant's claim under Bauman v. SAIF, 295 Or 788, 793-94 (1983). Bauman establishes that the right to deny a claim is waived by accepting it unless the facts of a particular case establish that there has been "fraud, misrepresentation or other illegal activity." No such activity is suggested in this case.

After investigating claimant's claim for nearly a year and a half and having received over a dozen medical reports stressing that claimant's case had a marked psychological component to it, the employer/insurer elected to accept the claim without reserving the right to contest any aspect of the claim. The employer/insurer is now barred from contesting the compensability of that component of the claim.

We find it unnecessary to further discuss the merits, although we are inclined to agree with the Referee that the evidence leans toward a finding that claimant's psychological condition is compensable.

ORDER

The Referee's order dated March 22, 1984 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the insurer.

JACK CROWDER, Claimant
Douglas Minson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-11132
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Leahy's order that awarded claimant 48° for 15% unscheduled disability for injury to his low back in addition to the 144° for 45% unscheduled disability previously awarded by Determination Orders. The issue is extent of disability, claimant contending he is permanently and totally disabled.

Claimant was injured on February 11, 1977 while employed as a bookkeeper when the chair in which he was sitting collapsed and he fell to the floor. Claimant had a history of low back trouble dating back to 1971, and he had had three previous back operations including a fusion from L4 to the sacrum. Claimant was hospitalized for conservative care from March 20 through March 31, 1977 with a diagnosis of acute lumbosacral sprain. When he was discharged it was noted that he had improved minimally.

In June 1977 Dr. McKillop performed surgery that revealed a defective L4-5 fusion. Dr. McKillop then performed a bilateral transverse L4-5 fusion to correct the problem. In December 1977 Dr. McKillop noted that claimant continued to experience severe low back pain and had developed an overdependency on prescription pain medication. Claimant was referred to the Portland Pain Center.

Claimant completed the pain center program in March and April of 1978. He was successfully weaned off prescription pain medication and seemed to perform well in the program. The psychological discharge notes refer to some depression, being managed with antidepressant medication.

In August 1978 Dr. Pasquesi opined that claimant's condition was medically stationary and that claimant's impairment due to his low back was 39% based upon loss of range of motion, ankylosis and pain. Dr. McKillop essentially agreed with Dr. Pasquesi, except that he rated claimant's disability due to his low back at 50%, about half of which he stated preexisted the 1977 injury.

On October 23, 1978 a Determination Order granted claimant an award of 80° for 25% unscheduled disability for injury to his low back.

In January 1979 claimant began a vocational assistance program. The goal of the program was to place claimant in a public accounting or bookkeeping position. Between February and June of 1979 an extensive employment search was conducted, with claimant ultimately returning to work as an accounting clerk for the United Way in June 1979.

On October 18, 1979 Dr. McKillop reported that claimant had had a recurrence of low back pain and would be hospitalized for a short period of time. He did not see any need for surgery and planned no other treatment.

Claimant was admitted to the hospital on November 4, 1979 and discharged on November 17, 1979 in a body cast. He wore the body cast until January 1980. On March 17, 1980 Dr. McKillop reported that claimant was continuing to experience continuous moderately severe pain with almost total restriction of range of motion. Dr. McKillop had, however, no additional treatment plans.

Claimant was reevaluated by the Portland Pain Center on May 8, 1980. Dr. Seres noted that claimant had not been following the regimen established by the pain center and had not been changing his position often, as he had been instructed to do, while he was employed at the United Way. The psychological, neuropsychological and multidisciplinary evaluations all noted that claimant was significantly depressed and not well motivated to return to work. Claimant was reinstructed in the pain center regimen and discharged.

Dr. Pasquesi reexamined claimant on May 14, 1980 and concluded that claimant was unchanged from his last examination. He continued to rate claimant's extent of impairment at 39%. A June 19, 1980 Determination Order granted no additional permanent disability.

In July 1980 Dr. McKillop asked that claimant's disability rating be reconsidered on the basis of his opinion that placed claimant's disability rating at 70% due to his low back injury, which he classified as moderately severe. On October 13, 1980 a Determination Order on Reconsideration granted no further disability award.

On June 26, 1981 Dr. Thiringer, an osteopathic physician, hospitalized claimant for low back pain. Claimant was released from the hospital on July 3, 1981 with minimal improvement. On August 18, 1981 Dr. Thiringer opined that claimant's pain syndrome was worse than when he had last been examined by Dr. Pasquesi. SAIF accepted claimant's aggravation claim on August 31, 1981. The claims examiner's worksheet states that additional permanent partial disability was indicated.

Claimant was examined at the William A. Callahan Center on October 21, 1981. Dr. Storino noted that claimant was experiencing mental depression that probably was magnifying his low back symptoms. Dr. Wise opined that claimant suffered from depressive neurosis; however, tests indicated that claimant did not show excessive preoccupation with his physical symptoms.

On October 27, 1981 Dr. Thiringer opined that, although claimant continued to experience low back pain, he was medically stationary and continued treatment would be necessary, but palliative. The Callahan Center closed claimant's case on October 30, 1981 stating that a vocational assessment was not feasible because of claimant's medical condition, both physical and psychological.

Dr. Duff examined claimant again in December 1981 and declared him to be medically stationary. A Determination Order dated January 18, 1982 awarded no additional permanent disability.

On February 1, 1982 claimant began a vocational rehabilitation program. Within one month he was placed in a sheltered workplace position as a tax preparer and bookkeeper. He began working four hours per day and was planning to gradually increase his work day to eight hours.

On May 26, 1982 claimant was examined by Dr. Colistro, psychologist, at SAIF's request. Dr. Colistro diagnosed claimant's condition as depressive reaction with melancholia and psychogenic pain disorder superimposed on a passive-aggressive personality. He opined that claimant's depression was linked to his 1977 injury and resulted, in his opinion, in a 20% impairment under the criteria of OAR 436-65-665.

On May 31, 1982 claimant's vocational counselor learned from claimant's employer that claimant's performance was deteriorating, apparently due to his lack of extensive bookkeeping skills. In June 1982 the Vocational Rehabilitation Division approved the construction of a special orthopedic chair for claimant. Claimant began using the chair in September 1982.

On November 29, 1982 claimant's vocational counselor reported that claimant had lost his job due to unsteady attendance. The counselor closed her file with the note that maximum services had been provided.

On May 11, 1983 Dr. Duff again declared claimant to be medically stationary and noted that claimant would be restricted to sedentary work.

On June 20, 1983 a Determination Order granted claimant an additional 64° for 20% unscheduled permanent disability for injury to his low back.

As of September 1983 Dr. Duff was trying to develop a combination of medications that would alleviate claimant's back pain to an acceptable degree without too heavily sedating him.

Doctors Thiringer and Turco testified at the hearing, and Dr. Duff's deposition was taken and is a part of the record. None of these three doctors have opined that claimant is physically prohibited from working or that it would be futile for claimant to continue to look for work. Claimant testified that he has not looked for work because he did not believe he could find an employer who would hire him, considering his limitations.

Claimant carries the burden of proving that he is permanently and totally disabled. ORS 656.206(3); Wilson v. Weyerhaeuser Co., 30 Or App 403, 409 (1977). Unless the medical evidence is persuasive that claimant is totally incapacitated, claimant is required in carrying this burden to establish that he is willing to return to the work force and has made reasonable efforts to do so. See Home Ins. Co. v. Hall, 60 Or App 750, 753 (1982); Butcher v. SAIF, 45 Or App 313, 318 (1980).

The medical evidence is consistent that claimant's condition has been more or less the same since shortly after his surgery in June of 1977. He has limited range of lumbar motion, ankylosis from L4 to S1 and moderately severe low back pain. There is no medical opinion in the record that suggests that claimant is totally incapacitated or that it would be futile for claimant to

seek work. Since his last back surgery claimant has worked at two jobs in the bookkeeping and accounting field. He has an orthopedic chair that was designed to meet his special needs. However, claimant testified that he has made no effort to seek work.

The Board finds that claimant is not excused from the requirement of ORS 656.206(3), that he be willing to work and have made reasonable efforts to seek work. The evidence is somewhat in conflict as to claimant's willingness to work; however, we are not persuaded that claimant is totally unwilling to work in a suitable job. We do find, however, that claimant has not made reasonable efforts to seek work. We, therefore, conclude that claimant is not permanently totally disabled.

Claimant is age 50 and has two years post high school education. He is by education, training and experience qualified for sedentary employment. He has, however, a medically verified difficulty in adjusting to his injury, which we have considered.

On de novo review we conclude that claimant's extent of permanent partial disability has been significantly underrated from the beginning. Claimant's treating physician for much of his course of treatment, Dr. McKillop, rated claimant in the moderately severe category, or 70% impaired due to his low back injury. Using 70% impairment as a starting point and applying the guidelines set forth at OAR 436-65-600, et seq., and based upon the evidence as a whole, we find that claimant is most appropriately compensated by an award of 224° for 70% permanent partial disability for injury to his low back. In arriving at this conclusion we have compared this case with other, similar cases. See, e.g., Bill Savage, 35 Van Natta 1323 (1983), aff'd without opinion, Savage v. SAIF, 67 Or App 534 (1984) (60% awarded); Phillip J. Barrett, 35 Van Natta 789 (1983) (on remand), aff'd mem, Barrett v. Industrial Indemnity, 66 Or App 972 (1984) (70% awarded); Richard A. Filonczuk, 35 Van Natta 1165 (1983) (75% awarded).

ORDER

The Referee's order dated March 29, 1984 is modified to grant claimant an award of 224° for 70% unscheduled permanent partial disability for injury to his low back. This award is in lieu of and not in addition to all previous awards. Claimant's attorney is awarded 25% of the increased disability award granted by this order, not to exceed $3,000, to be paid out of claimant's compensation. Except as modified, the Referee's order is affirmed.

CALVIN D. GAFFORD, Claimant
Myrick, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-03195
November 28, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Brown's order which set aside its denial of continued medical care and treatment for claimant's low back condition. Compensability is the only issue on review.

The Board affirms the Referee's order with the following comment: Claimant's injury of September 4, 1979 was formally accepted by SAIF and was never closed either by SAIF pursuant to

ORS 656.268(3) or by the Evaluation Division. SAIF argues that its notice of acceptance constitutes closure under ORS 656.268(3); however, it is apparent on its face that the notice of acceptance does not comply with the statutory requirements for carrier closure. The notice does inform claimant that the injury is classified as non-disabling. However, it does not indicate that a copy was sent to the Workers' Compensation Department. Neither does it indicate the amount or duration of temporary disability, nor does it inform claimant of his right to contest the non-disabling classification within one year. Finally, it does not inform claimant of his aggravation rights. In short, the form entitled "Notice of Acceptance" is just that, and not simultaneously a notice of closure.

Where an insurer has accepted a claim for a single condition it may not partially deny the claim until the claim is closed. Maddock v. Hyster Corporation, 68 Or App 372 (1984); Roller v. Weyerhaeuser Company, 67 Or App 583 (1984); Safstrom v. Riedel International, Inc., 65 Or App 728 (1983); Joji Kobayashi, 36 Van Natta 1558 (1984). Accordingly, SAIF's denial must be set aside.

ORDER

The Referee's order dated January 12, 1984 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the SAIF Corporation.

JAMES R. HALE, Claimant
Douglas Minson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-11701
November 28, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Gemmell's order which set aside its denial of claimant's aggravation claim. The issue on review is the compensability of claimant's aggravation claim.

Attached to its appellant's brief, SAIF has submitted excerpts of certain medical treatises. SAIF requests that we take official notice of the material contained therein. Claimant objects in view of the fact that this material was not submitted as evidence at the hearing. ORS 656.295(5). We have previously stated that we will not take notice of such material in the exercise of our de novo review function. Thomas C. Whittle, 36 Van Natta 343 (1984). Therefore, we have not considered the additional material submitted by SAIF.

On the merits of the compensability issue, we affirm the Referee's order.

ORDER

The Referee's order dated March 23, 1984 is affirmed. Claimant's attorney is awarded $350 for services on Board review, to be paid by the SAIF Corporation.

ABRAHAM HEAMISH, Claimant
Schwabe, et al., Defense Attorneys

WCB 84-02968
November 28, 1984
Order of Dismissal

The self-insured employer has moved to dismiss claimant's request for review for lack of jurisdiction.

On July 6, 1984 Referee Galton issued an Opinion and Order. On August 3, 1984 the Board, through its Hearings Division office in Portland, received a document from claimant entitled "Request for a Stay in the Opinion and Order." The document concludes, "[I]f this request for a stay is denied, please accept this document as my pertistion (sic) of a Notice of Appeal." (Emphasis in original.) This document was received by the Board through its hearings division within 30 days of the Referee's order, and it does state that it should serve as a notice of appeal. Considering these facts, the fact that the document does identify the Referee's order and the fact that claimant was unrepresented at the time he filed the document, we find that it is sufficient to constitute a valid request for review under ORS 656.295(1).

The employer's first notice of the request for review was on Tuesday, August 7, 1984 when it received a letter from the Referee dated August 6, 1984 indicating that he had forwarded the document to the Board for possible processing as a request for review. The Court of Appeals has held:

> "[C]ompliance with ORS 656.295 requires that statutory notice of the request for review be mailed or actual notice received within the statutory period." Argonaut v. King, 63 Or App 847, 852 (1983).

There is no evidence that the request for review was mailed to the employer within 30 days. The employer did not receive notice of the request for review until the 32nd day. Accordingly, under the authority of Argonaut v. King, the request for review must be dismissed for lack of jurisdiction.

ORDER

Claimant's request for review of Referee Galton's order dated July 6, 1984 is dismissed. The Referee's order is final by operation of law.

ROBERT L. KIRKWOOD, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-07328
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Braverman's order which: (1) granted claimant an award for permanent total disability in lieu of the 60° for 40% scheduled disability awarded by a July 5, 1983 Determination Order and 15° for 10% scheduled disability awarded by a previous Determination Order; and (2) affirmed the July 5, 1983 Determination Order insofar as it awarded claimant temporary total disability through June 8, 1983. On review, the insurer contends claimant is not permanently and totally disabled, claimant was medically

stationary prior to June 8, 1983 and that the vocational rehabilitation specialist's testimony, regarding psychological factors, should be accorded less weight than the opinions of psychologists.

The Board affirms the order of the Referee with the following comment. In conducting our de novo review, we have treated Dr. Rollins' testimony as the Referee did. Dr. Rollins' testimony has been considered as an opinion from a vocational rehabilitation specialist.

ORDER

The Referee's order dated February 1, 1984 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the insurer.

GARTH G. McBRIDE, Claimant
Velure & Bruce, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11177
November 28, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Foster's order which awarded claimant total awards of permanent disability in the following amounts: (1) 30% (96°) unscheduled permanent partial disability for a low back injury; and (2) 15% (20.25°) scheduled permanent partial disability for loss of use of the right foot. An October 25, 1983 Determination Order had awarded claimant 5% (16°) unscheduled disability and 5% (6.75°) scheduled disability. SAIF contends both of the Referee's awards are excessive.

The Board affirms that portion of the Referee's order which awarded claimant 15% scheduled disability. We modify the Referee's award of unscheduled disability.

Claimant is a 38 year old truck driver. His condition has been diagnosed as a chronically herniated L4-5 disc on the right with a right L5-S1 radiculopathy. Treatment has been conservative. His treating orthopedist, Dr. Davis, suggested surgery or disc injection therapy, both of which claimant has declined. Dr. Davis does not consider claimant's choice against invasive procedures unreasonable.

Dr. Davis opined that claimant was "pretty severely disabled by his present back condition." The doctor recommended that claimant avoid situations where he strains his back, such as lifting, bending, stooping or carrying. Dr. Davis described claimant's current truck driving duties as "somewhat modified work." Dr. Davis conceded that some of claimant's duties required bending and lifting, but the doctor stated that "apparently he can tolerate this for brief periods of time."

Claimant testified that he had no back injuries, problems or treatment prior to his December 1981 compensable injury. He returned to truck driving with his regular employer approximately six months after his injury, but his duties have been modified. Specifically, he must stop and walk around occasionally and he does not lift anything more than 40 pounds without assistance. By the end of the workday his "back's worn out." Claimant has

difficulty sleeping and has curtailed his recreational activities. At the time of the hearing, claimant was temporarily employed as a truck driver for another employer at a construction project. However, he anticipated returning to work with his regular employer, a company primarily involved in the hauling of asphalt, which is seasonal work. The Referee found claimant's testimony to be very credible and supported by his wife's testimony.

Claimant has a high school education. His work experiences have centered around truck driving, with additional experiences in heavy, physical labor. He has worked for his regular employer since 1977, primarily as a truck driver. Prior to his 1981 injury, claimant also performed duties as a concrete salesman and as a construction foreman.

We are persuaded that claimant has suffered permanent impairment and is entitled to a disability award in excess of the Determination Order's award. However, we find the Referee's award excessive.

Pursuant to OAR 436-65-600 et seq., we consider claimant's age, education, work experience, adaptability, mental capacity, emotional state, labor market findings and physical impairment, including residual pain, in rating the extent of claimant's disability. After completing our de novo review and considering the above guidelines, we conclude that an award of 15% unscheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated May 18, 1984 is modified in part and affirmed in part. In lieu of the Referee's award, and in addition to the 5% (16°) unscheduled disability awarded by the October 25, 1983 Determination Order, claimant is awarded 10% (32°) unscheduled disability for a total award of 15% (48°) unscheduled disability for a low back injury. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

LELAND D. OWENS, Claimant
Kirkpatrick & Pope, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-05660
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Braverman's order which upheld the SAIF Corporation's denial of dizziness and psychological sequelae of an accepted injury. We reverse.

Claimant was 54 years old at the time of hearing. He worked as a farm laborer and truck driver all his life. Before his accident, he had no severe headaches, no fainting spells, and no periods of dizziness or blackouts. He had a prior accident that seriously injured both shoulders. He was a truck driver at the time of this injury.

Claimant was injured by falling from a truck trailer on December 22, 1981. He lost consciousness and was taken to an emergency room. Doctors diagnosed a broken olecranon and concussion. The arm injury was surgically repaired.

Claimant suffered headaches and dizziness after the injury. He fell from his front porch the day after he returned home from the hospital because of a dizzy spell. He was taken to an emergency room and examined and released. Claimant and his family testified that dizzy spells occurred weekly.

Claimant returned to work in April 1982 when his arm was medically stationary and noticed that he was much clumsier and slower than before the injury. His employer accepted his handicaps for a while. When the employer questioned claimant about slowness and falling down episodes in August 1982, claimant decided he needed to ask his doctor about them. Dr. deRomanett examined claimant and referred him to Dr. Eisler, a neurologist.

Dr. Eisler diagnosed a moderately severe post-concussion syndrome without focal seizure activity. A subsequent EEG suggested that the headaches, dizzy spells and blackouts were due more to a reaction to neck pain than to the post-concussion syndrome.

In November 1982 Orthopaedic Consultants examined claimant for consideration of a left shoulder fusion. They reported a left rotator cuff defect and recommended against the fusion because of claimant's restricted elbow movement. They also noted that "some of the headache may be due to muscle spasm in the neck and shoulder, but otherwise the etiology of the intracranial problems is unknown and probably unrelated."

Claimant returned to work in April 1983 as a nightwatchman at a trucking company. He worked for two months and had a blackout spell while driving home one night after work. On June 21, 1983 he became numb all over and dizzy when he was leaving for work. His family took him to the local hospital. They transferred him to the hospital where Dr. Eisler practiced after claimant had a witnessed syncopal episode without convulsions. Dr. Eisler's final diagnosis was post-traumatic seizures and post-concussion syndrome; he ruled out unstable blood pressure as a cause.

Under continuing treatment and investigation, Dr. Eisler proposed that claimant might have vertebrobasilar insufficiency because some, if not all, of the syncopal episodes appeared to be related to head position. He reported that cerebral angiography would be necessary to establish the diagnosis and to rule out causes not related to the industrial injury.

Dr. Stolzberg examined claimant for the insurer in August 1982. He relied heavily on the history provided in Dr. Eisler's reports. He noted that he was not provided with a test report upon which Dr. Eisler rested his diagnosis. Dr. Stolzberg diagnosed cerebrovascular insufficiency, vascular-type headaches, and depression and found some functional interference on the neurologic examination. He explained the reasoning for his diagnosis:

> "I don't think the blackouts or dizzy spells can be directly attributed to the accident. The main thing is that they did not occur until a number of months after the accident. Whereas dizziness and even positional vertigo are common sequelae of

> head trauma, this is an entirely different pattern. . . .I don't see that he had any significant neurologic sequelae of the accident."

Claimant was also examined by a psychiatrist, Dr. Colbach. He deferred to the neurologists on the cause of claimant's problems. "I think his difficulties are neurological, and it is very hard to be certain as to whether they are a direct outgrowth of the industrial injury or are due to some new event."

Dr. Eisler reported that he doubted that vertebrobasilar insufficiency was the cause of claimant's problems, and even if it were he stated that it was probably related to the industrial injury. He postulated that a cerebral angiogram would have to prove non-traumatic cervical arthritis was the cause of the arterial insufficiency in order to rule out the December 1981 injury as the probable medical cause of claimant's problems. Dr. Eisler advised claimant that a cerebral angiogram could determine with certainty the extent of vertebrobasilar insufficiency and the contribution of the December 1981 injury. He also advised claimant that the statistical risk of death was 1%, permanent stroke 1%, and transitory stroke 10%. Claimant conferred with his family physician, who counselled against the procedure, and declined the cerebral angiogram.

Dr. Eisler referred claimant to a clinical psychologist, Dr. Metzger, for further psychometric testing. Dr. Metzger reported that claimant's tests showed damage in the right brain hemisphere and occipital lobes consistent with traumatic head injury.

> "[Claimant] perceives himself as being impaired and appears to dwell on physical symptoms to explain his impairment and inability to function as efficiently as he did prior to the accident. When persons like [claimant] who have a background of interest in work with objects and animals rather than with ideas and feelings sustain such subtle organic impairment, they often interpret a mental inefficiency concretely as aches and pains, fatigue and malaise. I do not believe that one can determine the extent to which [claimant's] headaches and dizzy spells, etc. are 'real', i.e. primary sequela of his injuries or to what extent they represent a functional overlay or secondary reaction to primary disabilities. Rather, his complaints most probably reflect a complex interaction between experienced deficit, perceived impairment, anxiety and response to situational distress, all of which tend to set up a vicious circle of pain, stress and distress that becomes self perpetuating. . . ."

Dr. Metzger's report stated that claimant should be able to handle the kinds of direct needs requiring simple responses that he encountered at home, but claimant's ability to recognize more complex demands and plan and perform more complex responses was very limited after the accident.

Dr. Eisler did not and could not state that all of claimant's neurological problems must have been caused by the accident in December 1981. It is a weakness in claimant's proof that he has not submitted to the cerebral angiogram. See Suell v. SAIF, 22 Or App 201 (1975). Whether claimant's refusal to submit to the cerebral angiogram was reasonable must be tested objectively, considering the factors of pain, risk, inconvenience and the potential benefit. Finley v. SAIF, 34 Or App 129 (1978); see Sarantis v. Sheraton Corp., 69 Or App 575 (1984). The treating physician, Dr. Eisler, described the procedure: it would be necessary to manipulate claimant's head until a spell could be induced, if vertebrobasilar insufficiency ischemic episodes were indeed the nature of claimant's problem. Then he would hold the claimant in that position while the spell continued long enough to get sufficient x-ray photographs to make a definitive diagnosis of any insufficiency of blood in claimant's brain during the spell. Claimant was advised by Dr. Eisler that there was a 10% chance of transitory stroke, and 1% chance of permanent stroke or death; Dr. deRomanett recommended that he not take the risk. We find that claimant's refusal to submit to the cerebral angiogram was reasonable.

After considering the evidence that developed later, it appears that Dr. Stolzberg's opinion was reasonable given the information on which he based it, but there were two flaws in that information. The major flaw appears to be the assumption of non-occurrence of neurological symptoms for several months after the accident. It appears from the record that claimant and his family noticed personality and ability changes immediately after the accident. Claimant had had no significant occurrence of headaches before the injury and had frequent painful headaches after it. His sleep pattern was changed. He lived in an environment that required relatively simple responses to direct needs and the psychometric testing showed that he could function normally in such an environment. While he was recovering at home from the serious arm and shoulder injuries, he was able to get by. When he returned to the working environment where he had previously functioned successfully, more complex needs were encountered and more complex responses were required. His inability to perform work he had successfully performed before the injury was immediately apparent.

The minor flaw in the information was the failure of SAIF to provide Dr. Stolzberg with the psychometric testing done by Dr. Fowler. Dr. Eisler specifically relied on that testing to support his diagnosis of post-concussion syndrome. Without Dr. Fowler's report to consider in forming his own impression, Dr. Stolzberg could neither rely nor comment on it. Perhaps it would not have changed Dr. Stolzberg's opinion, but without his having had the opportunity to review it we cannot speculate on its effect.

Because it appears that the non-occurrence of neurological symptoms was the major premise of Dr. Stolzberg's opinion, and Dr. Stolzberg did not have the report of Dr. Fowler's psychometric testing, we think that his conclusion is not as persuasive as Dr. Eisler's. Dr. Eisler's opinion is due deference as the treating physician and as the doctor with the greater access to and knowledge of the various tests done on claimant. Lucine Schaffer, 33 Van Natta 511 (1981). Dr. Eisler always related the neurological symptoms to the accepted injuries. "When the medical evidence is divided, we have tended to give greater weight to the

conclusions of a claimant's treating physician, absent persuasive reasons not to do so." Weiland v. SAIF, 64 Or App 810 (1983).

Claimant need only prove by a preponderance of the persuasive and credible evidence that his disability resulted from his on-the-job injury. We understand that Dr. Eisler believed that the test could definitely determine the etiology of claimant's neurological problems, and the extent of the contribution made by the December 1981 injury. We have already found claimant's refusal to submit to the procedure was reasonable. Without that procedure, Dr. Eisler was satisfied, on the basis of all of the EEGs, psychometric testing, history, and his own physical examinations, that the December 1981 injury was more probably medically responsible for the neurological problems than not. On that basis, we find his conclusions more persuasive than Dr. Stolzberg's. Accordingly, we reverse the Referee's order.

ORDER

The Referee's order dated May 15, 1984 is reversed and the claim is remanded to the SAIF Corporation for acceptance and processing in accordance with law. Claimant's attorney is awarded $1,500 for services at hearing and $800 for services on Board review, to be paid by the SAIF Corporation.

JEANNE SAYLER-KELLEY, Claimant
Allen & Vick, Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-09022
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Neal's order that granted claimant an award of 16° for 5% unscheduled disability for injury to her back, shoulder and chest and set aside its denial of continuing chiropractic care. The issues are extent of disability and the reasonableness of continuing chiropractic care.

Claimant sustained a compensable injury to her left shoulder and arm on February 2, 1981 when she fell after tripping on a utility wire. She was treated conservatively. Claimant missed only one day of work. On April 28, 1981 claimant's treating chiropractor, Dr. Close, noted that claimant was not medically stationary, but was released to continue working with no restrictions.

On August 25, 1981 Dr. Griffin examined claimant. He noted that claimant's musculoskeletal problems were due to her obesity in that claimant was 66 1/2 inches tall and weighed 232 pounds. He opined that claimant's weight problem was due to depression caused by the suicide of her daughter a few years earlier. Dr. Griffin recommended that claimant begin a weight reduction program. He noted that claimant had symptoms of costochondritis.

On November 18, 1981 Dr. Robinson, orthopedist, noted claimant's obesity and opined that continued chiropractic treatments were contraindicated because the manipulations further irritated the costochondritis condition. Dr. Close disagreed with Dr. Robinson. However, on December 10, 1981 Dr. Close reported that claimant was medically stationary. On December 17, 1981 Dr. Close stated to the employer that, although claimant was stationary, continued chiropractic treatments appeared to give some relief.

Dr. Close stated on April 12, 1982 that claimant was medically stationary, could work at her previous job with no restrictions and would have no permanent impairment. Dr. Close changed his report on June 4, 1982 when he reported that claimant could return to work at her former employment, but was not stationary.

The employer had claimant examined by Dr. Meridel Gatterman, chiropractor, on October 2, 1982. Dr. Gatterman opined that claimant's major problem was obesity and that further chiropractic treatments would not be helpful, and could in fact be harmful because they would exacerbate the inflamatory condition of costochondritis.

Claimant's claim was closed by a Determination Order issued November 5, 1982 that awarded no permanent disability.

On May 26, 1983 Dr. Close notified the employer that claimant was not medically stationary. On July 1, 1983 Dr. Close wrote to the employer's adjuster objecting to Dr. Gatterman as a consultant. He requested that claimant be examined by some other physician or chiropractor.

The employer had claimant examined by Dr. Howell, osteopath, on August 3, 1983. In Dr. Howell's opinion, claimant's primary retardant to recovery from her costochondritis was obesity, and the obesity was the result of depression not related to the compensable injury.

On August 18, 1983 the employer denied further chiropractic care. Dr. Close opined on September 27, 1983 that any further progress as a result of treatment would be slight. He stated that claimant was impaired to the extent of 10% of the whole person, and opined that claimant needed supportive care.

Drs. Robinson and Gatterman disagreed. They both saw continued chiropractic treatment as contraindicated for costochondritis and opined that claimant's problems were due to her weight. On February 28, 1984 claimant was seen by Dr. Deena Stolzberg, psychiatrist. Dr. Stolzberg opined that claimant was experiencing depression that was not related to her injury. She felt that chiropractic treatments might be palliative for her psychological condition, but not for her physical complaints. She noted that claimant's obesity likely was related to her psychological makeup.

Claimant is educated and trained as a registered nurse; however, she left the field at the time of her daughter's death and has no plans to return to active nursing. At the time of the hearing she cared for four Alzheimer's Disease patients in her home.

In order for there to be an award of permanent partial disability, a claimant must have a medically verified permanent impairment. There is no medical evidence that claimant has suffered a permanent loss of earning capacity due to her industrial injury. It was, therefore, error to grant an award of permanent partial disability.

The persuasive medical evidence also shows that continued chiropractic care is, at best, palliative for a condition that is unrelated to claimant's industrial injury and, at worst,

contraindicated for claimant's condition. The self insured employer was fully justified in denying continued chiropractic care of the type prescribed by Dr. Close.

ORDER

The order of the Referee dated March 23, 1984 is reversed. The self-insured employer's denials of August 13, 1983 and February 20, 1984 are reinstated and affirmed. The Determination Order dated November 5, 1982 is affirmed.

CLARA J. SPURLOCK, Claimant
Evohl Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys
Cummins, et al., Defense Attorneys

WCB 83-08321 & 83-08320
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer, International Paper Company (International Paper), requests review of those portions of Referee Howell's order which set aside its denial of responsibility for claimant's carpal tunnel syndrome and imposed a penalty for International Paper's unreasonable delay in payment of compensation. Georgia-Pacific, the other self-insured employer potentially responsible for payment of claimant's compensation, cross-requests review of the Referee's order insofar as the Referee declined to rule on this employer's pre-hearing Motion to Dismiss claimant's request for hearing. We affirm the Referee's order in all respects with the following additional comments.

With regard to the issue raised by Georgia-Pacific's cross-request, we hold that the Referee correctly declined to rule on the employer's Motion to Dismiss based upon his conclusion that International Paper was responsible for payment of claimant's compensation. We express no opinion on the merits of the motion, or whether the relief sought by the employer is available under the Workers' Compensation Law.

On the merits of the Referee's responsibility determination, we note that the Court of Appeals recently has addressed the burden of proof issue in certain cases arising under the last injurious exposure rule for occupational disease claims. FMC Corp. v. Liberty Mutual Ins. Co., 70 Or App 370 (1984). This case is factually distinguishable from FMC Corp. and is more similar to cases such as Bracke v. Baza'r, 293 Or 239 (1982), and SAIF v. Baer, 60 Or App 133 (1982). Assuming arguendo that International Paper is correct in its assertion that Georgia-Pacific, as the most recent employer whose work conditions could have caused claimant's condition, bears the burden of proving that it is not the employer responsible for payment of claimant's compensation, we find and hold that Georgia-Pacific has satisfied its burden of proof. Although Dr. Rosenbaum's report is not a model of clarity, we understand his opinion to be that claimant contracted her occupational disease during her employment with International Paper and as a result thereof; and that claimant's later employment with Georgia-Pacific merely contributed to a worsening of symptoms, as opposed to independently contributing to the cause of, aggravating or exacerbating the underlying disease. Under these circumstances, the earlier employer, International Paper, remains liable for claimant's condition. Bracke v. Baza'r, supra; SAIF v. Baer, supra; see also Boise Cascade Corp. v. Starbuck, 296 Or 238, 243 (1984).

With regard to the Referee's imposition of a penalty and associated attorney's fee, International Paper relies upon EBI Companies v. Thomas, 66 Or App 105 (1983), in support of its contention that the Referee erred. The facts of this case are clearly distinguishable from the facts of Thomas. In Thomas the claimant filed an aggravation claim with EBI in March of 1981. EBI neither denied claimant's aggravation claim nor sought an order designating a paying agent pursuant to ORS 656.307 until June of 1981. In June of 1981, however, EBI issued its denial; specifically admitting the compensability of claimant's condition and stating that the only issue was employer/insurer responsibility. By copy of its denial, EBI requested designation of a paying agent pursuant to ORS 656.307. In addition, EBI paid claimant temporary total disability benefits from the date of claimant's "new injury" through and including June 11, 1981, which was the day after its denial. The putative new injury employer subsequently denied responsibility, and EBI thereafter reiterated its request for designation of a paying agent. The claimant sought a penalty and attorney's fee for EBI's unreasonable delay in requesting an order pursuant to ORS 656.307. The Referee declined to impose a penalty in view of EBI's payment of temporary total disability benefits; however, the Referee awarded claimant's attorney a fee based upon his conclusion that EBI had unreasonably delayed its request for an order pursuant to ORS 656.307. The Board found it appropriate to impose a penalty notwithstanding EBI's payment of temporary disability benefits. Eugene Thomas, 35 Van Natta 16, 18 (1983). On EBI's petition for judicial review, the court held that claimant's request for imposition of a penalty for failure to meet the requirements of ORS 656.307 and the applicable administrative rule did not raise the issue of whether penalties/attorney fees should be imposed for a late denial pursuant to ORS 656.262(10). The court also stated:

> "ORS 656.307 and OAR [436-54-332] do not provide for attorney fees (or penalties) if an insurer unreasonably delays a request to designate a paying agent. Neither does 656.262(9) [since renumbered subsection (10)] so provide. EBI's request for a .307 order might have been more prompt if its denial of the claim had not been delayed, but in the absence of specific statutory authority for imposition of attorney fees (or penalties) the board may not impose them, even if the delay in requesting the .307 order results from unreasonable delay in denial of a claim." 66 Or App at 111-12.

In dicta the court also stated that even if claimant had raised an issue of penalties/attorney fees for late denial, there were no "amounts then due" upon which a penalty could be assessed within the meaning of ORS 656.262(10). 66 Or App at 111.

By contrast, the facts of this case are that International Paper refused to consent to the entry of an order designating a paying agent because it denied not merely responsibility for payment of claimant's compensation but compensability of claimant's condition as well. Georgia-Pacific indicated that it had no objection to designation of a paying agent and continued paying claimant interim compensation pending its ultimate decision

to deny the claim on responsibility grounds, which it did by letter dated October 14, 1983. When the hearing convened, International Paper continued to stand on its compensability denial; it was only after the hearing was completed that International Paper conceded the compensability of claimant's condition. The Referee found it appropriate to impose a penalty based upon the following reasoning:

> "When claimant filed her aggravation claim with International Paper, she had been out of its employ for nearly two and a half years. International Paper was aware that claimant had experienced disability while in its employ. Initially, then, the employer could not have known if subsequent injuries or exposure, unrelated to employment, might have been responsible for claimant's disability and need for medical treatment. However, the employer did have from August 1983 until the date of hearing (February 1984) to investigate that question. There is no indication in the record, except for a letter to Dr. Bernstein, that International Paper did so. If it did, there is no evidence as to why it continued to deny compensability. I believe that International Paper acted unreasonably by either failing to investigate or failing to accept the claim prior to the present hearing."

The basis upon which claimant seeks a penalty and attorney's fee in this case, and the basis upon which it was imposed by the Referee, is, in reality, an allegation that International Paper unreasonably refused to concede the compensability of claimant's condition and, therefore, unreasonably resisted the payment of compensation to which claimant was entitled and otherwise would have received. This is significantly different from the situation presented by EBI Companies v. Thomas, supra, and is more akin to the situation presented by SAIF v. Moyer, 63 Or App 498 (1983), in which the court agreed with the Referee's and the Board's conclusion that SAIF's denial of compensability and refusal to enter into an order designating a paying agent was unreasonable and warranted imposition of a penalty. In Quinten S. Hargraves, 35 Van Natta 156 (1983), we held that a penalty may be imposed for unreasonably denying compensability and failing to admit that employer/insurer responsibility of an otherwise compensable claim is the only issue for determination:

> "The appropriate question is whether the employer/insurer has a reasonable basis for denying compensability. If not, penalties are assessable on that ground alone without regard to the fact that the unreasonable denial of compensability also had the effect of blocking the possibility of a .307 order. Stated differently, we think the conduct of any employer/insurer in denying the compensability of a claim in a multiple-claim context should be examined in the same manner as if it were a single employer/insurer claim situation." 35 Van Natta at 158-59.

There are very few situations in which an employer/insurer can be found unreasonable for exercising its statutory right to deny the compensability of a claim. We believe this case falls into that narrow category of cases, however. International Paper accepted claimant's claim for bilateral carpal tunnel syndrome in 1979. The claim was accepted as a nondisabling occupational disease at that time. Surgery had been recommended, although claimant elected not to proceed with surgery. When claimant sought reopening of her claim with International Paper, and International Paper solicited information from Dr. Bernstein, Dr. Bernstein confirmed that nerve conduction studies demonstrated a minimal left-sided carpal tunnel syndrome as well as the possibility of a right-sided carpal tunnel syndrome. This was the same condition which International Paper had previously accepted and for which compensation had been paid. Under these circumstances, we believe that International Paper unreasonably denied the compensability of claimant's condition. Its denial amounted to an unreasonable refusal or resistance to the payment of compensation which claimant otherwise would have received (temporary total disability between the date of Georgia-Pacific's denial and claimant's release to regular work); therefore, the Referee was correct in imposing a penalty and associated attorney's fee.

ORDER

The Referee's order dated March 2, 1984 is affirmed. Claimant's attorney is awarded $500 for actively and meaningfully participating on the issue of employer responsibility on Board review, to be paid by International Paper. Claimant's attorney is awarded an additional $250 for services rendered in connection with the issue raised by Georgia-Pacific's cross-request for review, to be paid by Georgia-Pacific.

MELVIN J. WOOD, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-11203
November 28, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests, and the self-insured employer cross-requests, review of Referee Seifert's order which awarded claimant an additional 32° (10%) unscheduled disability on review of a Determination Order dated January 11, 1984, which awarded temporary total disability from March 11, 1983 through November 29, 1983, 128° (40%) unscheduled disability for injury to the low back and 6.75° (5%) for partial loss of use or function of claimant's left foot. Claimant contends that he is permanently and totally disabled or, in the alternative, that he is entitled to an award for 100% unscheduled disability. The employer contends that claimant was medically stationary during September of 1983 and, therefore, the Determination Order award for temporary total disability is excessive.

On de novo review, we agree with those portions of the Referee's order which found the claimant was not entitled to an award for permanent total disability. We find, however, that claimant is entitled to an additional unscheduled permanent partial disability award, and we modify the Referee's order accordingly.

Claimant was 64 years of age at the time of hearing. He has been a fuel oil truck driver since 1946, and he has worked for the same company under various ownerships during this period of time. Until claimant obtained seniority in 1976, this work was seasonal. During the summer months, claimant drove a gravel truck.

Claimant sustained this low back injury in September of 1982. In April of the following year, a herniated disc was diagnosed and claimant submitted to surgery for a lumbar laminectomy and decompression. Claimant's treating orthopedic surgeon, Dr. Matteri, released claimant to light work in August of 1983. No light work was available with the employer, however, and claimant never returned to work.

Claimant was referred for vocational assistance beginning in December of 1983. His claim was eventually closed by the above-referenced Determination Order. A direct employment program was initiated in an effort to locate suitable employment. Dr. Matteri had stated that claimant was not capable of performing his preinjury employment; therefore, a lighter form of truck driving was sought. In addition, employment as a security guard or dispatcher was considered. During the period from December of 1983 through May of 1984, claimant and his rehabilitation counselor made many job contacts considered suitable to claimant's physical limitations and vocational skills. Claimant was primarily interested in obtaining part time employment.

It is quite apparent that the jobs for which claimant is qualified, considering his physical impairment and transferable skills, are jobs which pay a minimum or slighter greater wage. At the time of his injury, claimant was earning $10.28 an hour. Under the facts and circumstances of this case, this wage disparity is a significant factor in assessing claimant's loss of earning capacity. See Jacobs v. Louisiana-Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549, 552 (1972).

According to Dr. Matteri, claimant has sustained a 25% limitation of back motion. In addition, claimant is relegated to performing work in the light category, being able to lift up to 10 pounds frequently and up to 20 pounds occasionally. Claimant is able to bend, squat, climb and reach above shoulder level on only an occasional basis. Claimant is precluded from crawling. In an eight hour day, claimant is capable of sitting for five to six hours, standing four to five and walking three to four hours. Claimant has a seventh grade education. As indicated above, claimant's only occupation has been driving large delivery trucks, primarily fuel oil trucks, for over 35 years preceding this industrial injury. Considering these factors, as well as the administrative guidelines for evaluating unscheduled disability, OAR 436-65-600 et seq., we find that claimant has sustained a loss of earning capacity equivalent to 192° for 60% unscheduled disability.

With regard to the issue raised by the employer's cross-request, we agree that Dr. Matteri considered claimant medically stationary prior to his November 29, 1983 examination. Although Dr. Matteri "presumed" claimant was medically stationary on September 20, 1983, when he sent information concerning claimant's physical limitations to claimant's rehabilitation coordinator, Dr. Matteri did not examine claimant on this date. He did, however, examine claimant on September 26, 1983, at which time he considered claimant's physical limitations to be permanent and indicated that claimant could be followed up on a "prn

basis." Dr. Matteri subsequently confirmed his impression that claimant was, in fact, medically stationary in late September of 1983. Accordingly, we find that the employer has sustained its burden of proof on this issue, and we modify the Determination Order accordingly.

ORDER

The Referee's order dated June 26, 1984 is modified. In addition to the permanent disability granted by the Referee's order and the January 11, 1984 Determination Order, claimant is awarded 32° (10%) unscheduled disability for a total award to date of 192° (60%) unscheduled disability for injury to the low back. Claimant's attorney is allowed an attorney's fee, in addition to that allowed by the Referee's order, equal to 25% of the additional compensation awarded herein, payable out of claimant's compensation and not in addition thereto. The referenced Determination Order is further modified as follows. In lieu of the temporary total disability awarded therein, claimant is awarded temporary total disability from March 11, 1983 through September 26, 1983. The employer is authorized to offset its resulting overpayment of temporary total disability against additional compensation to which claimant is or may become entitled. The employer, however, shall pay the attorney's fee allowed by the Referee and the Board pursuant to OAR 438-47-085(2).

JESUS A. ARAMBULA, Claimant
Francesconi & Cash, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-01392
November 30, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Mongrain's order which upheld the SAIF Corporation's denial of claimant's injury claim. The issue is whether claimant's injury arose out of and in the course of his employment.

Claimant was not required to live on the employer's premises. He did so, however, because there was housing available. Claimant had fixed hours of work outside of which he was not on call. Claimant was injured one evening when a wood stove exploded in the farm house which served as his residence. Claimant was not performing any duties associated with his work for the employer when the explosion occurred.

Under these circumstances, we agree with the Referee's conclusion that claimant's injury did not arise out of and in the course of his employment. Contrary to claimant's assertion, the record fails to establish that claimant's residence should be deemed "required" for lack of reasonable alternative housing, as that concept is discussed by Professor Larson in his treatise on the law. 1A Larson, Workmen's Compensation Law, §24, 20 (1982).

ORDER

The Referee's order dated June 6, 1984 is affirmed.

RAYMOND L. BALDWIN, Claimant
Cheney & Kelley, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06775 & 82-02000
November 30, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Presiding Referee Daughtry's order dismissing his claims. The issue is whether the claim were properly dismissed on account of delay.

Claimant requested a hearing in case number 82-02000 on March 5, 1982. At that time claimant was represented by an attorney. Prior to December 14, 1982, claimant's attorney notified the Board and other parties that he had withdrawn. A hearing scheduled for January 3, 1983 was postponed at claimant's request and claimant's claim was placed in inactive status.

On June 23, 1983 claimant requested a hearing on another claim, numbered as 83-06775. Claimant was not represented by counsel. In early August 1983 claimant was advised by the Hearings Division that his claim would be set for hearing in the regular course of business. On August 19, 1983 another attorney notified the Board that he was representing claimant. In due course a hearing on both claims was set for March 27, 1984. That hearing was postponed at one of the employers' request, dated November 8, 1983, because of a conflict of counsel. Claimant's attorney did not object to the postponement.

Claimant's attorney withdrew his representation on February 3, 1984. On February 10, 1984 the Hearings Division sent claimant a notice acknowledging claimant's attorney's withdrawal. The notice went on to state:

> "Please advise us whether you plan to pursue this matter, and if so, let us know if you will retain an attorney or if you intend to represent yourself at the hearing. Failure to respond may result in the dismissal of your case. Please respond within 30 days." (Emphasis in original.)

Claimant did not respond to the notice. On March 26, 1984 Presiding Referee Daughtry issued an order to show cause within thirty days why claimant's claims should not be dismissed as abandoned. Claimant did not respond to the order to show cause. On May 14, 1984 Presiding Referee Daughtry entered his order dismissing claimant's claims.

Claimant has requested review of the order dismissing his claims.

At the time the Presiding Referee entered the order to show cause, OAR 436-83-310 provided:

> "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."

Effective May 1, 1984 the Rules of Procedure for Contested Cases under the Workers' Compensation Law were revised and renumbered. The present counterpart to OAR 436-83-310, OAR 438-06-085, reads:

"A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions a delay of more than ninety (90) days without good cause. Prior to dismissal an order may be entered allowing a specific time within which the party requesting the hearing will have the opportunity to show cause why the case should not be dismissed. The filing of an application for a hearing date without explanation for the prior delay does not constitute a showing of good cause."

One of claimant's claims had been in an inactive status since January 13, 1983 after a hearing date had been postponed in order to allow claimant to find an attorney. The other claim had been in an active status for eight months when claimant's second attorney resigned. Claimant has not asserted that he did not receive the February 10, 1984 notice from the Hearings Division and the March 26, 1984 order to show cause. Both of these documents unambiguously state that failure to respond to them within the time specified would be interpreted as claimant's having abandoned his claims.

Claimant's only argument is that he needed to do nothing because a notice sent to the parties when the hearing was postponed in November 1983 stated that the hearing would be rescheduled in the regular course, and that no new application for a hearing date was required. We have considered this argument and find it unpersuasive. The withdrawal of claimant's second attorney triggered a call by the Hearings Division for a status report. After that call went unheeded, a second call for a showing why the claims should remain in the system was issued. The consequences of not responding to these calls was stated in language that could be clearly understood by a lay person. We have been shown no good reason why claimant ignored these calls for over three months.

ORDER

The Presiding Referee's order dated May 14, 1984 is affirmed.

ROBERT W. BROWN, Claimant
Peter Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-10907
November 30, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Baker's order that set aside its denial of claimant's industrial injury claim for asbestos exposure. The issue is compensability.

Claimant, a construction electrician, was exposed to asbestos dust during a remodeling project. The exposure occurred over a two week period during January 1983. SAIF contested at the hearing whether claimant was, in fact, exposed to asbestos dust. On de novo review we find that the preponderance of the evidence shows that claimant was so exposed.

Claimant filed an 801 form on September 9, 1983 claiming that he was entitled to compensation because of his exposure to asbestos dust. On September 27, 1983 Dr. Miles J. Edwards, a pulmonary specialist at Oregon Health Sciences University, reported that pulmonary examination and functions studies showed that claimant had normal lungs. Chest x-rays taken September 16, 1983 showed no changes when compared to similar x-rays taken four years earlier. Dr. Edwards noted that claimant had no pulmonary symptomatology either at the time of the asbestos exposure by history or in September 1983 by examination. He noted that it was not possible to tell whether claimant's exposure to asbestos dust would be to his later detriment.

Dr. Barker, one of Dr. Edwards's colleagues, saw claimant in a consultation on October 10, 1983. He noted that he saw claimant's chances of developing mesothelioma as "pretty small, given the relatively short exposure, but . . . a concern." Dr. Barker recommended that claimant stop smoking cigarettes, get an annual chest x-ray and report any unusual lung symptoms to his doctors.

SAIF denied claimant's claim on October 20, 1983. On October 31, 1983 claimant consulted with Dr. John F. Keppel. After a physical examination in which he noted that claimant was completely healthy, Dr. Keppel stated that claimant was concerned about developing lung disease because of his exposure to asbestos. Dr. Keppel noted that he told claimant that his chances of developing mesothelioma were "higher than the baseline population but not significantly so."

The Referee found that:

> "Any claim of occupational disease resulting from the exposure in question is premature and does not present an [sic] justiciable issue at this time. . . . The issue at this time is whether the Workers' Compensation Law is broad enough to provide compensation now for what has happened to date."

The Referee concluded that claimant had established that he has suffered a compensable nondisabling injury. The Referee stated in his order that, "The exposure at this time is an injury in and of itself within the meaning of the law in that it was an occurrence which reasonably required medical services."

We disagree. Claimant seems to be arguing that he has been injured because he requires medical services. From our review of this scant record we conclude that what medical services claimant has sought were sought solely to learn what his physical condition was. Claimant learned from his visits with the physicians that his condition was excellent. He also learned that he should stop smoking cigarettes. None of the medical services claimant has sought were required. Claimant has no condition that requires treatment.

Claimant argues that he is entitled to annual chest x-rays and checkups at SAIF's expense under ORS 656.245. Again we disagree. Medical services under ORS 656.245 are for those services reasonably required on account of a compensable, i.e. work related, condition. Claimant has no "condition." At best, claimant is seeking preventative care.

The only concern claimant has at this point in time is that he might at some time in the future develop lung disease. His examining physicians view this chance as greater than the baseline population, but slight nonetheless. Claimant's on the job exposure to asbestos has resulted in a condition that may be called apprehension, and nothing more. See Betty Fisher, 36 Van Natta 90, 92 (1984).

ORDER

The Referee's order dated April 27, 1984 is reversed. The SAIF Corporation's denial dated October 20, 1983 is reinstated and affirmed.

BOBBY BUSH, Claimant
Cue, Parker, et al., Claimant's Attorneys
Thomas C. Howser, Defense Attorney
John Svoboda, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-08805
November 30, 1984
Order on Remand

On review of the Board's Order dated October 26, 1983 the Court of Appeals reversed the Board's order.

The Board's order is vacated and this claim is remanded to the SAIF Corporation for acceptance and payment of benefits in accordance with law.

IT IS SO ORDERED.

EUGENE F. CLARK, Claimant
Jim Scavera, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 84-00359
November 30, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Brown's order which upheld the SAIF Corporation's denial of his aggravation claim for a low back injury. On review, claimant contends the last injurious exposure rule should not be applied to relieve SAIF from responsibility for claimant's worsened condition.

The Board affirms the order of the Referee with the following comment. If the employer against whom the claim is filed is not the last employer where working conditions were potentially injurious, that employer may assert the last injurious exposure rule as a defense. SAIF v. Luhrs, 63 Or App 78, 83 (1983); Dick L. Babcock, 35 Van Natta 325 (1983). The medical evidence preponderates in favor of a finding that claimant's subsequent employment independently contributed to his worsened condition. Therefore, SAIF, as insurer for claimant's prior employer, is not responsible for his current condition.

ORDER

The Referee's order dated March 5, 1984 is affirmed.

JAFER M. FARZANA, Claimant
Carney, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-01217
November 30, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of those portions of Referee Fink's order which set aside its partial denial of claimant's degenerative disc disease. Claimant argues that the Referee erred in failing to award an attorney's fee in association with a penalty awarded in the order.

The Board affirms and adopts the order of the Referee with the following comment on the attorney's fee issue. The Referee assessed a penalty against the employer for failure to pay interim compensation. The Referee awarded a total attorney's fee of $1,000, however he did not specify whether the attorney's fee was solely for claimant's prevailing on the compensability issue or whether a portion of it was intended in part as a penalty associated attorney's fee. Without more information, we are unable to determine whether the Referee erroneously failed to award a penalty associated attorney's fee. Claimant's attorney should have requested that the Referee reconsider his order if he wanted to have the supposed clerical error corrected. On this record the Board is unwilling to second guess what the Referee meant.

ORDER

The Referee's order dated June 11, 1984 is affirmed. Claimant's attorney is awarded $600 for services on Board review to be paid by the employer.

CATHERINE M. KNAPP, Claimant
Robert Chapman, Claimant's Attorney
Black, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-84009
November 30, 1984
Third Party Order

The SAIF Corporation has petitioned the Board for relief in connection with a third party recovery obtained by claimant. The specific relief which SAIF requests can best be stated by quoting from its original submission to the Board:

> "A request by SAIF that the settlement entered into between the plaintiff and the third party be declared void pursuant to ORS 656.587.
>
> "A request that the amount SAIF is entitled to under ORS 656.593(1)(c) be established . . . and that SAIF be granted such other further equitable relief as is deemed appropriate."

Briefly stated, the facts are as follows. Claimant was employed as a meter reader for Pacific Power & Light. While acting in the course of her employment reading a meter on privately owned real property, claimant was bitten by a dog, thereby sustaining an injury. She filed a workers' compensation claim with the employer's industrial insurer, the SAIF Corporation. Claimant also elected to pursue a civil action for

damages against the owners of the canine and real property. ORS 656.154; 656.578. Claimant's workers' compensation claim was accepted and benefits were paid. The civil action was eventually settled by and between claimant and the third parties for the sum of $9,500. Claimant failed to obtain SAIF's approval prior to effecting settlement of her third party action, and it is this failure to obtain prior approval which forms the basis of SAIF's request for relief.

It appears that claimant settled her civil action in October or November of 1983. It further appears that claimant's attorney notified SAIF of the settlement on or about November 9, 1983, at which time claimant stated her intent to reimburse SAIF for the full amount of its lien for claim costs paid to date. See ORS 656.580(2); 656.593(1). At that time, claimant understood the full extent of SAIF's lien to be $495, based upon SAIF's letter to claimant's attorney, dated May 16, 1983, indicating that SAIF had incurred that amount in expenditures for medical bills. On December 2, 1983 claimant's attorney forwarded a trust account check made payable to the SAIF Corporation in the amount of $495. By letter dated December 5, 1983, SAIF's third party claims person notified claimant's attorney that he was authorized to settle claimant's third party action for the sum of $9,500. That letter set out the statutory distribution formula contained in ORS 656.593(1) and indicated that SAIF was entitled to reimbursement in the amount of $735. The release form submitted under cover of this December 5, 1983 letter, which was itself dated December 6, 1983, stated, in pertinent part:

> "Said approval, authorization and the execution of this agreement is made with the understanding that it shall not become effective until such time as SAIF Corporation is paid and has received its part of the settlement amount due."

This document identified SAIF's claim expenditures in an amount of $735.

Upon receipt of SAIF's December 5, 1983 letter and release/approval form submitted thereunder, claimant's attorney requested, by letter of December 8, 1983 that SAIF compromise its lien and reduce it to $495. SAIF obviously refused to reduce its lien, and its application to the Board followed.

We begin by noting that no order of the Board is required in order to declare the third party settlement void. ORS 656.587 states:

> "Any compromise by the worker or other beneficiaries or the legal representative of the deceased worker of any right of action against an employer or third party is void unless made with the written approval of the paying agency or, in the event of a dispute between the parties, by order of the Board. * * * *"

Our understanding of this statutory provision is that, by operation of law, settlement of a civil action entered into without obtaining the prior approval of the industrial insurer is

void. No order of this Board is required to declare the settlement a nullity; it is void by virtue of the statute. When a paying agency is aggrieved as a result of the failure to obtain approval, the paying agency's remedy would not appear to lie with this agency; rather, we believe it would be necessary to seek enforcement of the paying agency's statutory lien through civil proceedings.

It is unclear whether SAIF's position is that claimant's third party settlement actually is void. It is clear, however, that SAIF is seeking full reimbursement of its lien for claim expenditures, which we understand to be in the amount of $735. Although ORS 656.587 contemplates prior approval of a proposed settlement by the paying agency, it is possible for the paying agency to grant its approval subsequent to settlement. It is arguable that, by virtue of SAIF's December 5, 1983 letter, such ex post facto approval was granted. Any such approval, however, was clearly conditioned upon SAIF's receipt of reimbursement for its claim expenditures paid as of that time. We understand this to be the intent of the December 5, 1983 letter, which was forwarded to claimant's attorney over the release/approval form clearly stating that SAIF's approval of the settlement was conditioned upon payment and receipt of its portion of the settlement proceeds.

We believe that SAIF intended to grant its approval, although on a conditional basis. Claimant's request that SAIF compromise a portion of its lien was an afterthought and would have been more appropriately presented to SAIF prior to effecting a settlement with the third party. SAIF justifiably believes that it is entitled to reimbursement to the full extent of its lien. Under the facts and circumstances presented herein, we find it appropriate to conclude that claimant's third party settlement is effective, and further that SAIF is entitled to be paid and retain $735 out of the proceeds of claimant's third party recovery. ORS 656.587; 656.593(3).

ORDER

The proceeds of claimant's third party recovery shall be distributed in accordance with the statutory distribution formula, and out of the proceeds thereof the SAIF Corporation shall be paid and retain the sum of $735 in full and final satisfaction of its lien.

ROBERT B. MACAITIS, Claimant
Gatti & Gatti, Claimant's Attorneys
David Horne, Defense Attorney

WCB 84-04090
November 30, 1984
Order Denying Motion to Dismiss

Claimant moves to dismiss the insurer's request for Board review on the ground that the request was untimely and, therefore, the Board is without jurisdiction.

The Referee's order issued on October 11, 1984. The 30th day after October 11, 1982 was Saturday November 10, 1984. The insurer's request for review was mailed and, therefore, filed on Tuesday November 13, 1984. In computing time periods, if the last day falls on a Saturday, Sunday or legal holiday, the period runs until the end of the next business day. OAR 438-05-040(4)(c). Because Monday November 12, 1984 was a legal holiday, the insurer's

request for review was timely filed. Accordingly, claimant's motion to dismiss is denied.

IT IS SO ORDERED.

RONALD L. REEDY, Claimant
Evohl Malagon, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys
Horne & Tenenbaum, Defense Attorneys

WCB 83-07575 & 83-07818
November 30, 1984
Order on Reconsideration

The self-insured employer requests reconsideration of our Order on Review dated November 5, 1984. The employer alleges that the Board erred in considering an argument made by claimant in his respondent's brief because claimant had not filed a cross-request for review and, therefore, the Board had no jurisdiction over the issue raised by claimant. The employer further argues that claimant was not entitled to an attorney's fee on that issue even if it was properly before the Board because he did not prevail on that issue. Finally, the employer argues that claimant was not entitled to an attorney's fee for prevailing on the sole remaining issue, responsibility, because:

> "Claimants' attorneys should not be allowed a fee simply because they elect to appear, where their services are not required in defense of the Claimant's interests. To allow such is to provide a windfall to Claimant's [sic] attorneys who, by the most routine appearance, in a matter not of their concern, can continue to collect fees."

The employer is not correct in its argument that the Board is without jurisdiction to consider issues raised in a respondent's brief when the respondent did not file a cross request for review. The Court of Appeals has made it clear that the Board may, in its de novo review function, consider issues raised in a respondent's brief even where there was no cross request for review. Neely v. SAIF, 43 Or App 319 (1979); Francouer v. SAIF, 20 Or App 604 (1975). The Board has made a policy decision to consider issues raised in respondents' briefs. Jimmie Parkerson, 35 Van Natta 1247 (1983). That policy decision is open to discussion, but to date it continues to be the Board's policy.

The employer is correct that claimant was not entitled to an attorney's fee on the issue raised in the respondent's brief because he did not prevail on that issue. No attorney's fee was awarded on that issue.

We awarded an attorney's fee to claimant because we found that his attorney had actively and meaningfully participated at the Board level. In the context of responsibility cases at the Board level, we have interpreted "active and meaningful participation," as used in OAR 438-47-090(1), to mean that the claimant has advocated a position that is adverse to one of the potentially responsible employers or insurers. Robert Heilman, 34 Van Natta 1487 (1982). In this case claimant took a position adverse to the self-insured employer and that point of view prevailed. Claimant's attorney was properly awarded an attorney's

fee in this matter. Therefore, on reconsideration, the Board adheres to its Order on Review.

ORDER

The Board's Order on Review is adhered to and is hereby republished.

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

WCB 81-08881
November 30, 1984
Order on Remand

On review of the Board's order dated July 14, 1983, the Court of Appeals reversed the Board's order and reinstated the Referee's award of permanent and total disability. Sarantis v. Sheraton Corp., 69 Or App 575 (1984).

Claimant's petition for attorney fees has been remanded to the Board for our determination.

Claimant was awarded 40% unscheduled disability by Determination Order. She subsequently was awarded permanent and total disability by a Referee's order. The Board reversed the Referee's permanent and total disability award, but increased claimant's unscheduled disability award to 70%. Zoi Sarantis, 35 Van Natta 1068 (1983). The Court of Appeals reversed the Board and reinstated the Referee's award. Sarantis v. Sheraton Corp., supra.

Claimant's attorney fees shall be paid from claimant's award of compensation. ORS 656.386(2); Gainer v. SAIF, 51 Or App 869 (1981). Where claimant appeals an extent of disability issue to the Court of Appeals, and prevails, an additional fee of 25% of any increase awarded by the appellate court shall be approved by the Board. ORS 656.388; OAR 438-47-045(1); Morris v. Denny's Restaurant, 53 Or App 863, 866 (1981). This fee is not mandatory, but suggestive. ORS 656.388(4); OAR 438-47-005; Morris, supra.

The Board has received sufficient information to form the basis for determining claimant's attorney fees.

Now, therefore, claimant's attorney is allowed 25% of the additional compensation awarded claimant by the Court of Appeals, payable out of claimant's compensation, not to exceed $3,200.

IT IS SO ORDERED.

STEPHEN F. TAAFE, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-09684 & 83-10308
November 30, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Wilson's order which set aside its denial of claimant's aggravation claim for his low back injury. We reverse.

In February 1980, while employed as a choker setter, claimant compensably injured his back. He was examined by Dr. Rissberger, who found tenderness and spasm in the right lumbocostal muscle; the diagnosis was contusion and strain of the lumbocostal muscle.

Claimant was released to regular work approximately three weeks later. His claim was closed in April 1980 without an award of permanent disability. Claimant did not request a hearing.

Claimant testified that he continued to experience intermittent pain in his low back, but "never as bad" as his initial symptoms. Claimant's wife supported claimant's testimony, stating that his complaints were off and on, depending on his activities at work. From March 1980 until September 1983 claimant did not seek medical treatment for his back.

On September 1, 1983 claimant began work as a choker setter for another employer. The job was more strenuous than his prior employment. Claimant's back became sore after two days of work.

On September 6, 1983 claimant returned to Dr. Rissberger. Claimant reported that he had felt a sudden pain in his low back while jogging that morning. Noting muscle spasms, Dr. Rissberger prescribed Norgesic, ordered claimant to refrain from work and advised him to return in one week.

Dissatisfied with Dr. Rissberger's treatment, the next day claimant sought treatment from a chiropractor, Dr. Stellflug, who recorded a history to the effect that claimant had been experiencing back symptoms since his 1980 injury, which began worsening within the last two to three months. An 827 form from Dr. Stellflug indicates that claimant was doing "some mild exercise" when his low back gave out again. Dr. Stellflug found localized pain at L4-5 on the right with limitation of motion and spasm. The diagnosis was lumbar strain with attendant myofibrosis.

Dr. Stellflug opined that claimant's current condition represented a material worsening of his previous condition with no real intervening cause.

Claimant testified that he had advised Dr. Rissberger that he intended to file an aggravation claim, but that Dr. Rissberger would not support the claim.

The Referee found that claimant had met his burden of proving an aggravation. The Referee reasoned that the testimony of claimant and his wife, and Dr. Stellflug's opinion established that claimant's 1980 injury was a material cause of his worsened condition in 1983. The Referee cited Grable v. Weyerhaeuser Company, 291 Or 387 (1981).

We conclude that claimant has not satisfied the Grable burden of proof primarily because we are not persuaded by Dr. Stellflug's analysis. The doctor did not have the benefit of examining claimant before this 1983 exacerbation of symptoms. Although not absolutely necessary, this lack of an opportunity to compare claimant's condition before and after the jogging episode is of some relevance in assessing the persuasiveness of Dr. Stellflug's opinion.

More importantly, it appears that Dr. Stellflug's opinion was based on an inaccurate history. Dr. Stellflug apparently understood that claimant's low back symptoms had been worsening for two to three months prior to early September 1983. In fact, those symptoms worsened somewhat after claimant started a new job the first of that month and worsened considerably when claimant went jogging on September 6.

Moreover, Dr. Stellflug makes no mention of the jogging incident, which was prominent in Dr. Rissberger's chart notes and in claimant's testimony. Instead, the 827 form executed by Dr. Stellflug mentions increased back pain associated only with "some mild exercise." A physician's conclusion concerning causation is only valid to the extent that a claimant's history is accurate. Miller v. Granite Construction Co., 28 Or App 473 (1977). Since the jogging incident was both significant in determining causation of claimant's current symptoms and significant by its omission in Dr. Stellflug's reports, we afford his opinion less weight.

Finally, claimant acknowledged that Dr. Rissberger, who was his treating physician following the 1980 injury and the only physician who had examined claimant before and after the jogging incident, indicated he would not support claimant's aggravation claim. This admission against interest somewhat further rebuts Dr. Stellflug's opinion.

ORDER

The Referee's order dated December 19, 1983 is affirmed in part and reversed in part. That portion which set aside the SAIF Corporation's denial dated September 26, 1983, and awarded claimant an attorney fee for prevailing on a denied claim are reversed and, in lieu thereof, SAIF's denial is reinstated and affirmed. The remainder of the order is affirmed.

JEFFREY BARNETT, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03366
December 4, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Howell's order which awarded him 64° for 20% unscheduled disability on review of a Determination Order dated April 12, 1982, which had awarded no compensation for permanent disability. The Referee's award brought claimant's total award for a low back injury to 160° for 50% of the maximum allowable. The issues are: (1) the propriety of the Referee's finding that the April 12, 1982 Determination Order did not prematurely close this claim; and (2) the propriety of the Referee's evaluation of claimant's permanent disability based on circumstances existing at the time of claim closure in April 1982, rather than at the time of the hearing in September 1982.

By order dated September 24, 1982, the Board referred claimant's request for own motion relief pursuant to ORS 656.278 to the Referee for consolidation with the issues arising under the request for hearing in this case. In addition to issuing his appealable order pursuant to ORS 656.289, the Referee recommended that the Board exercise its discretionary own motion authority and reopen this claim for a worsened condition related to claimant's original injury. We have consolidated our review of the Referee's order in this case with consideration of the Referee's own motion recommendation, and have this day issued an Interim Own Motion Order in Own Motion No. 82-0237M, adopting the Referee's recommendation that claimant's claim be reopened.

Claimant sustained a compensable low back injury on July 28, 1974. The resulting claim was first closed by a Determination Order dated October 19, 1976, which awarded temporary disability compensation for about a two-year period and 96° for 30% unscheduled permanent disability. This first Determination Order began the five-year aggravation period, i.e., claimant's aggravation rights lasted until October 1981.

A second Determination Order was issued in June 1978, reclosing the claim upon completion of a vocational rehabilitation program. No additional permanent disability was awarded. Claimant's original permanent disability award reflected the fact that a laminectomy had been performed at L4-5. Claimant submitted to a second laminectomy, at L3-4, in July of 1979. The SAIF Corporation denied claim reopening for this surgery, alleging an intervening injury. This denial was set aside in a prior proceeding by a Referee's order dated October 28, 1980. Claimant's claim was then reopened as of June 21, 1979, and remained in open status until April 12, 1982, when the Determination Order that is the basis of this proceeding was issued.

Claimant's aggravation rights in connection with his 1974 injury expired in October 1981, while his claim was in open status pursuant to this most recent reopening. Because his claim was reopened while his aggravation rights were still in effect, the reclosure after expiration of aggravation rights was properly by the Evaluation Division pursuant to ORS 656.268, and claimant could and did request a hearing on the determination of the Evaluation Division. See Buell v. S.I.A.C., 238 Or 492 (1964).

The Referee found it questionable whether claimant actually raised the issue of premature claim closure. We note in this regard that, when asked at the start of the hearing what his position was on premature closure, claimant's counsel replied that he was "not really sure." We thus share the Referee's doubts about whether any premature closure issue was properly raised. Assuming the issue was raised, we conclude that claimant has not presented a preponderance of persuasive evidence to the effect that the April 12, 1982 Determination Order prematurely reclosed his claim.

The Referee believed that he faced a quandary concerning the proper manner to proceed with regard to the evaluation of claimant's permanent disability because he understood that claimant was not medically stationary at the time of the September 1982 hearing.

Contrary to the Referee's finding or assumption, we believe that claimant was stationary at the time of the hearing (although it is easy to understand the Referee's contrary belief based on some of the statements of counsel at the hearing).

After his claim was closed in April 1982, claimant was hospitalized on two or three occasions during the summer and fall of that year. Claimant's primary treating physician, Dr. Van Olst, described this course of treatment in a report dated September 28, 1982 as "symptomatic rather than curative" and opined that claimant's "condition remains essentially unchanged." We think the essence of the doctor's position is that claimant's several hospitalizations represented the "waxing and waning" (our

paraphrase, not the doctor's words) of symptoms to be expected given the nature and extent of claimant's disability. Since claimant's condition was "essentially unchanged" in September 1982 despite this "waxing and waning" of symptoms, there is no basis for saying that claimant was other than medically stationary at the time of the September 1982 hearing. (As discussed in our companion Interim Own Motion Order issued this date, claimant's condition did worsen after the September 1982 hearing.)

Proceeding on his understanding that claimant was not stationary at the time of hearing, the Referee concluded that the only viable alternative was to evaluate claimant's disability as it existed at the time of claim closure. As discussed in Travis, we think that the Referee's analysis comes close to the mark if a claimant whose aggravation rights have previously expired is not stationary at the time of a hearing. However, as discussed above, in this case claimant was stationary at the time of hearing. Claimant thus should have received the benefit of the usual rule that disability is rated based on the facts and circumstances at the time of hearing. Gettman v. SAIF, 289 Or 609, 614 (1980); Livesay v. SAIF, 55 Or App 390 (1981); Gary A. Freier, 34 Van Natta 543 (1982).

In the final analysis, however, whether claimant's disability is rated as of the time of the last claim closure (April 1982) or as of the time of hearing (September 1982) would not appear to make much difference. Claimant's hospitalizations during the five months after April 1982 tend to dramatize the nature and extent of his physical impairment; however, claimant's treating physician ultimately opines that his condition is "essentially unchanged" despite those hospitalizations. We will rate claimant's disability as of September 1982; however, even with this difference in methodology, we arrive at the same result the Referee reached.

Claimant also argues we should treat his most recent worsening as an "aggravation claim" and remand it to SAIF for reopening and, presumably, reclosure pursuant to ORS 656.268. Such a disposition of this case would be inconsistent with the clear legislative intent that a claimant be allowed five years from the date of the first claim closure within which to claim disability compensation, as a matter of right, for worsened conditions related to the original injury. ORS 656.273. Such a disposition would also be irreconcilable with our decision in Claude Allen, 34 Van Natta 769 (1982), aff'd 62 Or App 664 (1983). Allen, like this case, involved a hearing on extent of disability after the claimant's aggravation rights had ended. Allen, like this case, involved a possible worsening in the claimant's condition while his request for hearing on extent of disability was pending. Discussing prior Court of Appeals decisions, we concluded:

> "[N]othing in Coombs or Carter amends the aggravation statute to permit an aggravation claim to be made as a matter of right more than five years after the first claim closure. Instead, once five years have passed since the first claim closure, what could previously have been presented as an aggravation claim as a matter of right, must thereafter be addressed to the

Board's discretionary own motion authority pursuant to ORS 656.278.

"Any other result would create an unequal and thus possibly unconstitutional classification. One group of claimants would have five years, no more, in which to perfect aggravation claims. If the claimant in this case still could perfect an aggravation claim in December of 1978 after his aggravation rights expired in May of 1977, there would be another group of claimants who would have some greater period, conceivably infinite, in which to perfect aggravation claims. Such disparate treatment could not have been intended and makes no sense. We, therefore, conclude that, assuming arguendo that claimant made any aggravation claim in this case, it was made after the expiration of claimant's aggravation rights and was thus invalid." 34 Van Natta at 771.

In this case, there is no aggravation claim that was filed before claimant's aggravation rights expired to "remand" anywhere or to resolve in any other way as an aggravation claim; there is, instead, a request for own motion relief properly before us which is the subject of a separate order entered this date.

ORDER

The Referee's order dated December 27, 1982 is affirmed.

JEFFREY BARNETT, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 82-0237M
December 4, 1984
Interim Own Motion Order

Claimant requested that the Board exercise its own motion authority and reopen his July 28, 1974 industrial injury claim for an alleged worsening of his injury-related condition.

By an order dated September 24, 1982, the Board referred claimant's request for own motion relief to the Hearings Division for consolidation with claimant's pending hearing request in WCB Case No. 82-03366. The Referee conducted a consolidated hearing, entered an appealable order in WCB Case No. 82-03366 and made a recommendation to the Board with respect to claimant's request for own motion relief.

In WCB Case No. 82-03366, the Referee awarded claimant an additional 64° or 20% unscheduled permanent partial disability for injury to claimant's low back for a total unscheduled award of 160° or 50% of the maximum allowable. Claimant requested Board review of the Referee's order in WCB Case No. 82-03366. We have this day issued a separate Order on Review in that case.

The Referee also recommended that the Board exercise its own motion authority and order claim reopening. Having reviewed the record, we agree with the Referee's recommendation. As also discussed in our separate Order on Review, claimant was

hospitalized on two or three occasions during the summer and fall of 1982 due to the "waxing and waning" of back symptoms generally to be expected in somebody 50% disabled. However, in a November 1, 1982 report, Dr. Van Olst -- who had previously recognized that claimant's back symptoms had been waxing and waning -- opined that claimant's condition was clearly worse and that he was initiating a new form of treatment. Considered in the context of what Dr. Van Olst had previously said, we find this report to be cogent evidence of a worsening of claimant's condition and a persuasive basis for allowing some form of own motion relief.

We are disinclined, however, to order claim reopening retroactive to November 1, 1982 in the absence of more current information which might enable us to establish a date for termination of temporary disability. Such an open-ended order could create a large overpayment of benefits, and we believe that, in the exercise of our own motion authority, we have the flexibility to avoid this result.

Accordingly, SAIF is ordered to provide the Board, within ten (10) days of the date of this order, with current medical reports and information presently in its possession, reflecting claimant's condition and how it has progressed since Dr. Van Olst's November 1, 1982 report. Upon receipt of this more current information, we will award claimant appropriate compensation and allow counsel a reasonable attorney's fee.

IT IS SO ORDERED.

CAROL A. HUSTED, Claimant
Galton, et al., Claimant's Attorneys
George Zarzana, Defense Attorney
SAIF Corp Legal, Defense Attorney
Carl Davis, Ass't. Attorney General

WCB 83-04853
December 4, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Knapp's order which set aside its denial of claimant's industrial injury claim for her left hand. The issues center around interpretation of the "on premises" exception to the "going and coming" rule.

The entrance to the employer's premises was bordered directly by a cement sidewalk which the employes used to reach the door. Bordering directly on this sidewalk was a strip of land approximately four to five feet in width upon which ivy was growing. Directly on the other side of this strip of land was a paved parking lot. Both the paved parking lot and the strip of land were leased to the State of Oregon, and not the responsibility of the employer. The employer's parking area was further away, around the corner from the employer's entrance. The employer had posted a sign on the entrance door requesting that his employes park in the proper parking lot, but over time, paths had been worn through the ivy as a result of employes crossing between the State of Oregon parking lot and the employer's entrance.

There is no real disagreement but that the employer had the responsibility to maintain the cement sidewalk outside his entrance. On review claimant does not seriously argue that the

employer had control of the ivy strip or that an easement had been created by his employes' use of the paths to cross the ivy strip from the State of Oregon parking lot.

Claimant began work for this employer on the day before she was injured. She took a scheduled lunch break on the date of injury. A friend drove her back to work at the end of her lunch break, dropping her off in the State of Oregon parking lot. While she was crossing the ivy strip, her foot became caught in the ivy, causing her to trip and fall forward onto the cement sidewalk. A soda pop bottle that she was carrying was smashed and cut claimant's left hand.

Generally, injuries received while a claimant is going to or coming from work are not compensable. Adamson v. The Dalles Cherry Growers, Inc., 54 Or App 52, 56 (1981). However, an injury is compensable if it occurs while the claimant is going to or coming from work and the injury occurs on the employer's premises. Montgomery Ward v. Cutter, 64 Or App 759, 761 (1983). The Referee determined that claimant's injury was compensable because, even though the cause of her fall originated off the employer's premises, her lead foot had partly entered upon the cement sidewalk area when she tripped and she sustained her injury when the soda pop bottle smashed on the employer's sidewalk.

We disagree with the Referee's analysis. The employer did not control the ivy strip, and hence was not responsible for the ivy causing the accident. While the employer was aware that his employes sometimes used the state parking lot and crossed through the ivy strip, he had posted signs to discourage this practice. Since the actual cause of claimant's injury was unsafe conditions in an area outside the employer's control, it follows that the employer is not responsible for this claimant's injury. See White v. SIAC, 236 Or 444 (1964); Kringen v. SAIF, 28 Or App 19 (1977); Rohrs v. SAIF, 27 Or App 505 (1976); Barker v. Wagner Mining Equipment, 6 Or App 275 (1971).

ORDER

The Referee's order dated November 29, 1983 is reversed. The SAIF Corporation's denial dated May 5, 1983 is reinstated and affirmed.

ALVIN L. VAN ARNAM, Claimant
Galton, et al., Claimant's Attorneys
Beers & Zimmerman, Defense Attorneys
Reviewed by the Board en banc.

WCB 83-06335
December 5, 1984
Order on Review

The insurer requests review of Referee Shebley's order which found claimant permanently and totally disabled, whereas a July 1, 1983 Determination Order had awarded him 45% (144°) unscheduled permanent partial disability for a low back injury. On review, the insurer contends claimant is not permanently and totally disabled. We agree and reverse the Referee's order.

Claimant is a 52 year old truck driver. In April 1981 he suffered a compensable low back strain. Previous to this incident, claimant had sustained five compensable low back injuries, all of which resulted in no award of permanent disability. Two CT scans and one myelogram have been essentially normal, with only minor defects. Treatment has been conservative.

In January 1982 Dr. Post, claimant's treating orthopedist, advised that claimant was medically stationary and recommended claim closure. The diagnosis was lumbar strain superimposed on preexisting degenerative lumbar arthritis. Range of motion was at most 25% of normal flexion, 10% of normal extension and 25% of bilateral lateral flexion. Dr. Post opined that claimant could not return to truck driving and doubted whether claimant could return to occupations requiring manual labor.

On January 28, 1982 a Determination Order issued awarding claimant 45% unscheduled permanent disability.

In March 1982 claimant was referred to Germain Bennett for vocational services. At that time it was noted that claimant expressed a strong desire to return to work, but only for his employer of 15 years. Otherwise, he was hesitant to undergo an authorized training program since he was unsure of his capabilities.

In June 1982 Germain Bennett arranged a modified position for claimant with his former employer. His duties included short haul truck driving, with some warehouse lift truck and forklift duties. This position permitted claimant to move about and change positions often. Within two months his low back and leg pain increased to the point where Dr. Post took him off work. In addition, a marked lumbar list returned.

In December 1982 claimant was referred to Dr. Parsons, neurologist, who performed a myelogram. Dr. Parsons considered the studies to be essentially normal. The diagnosis was chronic lumbar strain.

By letter dated December 22, 1982 Dr. Post reported that claimant was forced to lie down periodically during the day. When the question of vocational training was posed, claimant stated that he did not know anything easier than truck driving and could not perform sedentary half-day jobs at the present time. Dr. Post referred claimant to the Northwest Pain Clinic.

Based on Dr. Post's report, Germain Bennett closed claimant's case, awaiting the time when he would be physically able to participate in a training program.

In February 1983 claimant was examined by Dr. Miller, rehabilitation medicine specialist at the Pain Clinic. Dr. Miller diagnosed claimant's condition as chronic low back pain without definite evidence of root problems, poor body mechanics, posture and obesity. Dr. Ballering, staff psychologist, reported that claimant was an emotionally denying and guarded male. Motivation for pain center therapy remained a question, but was considered in the fair range. Motivation for vocational rehabilitation or return to work also appeared to be in the same range.

Upon claimant's discharge from the Pain Clinic, Dr. Miller and Dr. Sears reported that the prognosis for his return to work was good, provided claimant stayed within his reasonable physical limits. These limits were described as refraining from any significant lifting, no repetitive bending, stooping, twisting, turning, reaching and frequent opportunities to change position.

In March 1983 Dr. Post again referred claimant to Dr. Parsons to investigate the possibility of surgical intervention. By letter dated April 28, 1983 Dr. Parsons opined that claimant's pain was not primarily radicular and advised against a laminectomy. Dr. Parsons noted that claimant experienced a "significant restriction of lumbar motion in all directions to probably 50 percent of normal" and "once again stands with a list." It appeared to Dr. Parsons that claimant would not be able to return to his usual occupation as a truck driver.

Dr. Post conducted his closing examination on May 11, 1983. Dr. Post noted claimant's lumbar list. Range of motion was 60% of normal flexion, 50% of normal bilateral lateral flexion and rotation, but about 20% of normal extension at best. Dr. Post concluded as follows:

> "I feel that he can't return to any kind of heavy physical work and that bending and lifting are contraindicated. In addition, sitting for more than a couple of hours apparently is poorly tolerated, and the patient claims that he has to lie down every day. Again, I don't live with him, but he describes himself as restricted to home activities. He has only an 8th grade education. I think he really is equipped only for sedentary work physically and he has no educational background to be employable in that way."

On July 1, 1983 a Determination Order issued, awarding claimant 45% permanent disability. Although the order does not make it clear, we assume that this award was not in addition to the 45% award granted in January 1982. The parties' contentions at hearing indicate that claimant had received a total award of 45% for this injury.

On July 7, 1983 Dr. Post reported that claimant experienced intermittent episodes of acute lumbar spasm, pelvic tilt and trunkal list. At times the list was so severe that claimant's head was "fully six inches out of balance with his pelvic midline." Dr. Post noted that the list, which could not be simulated and occurred frequently, restricted claimant's "ability to be up and about on a consistent basis." Accordingly, Dr. Post opined that "especially in view of his limited education, I feel that the patient can not work and that he is permanently and totally disabled from engaging in regular and gainful employment."

In August 1983 claimant returned to the Pain Clinic for a follow-up examination. Dr. Yospe, psychologist, and Dr. Cramer, orthopedist, both report that claimant viewed himself as permanently and totally disabled. The doctors noted a regression in claimant's condition, attributable to an abandonment of the principles and techniques he had learned during his prior visit.

Mr. Milholm, vocational rehabilitation counselor for The Counseling Institute, reviewed claimant's file and offered his opinion. Mr. Milholm reported that "to my knowledge, there are no employment positions or short term training programs appropriate for a 52 year old manual laborer with an 8th grade education, that

would not require some lifting and bending, even if infrequently." Due to the severity of claimant's limitations, it was Mr. Milholm's opinion that the chances of claimant securing employment were remote and that his condition should be considered permanent and total.

Claimant has an eighth grade education and has not received a GED. Other than his work experiences, he has no other special training or skills. His work experiences have all involved manual labor. He has worked as a choker setter in the woods, a roughneck in the Wyoming oil fields, a logging road construction worker and as a truck driver for a moving and storage business.

Claimant testified he suffers from constant pain, sometimes sharper than others. The pain radiates down the left leg and, at times, into his right leg. He experiences one or two muscle spasms each week, which necessitate bedrest for "a day-and-a-half or two days, sometimes longer." He experiences headaches 3 or 4 times a week. Claimant takes prescription medicines for his pain and as a muscle relaxant. He also uses a back brace, heating pads and a traction device. Claimant lies down three or four times a day and uses his traction device twice a day. He tries to change position every 10 to 15 minutes and avoids lifting anything in excess of 5 pounds.

Daily activities such as shaving, dressing, brushing his teeth, grocery shopping, vacuuming and placing dishes in the dishwasher cause claimant pain. Claimant occasionally rides his lawn mower, but most of the time his daughters do the mowing. Claimant has curtailed his fishing and hunting activities. The times he has attempted to hunt he has ended up in camp or sitting in the car.

Since claimant was removed from his modified position he has not returned to work. Other than reading the classified ads for employment opportunities, claimant has not sought other employment.

The Referee found claimant permanently and totally disabled. The Referee observed that it was uncontroverted that claimant could not return to any of his previous positions and that he had received no vocational rehabilitation or training. The Referee was further persuaded by claimant's social/vocational factors and the opinions of Dr. Post and Mr. Milholm. Finally, the Referee concluded that it would be futile for claimant to seek employment.

We are not persuaded that claimant is permanently and totally disabled from a physical standpoint, or when his physical condition is considered in conjunction with the relevant social/vocational factors of OAR 436-65-600 et seq. Consequently, we do not believe it would be futile for claimant to comply with the "seek work" requirements of ORS 656.206(3).

Although claimant is significantly impaired, we are not persuaded that he is physically incapacitated from working. Dr. Parsons expressly ruled out claimant's return to his usual truck driving occupation. We do not interpret his opinion as support for the contention that claimant is permanently foreclosed from all future employment possibilities. Likewise, we do not believe Dr. Post concluded claimant was totally disabled from a physical standpoint. In arriving at his opinion, Dr. Post considered social factors such as claimant's age and education. These

factors are outside of the doctor's area of expertise. It would appear that when claimant's social and vocational factors were not considered, Dr. Post concluded that claimant was physically able to perform sedentary duties.

In addition, we are not persuaded by Mr. Milholm's opinion. To begin, he was not intimately involved in claimant's rehabilitation efforts. Secondly, he merely recited portions of the record, without providing a convincing analysis for his conclusion that claimant is permanently and totally disabled. Thirdly, and most importantly, he opined that claimant's chances for securing gainful employment were "remote." Even if we found Mr. Milhom's opinion persuasive, we do not interpret it to mean that it would be futile for claimant to seek work.

Claimant also has a number of social and vocational impediments to securing suitable employment. However, we do not feel that these impediments are so severe that he should be excused from the statutory "seek work" requirement. Since his modified truck driving position failed, no further vocational rehabilitation or training has been implemented. Granted, rehabilitation efforts were terminated at Dr. Post's behest. However, as previously noted, Dr. Post "short circuited" the process by introducing his own prognosis for claimant's vocational future. We believe claimant would be better served by receiving a thorough evaluation of his vocational capabilities from trained professionals before he is adjudged permanently and totally disabled. Furthermore, claimant has not attempted to secure employment other than a periodic perusal of the classified ads. Under these circumstances, we find these efforts inadequate to establish that claimant is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(3).

Based on the factors discussed above and the record as a whole, we find that claimant has not proven he is unable to regularly perform any suitable and gainful employment. Therefore, we reverse the award of permanent and total disability and rate claimant's permanent partial disability.

Pursuant to OAR 436-65-600 et seq., we consider claimant's age, education, work experience, adaptability, mental capacity, emotional state, labor market findings, and physical impairment, including residual pain, in rating the extent of claimant's disability. After completing our de novo review of the record and considering the guidelines, we conclude that an award of 65% would more appropriately compensate claimant.

ORDER

The Referee's order dated January 18, 1984 is reversed. In addition to the 45% (144°) unscheduled disability awarded by the July 1, 1983 Determination Order, claimant is awarded 20% (64°) unscheduled disability for a total award to date of 65% (208°) unscheduled disability for a low back injury. Claimant's attorney's fee shall be adjusted accordingly.

BOARD MEMBER LEWIS DISSENTING:

ORS 656.206(1) provides that a claimant is permanently and totally disabled if permanently incapacitated from regularly performing work at a gainful occupation which the worker has the

ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation. ORS 656.206(3) places upon the claimant the burden of proving permanent total disability status, claimant's willingness to seek regular gainful employment and that claimant has made reasonable efforts to obtain such employment.

The majority interprets Dr. Parsons' and Dr. Post's reports as not supporting the contention that claimant's physical impairments permanently foreclose all future employment possibilities. Our task, however, is to fairly and objectively evaluate claimant's disability, considering both physical impairment and pertinent social/vocational factors as they existed at the time of the hearing. The law does not allow us to speculate regarding possible future changes in employment status. Gettman v. SAIF, 289 Or 609, 614 (1980).

I agree with the Referee's well reasoned and well written order. The Referee summarized as follows:

> "It is uncontroverted that claimant cannot return to his previous occupation as a moving and storage truck driver, or to any of his prior jobs for that matter. Likewise, it is not disputed that he has received absolutely no vocational rehabilitation or training since his industrial injury. All of his work experience has involved medium to heavy physical labor and the repetitive body movements he can no longer perform. He has but an eighth grade education and no training or skills that would help him in performing light or sedentary work. At 52 it is rather unlikely that any employer would hire and retrain claimant for work, if any there be, he is capable of performing. His long time treating physician, Dr. Post, and the vocational rehabilitation expert his counsel obtained an opinion from have both stated claimant is permanently and totally disabled. These facts and opinions, in my view, establish that claimant is indeed permanently and totally disabled.
>
> "Finally, I agree with claimant's counsel that it would be 'futile' for his client to seek employment and that his claim is therefore not defeated by the seek work requirement of ORS 656.206(3)."

In this case the medical evidence together with claimant's testimony clearly indicate that it would be futile for claimant to attempt to become employed. See Butcher v. SAIF, 45 Or App 313 (1980). Nevertheless, claimant has demonstrated his willingness to work through efforts beyond those that might reasonably be expected of him. See Pournelle v. SAIF, 70 Or App 56 (1984). I believe that he has met his burden. Accordingly, I respectfully dissent.

VERSIE L. KELSAW, Claimant
Ann B. Witte, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-01422 & 83-09218
December 7, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Gemmell's order which: (1) upheld the insurer's denials of her February 1982 and April 1982 injury claims; and (2) found that she was entitled to interim compensation from May 5, 1982 to May 27, 1982. On review, claimant contends: (1) the insurer is precluded by Bauman v. SAIF, 295 Or 788 (1983), from denying the claims; (2) alternatively, her slip and falls, which precipitated the injury claims, were not idiopathically caused and thus compensable; (3) if the denials are upheld, the insurer should be assessed penalties and accompanying attorney fees for untimely denials; and (4) she is entitled to interim compensation from April 5, 1982 - May 27, 1982 and November 29, 1982 - December 22, 1982, in addition to penalties and attorney fees. The insurer contends claimant was not entitled to any interim compensation.

We modify that portion of the order which concerns interim compensation.

Claimant filed her claim on April 8, 1982, alleging she suffered an injury on April 5, 1982. Claimant's employer acknowledged notice of the injury on the date it occurred. The insurer accepted the claim on May 27, 1982. Apparently, claimant continued to work during this time, except for approximately 4 days. Other than paying for two days of time loss, the insurer paid no compensation. The Referee found that interim compensation should run from May 5, 1982 - May 27, 1982. In addition, the Referee assessed a 10% penalty and accompanying attorney fee.

ORS 656.262(4) requires an insurer to pay interim compensation no later than 14 days after notice or knowledge of the claim. This obligation to pay interim compensation until the claim is accepted or denied is imposed regardless of the claim's merits and regardless of whether claimant continues to work. Bono v. SAIF, 66 Or App 138 (1983), rev allowed 296 Or 829 (1984); Hubbard v. Imperial Fabrics, 69 Or App 687 (1984). When the underlying claim is determined not to be compensable, interim compensation is due only from the date of notice or knowledge of the claim. Stone v. SAIF, 57 Or App 808, 812 (1982); Donald Wischnofske, 34 Van Natta 664 (1982). "Claim" is defined as a written request for compensation from a subject worker or someone on the worker's behalf, or any compensable injury of which a subject employer has notice or knowledge. ORS 656.007(7).

We agree that interim compensation, penalties and accompanying attorney fees are in order. However, interim compensation should run from April 5, 1982, the date the employer had notice or knowledge of the injury, until May 27, 1982, the date the claim was initially accepted.

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

ORDER

The Referee's order dated July 25, 1984 is affirmed in part and modified in part. That portion of the order concerning interim compensation is modified. Claimant shall be paid interim compensation from April 5, 1982 to May 27, 1982. The insurer is assessed a penalty of 10% of this compensation. Claimant's attorney is awarded $200 for services on Board review concerning the interim compensation issue, in addition to the attorney fee awarded at the hearing level. The remainder of the Referee's order is affirmed.

CARL R. OSBORN, Claimant
David Force, Claimant's Attorney
Coons, et al., Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-10056, 84-01521 & 84-01692
December 7, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Danner's order which: (1) granted him an award of 128° for 40% unscheduled disability for a low back injury in lieu of the 80° for 25% unscheduled disability granted by Determination Order; (2) upheld the SAIF Corporation's denial of his hearing loss claim; (3) declined to award interim compensation on the hearing loss claim; and (4) declined to assess a penalty for late denial of the hearing loss claim. On review claimant argues (1) that he is permanently and totally disabled or is entitled to an increased award for unscheduled permanent disability; (2) that his hearing loss claim is compensable; and (3) that he is entitled to interim compensation plus a penalty and associated attorney's fee for SAIF's late denial.

The Board affirms and adopts the order of the Referee with the following comment on the interim compensation issue. At the time claimant filed his hearing loss claim he was being paid temporary total disability for his accepted low back claim. Both claims were against the same employer and the same insurer, SAIF. Claimant contends that under the authority of Bono v. SAIF, 66 Or App 138 (1983) he was entitled to receive interim compensation on the hearing loss claim even though he was then being paid temporary total disability for the low back claim.

The Referee distinguished Bono on the basis that the claimant in Bono was working while the claimant in this case was not working, but was receiving temporary total disability benefits from the same insurer who would otherwise be liable for the interim compensation on the hearing loss claim. The Referee commented:

> "I do not interpret Bono to mean that a claimant can stack awards of temporary total disability. The system certainly will have run amok, if a claimant could receive three payments of temporary total disability at the same time. If the carrier would have little incentive to process the claim expeditiously under some circumstances, a claimant would certainly have little incentive to return to work, if

he were receiving three checks for temporary total disability at the same time."

We wholeheartedly agree. We cannot believe that the Bono court intended to extend the duty to pay interim compensation to an insurer who is already paying the same claimant temporary total disability. To extend Bono that far is to create a windfall for claimants. We decline to extend Bono.

ORDER

The Referee's order dated July 24, 1984 is affirmed.

FRED L. SATTERFIELD, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-07406
December 7, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Mulder's order which upheld an order of the Director of the Workers' Compensation Department that denied claimant's request for referral to a vocational rehabilitation program on the ground that claimant had left work for reasons other than his injury. OAR 436-61-100(4).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated March 7, 1984 is affirmed.

THOMAS D. CRAFT, Claimant
Kenneth Peterson, Claimant's Attorney
Cheney & Kelley, Defense Attorneys

WCB 82-01461
December 12, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The insurer requests review of Referee Podnar's order which awarded claimant compensation for permanent total disability. The threshhold issue is procedural -- whether it was appropriate for the Referee to consider the extent of claimant's permanent disability when his claim was in open status. We conclude that it was procedurally improper to do so.

This proceeding originated February 19, 1982, when claimant's request for hearing was filed. That hearing request designated several issues, including the propriety of a partial denial issued by the insurer on February 16, 1982; premature claim closure and extent of disability in connection with a February 3, 1982 Determination Order; and a request that, "the claim should be reopened for further medical care and treatment and time loss benefits." The February 1982 Determination Order had reclosed this claim with an award for temporary total disability from August 13, 1981 through January 13, 1982, and no additional permanent partial disability. Claimant previously had received a permanent disability award of 112° for 35% unscheduled disability as a result of his compensable head injury.

While this hearing request was pending, claimant was admitted to the Callahan Center from about mid-November 1982 until he was

discharged on February 10, 1983. Dr. Storino's discharge summary states:

> "At the final team meeting on February 10, 1983, it was the opinion of the team that there were probably no jobs that [claimant] would be able to perform for any length of time, at a competitive pace.
>
> "However, it is my opinion, as well as some of the other team members, that he probably could work in a sheltered workshop, under close supervision, where the work was quite structured."

A separate vocational discharge summary included the suggestion that, inasmuch as claimant had resided in the Baker area for many years and had many personal contacts there, there might be the possibility of developing a job for him within his restrictions.

After claimant's discharge from the Callahan Center, he was contacted by Jeff Frost, a vocational counselor. Mr. Frost's letter of February 28, 1983 indicates that some vocational possibilities that "could be worth looking into" had been identified. Mr. Frost advised claimant that his case had been referred to the Vocational Rehabilitation Division to provide assistance in exploring these specific ideas; Mr. Frost's letter to claimant states in part:

> "While you were here [i.e., at the Callahan Center], all of us on the team felt that you tried your best and made some good progress, and you certainly demonstrated that you wanted to return to work. It seems obvious that a suitable job will have to meet a number of conditions. However, I think that if such work is available, you will find it very rewarding. I have discussed some possibilities with Al, and he has some other ideas that he will be talking to you about."

In early April 1983 claimant first met with the vocational counselor to whom he had been referred. Claimant's new counselor stated on April 7 that there was "little or no progress to report at this time as the rehabilitation process is just beginning."

Dr. Stanulis, claimant's treating psychologist, had reported to claimant's attorney in March 1983 that "from the vocational point of view" claimant's condition was stationary "at the level of total disability." He stated that the prognosis for change "is nil." Dr. Stanulis essentially reiterated the same conclusion in a report dated May 9, 1983, and stated:

> "[Claimant] is gradually learning to provide his own structure, but as noted in my report of March 14, 1983, it has become increasingly clear that he will never be able to return to work. [Claimant] continues to put out maximum effort in an attempt to make his life more meaningful

> and workable, and can only be described at this time as continuing to be actively mourning his loss of ability to work.
>
> "As before, my view is that he will continue to require psychotherapy for a considerable time in the future as he learns to make the adjustments in his life necessary to live as a person who is totally disabled from a vocational point of view."

Although it is not particularly relevant to our disposition, we note that the vocational rehabilitation reports from early 1983 paint a somewhat more sanguine picture than does Dr. Stanulis.

By letter dated May 25, 1983, the insurer notified claimant as follows:

> "Your claim was closed by Determination Order issued 2/3/82 which awarded temporary total disability through January 13, 1982. Your temporary total disability benefit was started again on 11/15/82, on a voluntary basis to provide a complete vocational assessment at the Callahan Center. The results of the Callahan Center indicate you are not vocationally stationary at this time. Therefore, we are sending this letter to you to notify you that we are voluntarily reopening your claim as of 1/13/82.
>
> "This letter is also to notify you that we are withdrawing the [partial] denial we issued on 2/16/82 concerning your paroxysmal atrial tachycardia episode."

The hearing convened on May 31, 1983. Claimant's claim was then in open status because, six days earlier, the insurer reopened the claim retroactive to the date that claimant's temporary disability was terminated by the February 1982 Determination Order. Since claimant had contended in his hearing request that the February 1982 Determination Order prematurely reclosed his claim, the insurer's act of reopening the claim (and withdrawing its partial denial) could be viewed as being in the nature of a confession of judgment, leaving nothing for resolution at a hearing. However, claimant objected to the insurer's recent claim reopening; argued that he was then (as of the May 1983 hearing) medically stationary; and sought an award for permanent total disability. Although the insurer's letter advising claimant of claim reopening stated that it was premised upon claimant's unstable vocational situation, counsel for the insurer appeared to contend at hearing that claimant was neither "psychiatrically stationary" nor "vocationally stationary."

The Referee concluded that claimant was medically stationary as of January 13, 1982 and further concluded that claimant's condition was "psychiatrically stationary" as of the date of hearing. The Referee reasoned that "there is no basis in law or fact why the reopening of the claim by the [insurer] on May 25,

1983 should act as a bar preventing a determination of claimant's . . . disability." The Referee proceeded to determine that claimant was permanently and totally disabled as of January 13, 1982.

Generally, it is not appropriate to rate a claimant's permanent disability when his or her claim is in open status. Kociemba v. SAIF, 63 Or App 557, 559-60 (1983); Gary A. Freier, 34 Van Natta 543, 545 (1982). That doctrine is most consistently followed when a claim is in open status because the claimant is not medically stationary. Matters are a bit more involved when a claim is in open status because the claimant is involved in vocational rehabilitation efforts.

In Minor v. Delta Truck Lines, 43 Or App 29 (1979), which involved this latter situation, the court held that a claimant who was participating in a rehabilitation program nevertheless had the right to a decision on the extent of his disability as it had existed before the training program started. However, since Minor, this Board has adopted an administrative rule that states: "When an injured worker is participating in an authorized vocational training program, a hearing will not be held on an issue of unscheduled disability except where there is an interruption of compensation or upon a showing of good cause." OAR 438-06-105. This new administrative rule, which we believe largely supercedes the effect of Minor, see 43 Or App at 31, n 1, represents the Board's policy judgment that hearings involving the extent of unscheduled disability should not be held until reasonable efforts to minimize an injured worker's disability have been completed.

Therefore, in view of the recent adoption of OAR 438-06-105, the prohibition against rating permanent disability when a claim is in open status would appear to be equally applicable and relevant regardless of whether the claim is open for medical treatment or open for retraining efforts.

There is no reason to conclude in this case that the insurer did anything wrong when it voluntarily reopened the claim for payment of temporary total disability benefits, which are obviously intended to sustain claimant while further efforts are made to identify his vocational needs and secure appropriate employment. The insurer's actions are entirely consistent with the objectives of the Workers' Compensation Law, particularly the goal of restoring workers physically and economically to a self-sufficient status to the greatest extent practicable. ORS 656.012(2)(c); 656.268(1). The periodic payments of permanent total disability benefits, which claimant insists he should receive, are about the same as the periodic payments of temporary total disability benefits claimant will receive while his claim is in open status. Compare ORS 656.206(2)(a) with ORS 656.210(1); see also ORS 656.636 (benefits payable from the Retroactive Reserve). Therefore, claimant has no apparent pecuniary interest in whether the benefits he receives are labeled as being for permanent or labeled as being for temporary disability.

Indeed, we believe that the insurer's act of retroactively reopening this claim pending further vocational rehabilitation efforts was commendable. Although claimant's treating psychologist does not appear to share this view, there are professionals involved in this claim who believe that claimant is

capable of returning to the work force despite his serious impairment. The insurer should have the option to keep the claim in open status while further vocational avenues are explored.

We conclude and hold that the insurer was permitted to retroactively reopen this claim for payment of temporary total disability in order to provide claimant with financial sustenance during continuing vocational rehabilitation efforts designed to minimize claimant's vocational disability and identify suitable employment. The insurer's claim reopening mooted the issues concerning premature claim closure. The only remaining issue, other than those concerning the denial (which were also resolved), was claimant's entitlement to an award for permanent disability. Because the claim was in open status, it was premature for the Referee to consider this issue.

In various contexts, the Court of Appeals has repeatedly spoken of the "desirability of maintaining an orderly compensation process." See Wilson v. SAIF, 48 Or App 993, 997 (1980); Hicks v. Fred Meyer, Inc., 57 Or App 68 (1982); Roller v. Weyerhaeuser Co., 67 Or App 583, 587, adhered to on reconsideration 68 Or App 743 (1984); Safstrom v. Riedel International, Inc., 65 Or App 728 (1983). Roller and Safstrom were cases involving claims which were in open status until the respective employers issued partial denials of continuing workers' compensation benefits based upon the employers' contention that the claimants' ongoing problems were attributable to nonindustrial conditions. In both cases, it was determined that the employers' partial denials had the effect of circumventing the claim closure provisions of ORS 656.268. In Safstrom the court stated:

> "[T]he Evaluation Division has the ultimate responsibility to determine whether a claim is ready for closure and, if so, the extent of the claimant's permanent disability. Any party may request a hearing under ORS 656.283 on that determination." 65 Or App at 731-32.

The court in Roller also specifically spoke of "the orderly process of claim closure and determination of extent of disability," and stated that an employer/insurer "may not summarily terminate . . . benefits by short-cutting the process of closing the claim by a determination of the extent of claimant's disability." 67 Or App at 587.

We think that the benefits and burdens of "the orderly process of claim closure" should be shared equally by claimants and insurers alike. Just as an employer/insurer should not be permitted to circumvent the claim closure procedures of ORS 656.268 by a partial denial, a claimant should not be able to circumvent those same procedures by requesting a hearing on the extent of his disability while his or her claim is still in open status.

For all of these reasons, we conclude that there were no issues ripe for adjudication by the Referee, and therefore that the Referee's award of permanent total disability must be vacated. The claim remains in open status pursuant to the insurer's May 1983 claim reopening, until such time as the claim is properly submitted for closure pursuant to the provisions of ORS 656.268.

ORDER

The Referee's order dated June 30, 1983 is vacated, and this claim is remanded to the insurer for further processing and payment of benefits according to law.

JAMES G. EDIN, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 84-0431M
December 12, 1984
Own Motion Order

SAIF Corporation has submitted to the Board claimant's claim for an alleged worsening of his August 12, 1963 industrial injury. Claimant's aggravation rights have expired. SAIF has authorized the treatment recommended by Dr. Litin. We have been asked to rule on claimant's entitlement to continued medical treatment and time loss.

As claimant's injury was sustained prior to 1966, he does not have a statutory right to continued medical benefits pursuant to ORS 656.245. Rather, this case must proceed under the provisions in ORS 656.278. Based on a review of the record, the Board concludes that each time claimant requires dilatations due to urethral stricture, SAIF should pay the related medical expenses. The claim does not need to be formally reopened each time this problem occurs. No time loss is due under the rationale in Vernon Michael, 34 Van Natta 1212 (1982).

IT IS SO ORDERED.

WILLIAM J. FRAME, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

Own Motion 84-0453M
December 12, 1984
Own Motion Order Rescinding
Own Motion Determination

Claimant has moved for an order rescinding the Own Motion Determination dated October 15, 1984. The employer opposes the motion.

Claimant was compensably injured in August 1978. In August 1980 claimant requested a hearing on the issues of the extent of his permanent disability following an aggravation claim and his entitlement to vocational rehabilitation. The issue of claimant's entitlement to vocational rehabilitation was finally resolved in the Court of Appeals by an order which became final on February 10, 1984. During the time the issue of entitlement to vocational rehabilitation was pending, claimant's aggravation rights expired on December 22, 1983. Claimant entered a vocational rehabilitation program after the court's order became final. After claimant's vocational rehabilitation program was terminated, the Board issued its Own Motion Determination. Normally, when a claim in which aggravation rights have expired is opened for a vocational rehabilitation program, we subsequently close the claim with an Own Motion Determination. We believe that is the correct practice and will continue to follow it.

However, we find that in these circumstances, claimant is entitled to have his claim closed pursuant to ORS 656.268 rather than under ORS 656.278. Although claimant did not enter the vocational rehabilitation program until after his aggravation rights had expired, he began his attempt to enter the vocational

rehabilitation program three years before his aggravation rights expired. Due to the facts that the litigation process is time consuming, that the various levels in the system disagreed about claimant's entitlement to vocational rehabilitation and that both parties contested this issue at every level, claimant was not finally adjudged eligible for vocational rehabilitation until after his aggravation rights had expired. Nevertheless he entered the vocational rehabilitation program pursuant to a final order adjudicating a hearing request made long before the aggravation rights expired.

In Miller v. SIAC, 149 Or 49 (1934), claimant filed a claim for aggravation a few days before his aggravation rights expired. Due to apparent confusion over whether claimant had, in fact, filed an aggravation claim, the Commission did not reopen the claim until February 1931. The Supreme Court held that the claimant was entitled to appeal rights from any order closing the claim. The Court of Appeals, in SAIF v. Coombs, 39 Or App 293 (1979) characterized Miller:

> "The essence of the holding in Miller is that when a claim is reopened as a matter of right, i.e. in response to a request for hearing, claimant has a right to appeal the subsequent closure of the claim no matter when the closure order is issued. The timing of the claim closure does not determine whether it is on the Board's own motion."

We find that this claim was ultimately reopened for vocational rehabilitation in response to a request for hearing, i.e. a claim of a right to vocational rehabilitation. The fact that the ultimate reopening was after the aggravation rights expired is as irrelevant as it was in Miller. The relevant fact is that the claim was reopened as a matter of right and consequently closure must take place pursuant to ORS 656.268. Accordingly, the Board rescinds its Own Motion Determination dated October 15, 1984 and remands this case to the employer for processing consistent with this order.

ORDER

The Board's Own Motion Determination dated October 15, 1984 is rescinded. The claim is remanded to the employer for processing consistent with this order.

GLENN L. GOSSLER, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Brian Pocock, Defense Attorney

WCB 83-06754 & 81-03060
December 12, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requested review of Referee Seymour's order that set aside its denial of claimant's occupational disease claim for aggravation of his tinnitus condition manifested by a psychological condition (depression). SAIF's request for review was dismissed on the motion of Aetna Technical Services because its request for review was not served on Aetna, its insured or its

attorneys. Glenn L. Gossler, 36 Van Natta 1278 (Interim Order of Dismissal, September 19, 1984). However, claimant submitted a timely cross-request for review, and the Board has reviewed this case pursuant to its jurisdiction arising from claimant's request. The issue is compensability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 18, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

ASHTON V. LAWRENCE, Claimant
SAIF Corp Legal, Defense Attorney

WCB 83-03493 & 83-08676
December 12, 1984
Order of Dismissal

By notice of appeal dated December 1, 1984 claimant requested Board review of a Referee's Interim Orders dated September 11, 1984 and September 16, 1984.

It appears:

1. This is an open case pending final decision in the Hearings Division and is set for hearing December 27, 1984 before Referee Mongrain.

2. The interim orders from which claimant appeals are not now final, appealable orders.

3. The interim orders (rulings) from which claimant appeals are reviewable by Referee Mongrain as part of the hearing process.

4. When the record is closed by Referee Mongrain, all rulings and decisions made up to that time will be made final and incorporated in Referee Mongrain's Opinion and Order.

5. Referee Mongrain's Opinion and Order will be appealable, and if any party disagrees with Referee Mongrain's Opinion and Order, they can request review by the Workers' Compensation Board in the time allowed by statute. Notice of appeal rights will be included in Referee Mongrain's Opinion and Order.

Based on the above, the Board finds claimant's request for review is premature and should be dismissed.

THEREFORE, claimant's request for review dated December 1, 1984 is hereby dismissed.

MARK R. LUTHY, Claimant
Peter Baer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-05926
December 12, 1984
Order on Review (Remanding)

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Pferdner's order which, in effect, dismissed claimant's request for hearing for lack of jurisdiction.

The Referee mistakenly elevated an administrative problem to the level of a jurisdictional bar. It would be of no benefit to recite the facts or procedural history which led to issuance of the Referee's order. Suffice it to say that, subject to correction of the administrative error that was made when claimant filed his June 1983 "Supplemental Request for Hearing," the issue that was fully litigated by the parties during the course of the proceedings before the Referee in December 1983 and April 1984 is ripe for a decision on the merits.

ORDER

The Referee's order dated April 27, 1984 is vacated, and this case is remanded to the Presiding Referee for further processing as follows. WCB Case No. 81-05926 shall be closed pursuant to the parties' February 4, 1983 Disputed Claim Settlement; this case shall be assigned a new WCB Case No., as deemed appropriate; this case shall be reassigned to Referee Pferdner for a decision on the merits within thirty (30) days of reassignment, and, in the event claimant ultimately prevails before the Referee, counsel's services before the Board shall be considered in awarding a reasonable attorney's fee. ORS 656.388(1).

PATRICK K. RICHARDS, Claimant
Duncan & Lusk, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-11053
December 13, 1984
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Fink's order which upheld the insurer's denial of claimant's aggravation claim for his right knee injury.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated October 24, 1983 is affirmed.

Board Member Barnes Dissenting:

The Referee's order, which the Board majority "adopts," seems to be predicated largely upon a finding that claimant's hearing testimony was not credible. In my opinion, claimant's credibility or lack thereof has little to do with assessment of the most important evidence in this case -- the objective findings of Dr. Wells at the time of recent surgery.

Claimant sustained a compensable right knee injury in 1979. Dr. Mandiberg performed surgery at that time.

Claimant sustained another compensable right knee injury in 1980. There is some dispute before us regarding whether evidence about this 1980 injury was admitted solely for impeachment, and not as substantive evidence. I regard that to be a nonissue. After documents regarding the 1980 injury were admitted, possibly only for impeachment, claimant then testified about the circumstances of the 1980 injury. Claimant's testimony is substantive evidence, even if the documents in question are not.

In August 1982 claimant had an onset of serious knee symptoms while playing softball. This is the genesis of the present aggravation claim, which is asserted against the employer/insurer involved in claimant's original 1979 knee injury. The employer/insurer argues that the 1980 industrial injury and/or the 1982 softball incident were new injuries that cut off any causal link back to the 1979 injury.

After the softball incident, claimant at first returned to Dr. Mandiberg, but later transferred his care to Dr. Wells, who eventually performed surgery. As far as I am concerned, Dr. Wells' surgical findings conclusively establish that the 1982 incident was not a new injury. Dr. Wells first reported his surgical findings on February 25, 1983:

> ". . .a rather complex horizontal cleavage tear of the lateral meniscus which was obviously old, extending clear back to the popliteus recess was found . . .
>
> "[I found] rather extensive degenerative damage to the articular cartilge [sic] as a result of this meniscal tear, indicating it was old. The fact that a partial meniscal tear was found at the time of his original arthrotomy would tend to imply that the present knee condition dates back to his injury of April 1979 . . ." (Emphasis added.)

Dr. Wells elaborated in June 1983, explaining how a meniscus tear could have been present in 1979 but not discovered at that time:

> ". . .the cleavage could be buried within the substance of the meniscus if it is not visible from the surface. These are very much microscopic and occasionally quite large but not detectable by looking at the surface of the meniscus alone."

Finally, on October 6, 1983, after having been informed of Dr. Mandiberg's contrary assessment, Dr. Wells adhered to his position in no uncertain terms:

> "I continue to feel that considering the very tattered nature of the lateral meniscal tear [and] the secondary articular cartilge [sic] damage, that this spoke strongly of the presence of this lesion over a prolonged period of time, though I am unable to state [exactly] how long. I would be able to state, however, that they

had been there longer than three months [i.e., longer than the interval between the softball incident and the surgery Dr. Wells performed]."

It is obvious to me that these objective surgical findings have absolutely nothing at all to do with claimant's credibility or lack thereof. Perhaps the Referee or the Board majority has doubts about Dr. Wells' ability to state that the condition he observed at surgery, a meniscus tear and associated degenerative cartilage damage, existed before the softball incident, but any such doubt about Dr. Wells' ability would have nothing to do with claimant's credibility. And I do not share any doubts about Dr. Wells' ability to assess the relative age of the conditions he observed at surgery. Therefore, to repeat, I regard it clearly established that the 1982 softball incident was not a "new injury" that cuts off the possible responsibility of the 1979 employer/insurer.

If claimant's current right knee problems predate the 1982 softball incident, which I would find, and those same knee problems are not materially related to the 1979 industrial injury, which the Board majority apparently finds, one has to wonder about the genesis of those problems. Does the majority think that claimant's current knee problems originated with the 1980 industrial injury? So far as I know from this record, that "injury" involved one visit to a doctor who provided "treatment" in the form of an Ace bandage, five days of time loss followed by claimant's return to regular work. Perhaps claimant's testimony about this 1980 injury is not credible, but there is no other evidence in the record to the effect that this 1980 injury was more than de minimus.

If the majority nevertheless attaches greater significance to this de minimus 1980 injury than I think is warranted, that sets the stage for another issue raised on review which the majority ignores. After the fact that claimant was involved in a 1980 knee injury claim was developed at hearing, claimant's attorney apparently asked Dr. Wells if this new information had any impact on the doctor's opinion. Dr. Wells responded on November 14, 1983:

> ". . .it would not change my opinion substantially. I would certainly look at it as an aggravating factor as far as his lateral meniscal tear is concerned but still feel that the findings at the time of my arthroscopy [in early 1983] would indicate a very old tear with a lot of secondary change, probably having its origins at the time of his 1979 [injury] with subsequent aggravation on one or multiple occasions."

Claimant moved that the Referee reopen the record for admission of this most recent report from Dr. Wells. The Referee denied that motion. On review, claimant in effect argues that this case should be remanded to the Referee for introduction of this evidence. I assume that the Board majority, without saying so, has decided that remand would not be appropriate, without saying why.

I would join in denying remand only if we were reversing the

Referee; on the evidence introduced at hearing, and without considering Dr. Wells' subsequent November 1983 report, I submit that Dr. Wells' objective findings at surgery and his opinion based on those findings clearly satisfy claimant's burden to prove the compensability of this aggravation claim. But since there is not a second vote for that position, I alternatively submit that it would be a greater service to substantial justice to remand than to affirm.

THOMAS L. RUNFT, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-03962
December 13, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Knapp's orders which affirmed the SAIF Corporation's denial of claimant's occupational disease claim. The issue for review, as stated in claimant's brief, is:

> "In an occupational disease case, once actual causation has been established with a given employer, can that employer raise the 'last injurious exposure rule' as a means of defeating liability?"

The Referee concluded that claimant had proven that his work activities between 1958 and 1967 while employed at Specialized Services Inc., insured by SAIF, were the major cause of his pulmonary fibrosis. The Referee also concluded that claimant's subsequent employment activities at International Truck contributed independently to claimant's disease, although to a lesser degree. (Claimant has filed no claim against International Truck and neither that employer nor its insurer are parties to this proceeding.) The Referee upheld SAIF's denial on behalf of Specialized Services because he concluded that SAIF could successfully raise claimant's subsequent injurious exposure at International Truck and the last injurious exposure rule as a defense pursuant to Bracke v. Baza'r, 293 Or 239 (1982), SAIF v. Luhrs, 63 Or App 78 (1983); and SAIF v. Gupton, 63 or App 270 (1983).

Claimant contends that the Referee's interpretation of the law is inaccurate. Claimant argues that, since he established his employment at Specialized Services to be the "actual" cause of his disease, SAIF may not rely on the last injurious exposure rule to defeat its liability. Claimant also contends that it was the Referee who injected the issue of the last injurious rule into the case, rather than SAIF.

Contrary to claimant's position, we believe the Referee's analysis accurately reflects what we understand to be the current state of the law in regard to the use of the last injurious exposure rule as a defense. As the court stated in Bracke:

> "Liability was properly assigned to Baza'r in this case because the disease was contracted and disability occurred during employment at Baza'r. According to the evidence . . . the employment subsequent to

> Baza'r did not contribute to the cause of, aggravate, or exacerbate the underlying disease. Had that occurred, a later employer would be liable under the last injurious exposure rule of liability . . ." 293 Or at 250.

In SAIF v. Luhrs, supra, 63 Or App at 84, the court stated:

> "We believe that under the Supreme Court's opinion in Bracke an employer in the position of Northwest Scientific [i.e., the earlier employer in a series of potentially injurious employments] may rely on the last injurious exposure rule as a defense. However, if, as in Bracke, the claimant's evidence is that the working conditions at Northwest Scientific were the actual cause of his [occupational disease], the defense will not succeed."

This passage from the Court of Appeals decision in Luhrs is significant for two reasons: (1) as in this case, the facts in Luhrs involved a single claim against a single employer -- for reasons unknown the claimant in Luhrs had never asserted claims against subsequent employers; and (2) what the court said in Luhrs should be interpreted in context with what we had said in our decision that the court was reviewing:

> "Footnote 5 of the court's opinion [in Bracke] speculates about instances in which an employer might be able to use the last injurious exposure rule to shift 'liability' to another employer. 293 Or at 250. It is not clear to us whether the court was using 'liability' in the sense of 'compensability' or in the sense of 'responsibility,' which are distinct concepts. In any event, we do not believe the Supreme Court intended to hold that an employer would be able to utilize the last injurious exposure rule to 'defend' its interests when a single claim is filed against a single employer and the issue is compensability." Robert Luhrs, 34 Van Natta 1039 (1982) (emphasis in original).

As we understand its decision, in Luhrs the Court of Appeals was expressly rejecting the line of analysis we had invoked in our decision in that case. See also, SAIF v. Gupton, supra.

We are uncertain whether there is anything in Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984) that changes this aspect of Bracke, Luhrs, or Gupton. We doubt it.

With regard to claimant's arguments concerning joinder, although the court in Bracke noted that procedures exist pursuant to OAR 436-54-332 where one employer could join another employer, Bracke v. Baza'r, supra, 293 Or at 250 n. 5, we believe there are certain unresolved jurisdictional problems lurking in a procedure

which allows one employer to join another employer in the absence of a claim having been filed against that employer. E.g. Syphers v. K-W Logging Co., 51 Or App 769 (1981). Certainly, for whatever it is worth, it has been the longstanding policy of this agency that motions by one employer to join another employer in a pending hearing proceeding are consistently denied if the claimant has never made a claim against the employer sought to be joined.

As for claimant's contention that he proved "actual" causation against Specialized Services, we understand "actual" causation as used in the Bracke line of cases to mean something akin to sole causation. As the court explained in Bracke: "According to the evidence . . . the employment subsequent to Baza'r did not contribute to the cause of, aggravate or exacerbate the underlying disease." 293 Or at 250. We agree with and adopt the Referee's findings and analysis in this case to the effect that claimant's employment exposure subsequent to Specialized Services did contribute to the cause of, aggravate or exacerbate his underlying pulmonary fibrosis disease.

Finally, we disagree with claimant's assertion that it was the Referee who injected the last injurious exposure rule defense into this case rather than SAIF. Although somewhat vague, we find that counsel for SAIF did raise the defense in opening statements to the Referee.

ORDER

The Referee's order dated October 10, 1983 is affirmed.

LYLE D. WHEELER, Claimant
Carney, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-02676
December 13, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Pferdner's ultimate order that upheld the employer's denial of his arm injury claim.

The closeness and difficulty of this case is indicated by the various orders issued by the Referee. His first order, dated January 21, 1983, upheld the employer's denial. The January order was reconsidered and a second order, dated March 7, 1983, set aside the denial. The March order was reconsidered and a third order, dated May 16, 1983, again upheld the denial. Claimant requests review of this ultimate May order.

Claimant contends that, in the course of performing his work as a truck driver, he was in the process of climbing into the cab of his truck when the grab bar broke, causing him to fall backwards into another parked truck and injure his left arm at the elbow. The employer responds that claimant's story is a fabrication, and that the truck's grab bar was intentionally damaged to support this fabricated claim.

In a case like this, credibility of the witnesses is usually critical. Claimant's testimony, of course, is that he really fell at work, that the fall was accidental rather than intentional and that he injured his previously-uninjured elbow as a result of that fall. In his first order, the Referee stated there were:

> "occasions on cross-examination when [claimant] professed not to know the answers to some of the questions which he normally would have been expected to be able to answer. Other than this the Referee hasn't any reason to disbelieve the testimony of any of the witnesses."

This statement does not appear fully consistent to us with other portions of the Referee's original order, which suggest that the Referee's assessment of claimant's credibility was considerably more adverse to claimant's position. The Referee noted the testimony of one of claimant's supervisors, Bruce Leonard, to the effect that claimant had told Leonard that he had a left elbow condition that required ulnar nerve transposition surgery before any doctor treating claimant for this alleged injury could possibly have so stated to claimant. The Referee noted that three physicians had separately recorded a history that claimant had sustained left elbow injuries before the alleged fall at work; that claimant denied prior injuries in his hearing testimony; but that: "Claimant was unable to explain how three different doctors acquired similar histories despite his contention he had never injured his left elbow prior to February 21, 1982." After summarizing these circumstances, the Referee concluded: "The accident was staged by claimant in the manner contended by [the employer] in order to obtain medical attention, time loss compensation and a possible permanent disability award for a pre-existing condition which had progressed to the point where claimant was willing to undergo surgery."

The Referee's second order, in which he reversed himself and found this claim compensable, was based primarily on new evidence in the form of a radiologist's report to the effect that x-rays taken at the hospital after claimant's alleged fall indicate a chip fracture or flake fracture of the left radial head. The Referee reasoned that: "Such a fracture is evidence of the application of external force which is most likely to have resulted from trauma." The Referee's second order also contained another general statement regarding credibility:

> "Claimant appeared to be credible but professed to be unable to remember events which the Referee thought the average person would probably remember. Thus, based on claimant's attitude, appearance and demeanor as a witness the Referee cannot fault his credibility as human beings are entitled to their frailities and shortcomings, including bad memories."

Only one of the specific credibility problems that had been discussed in the first order was also discussed in the second order -- the question of prior elbow injuries. The Referee reasoned in his second order that the employer's failure to produce evidence from doctors about treatment of claimant's left elbow before the alleged work injury supported a finding that "claimant did not have any treatment for any left elbow condition or injury prior to February 21, 1982" and that the contrary history recorded by three different doctors "was a misunderstanding."

The Referee's third order, in which he reversed himself again and found this claim not compensable, was also based in part upon new evidence, i.e., another report from a radiologist stating that the x-rays did not reveal any fracture at or near claimant's left elbow. The Referee did not directly mention the credibility of the lay testimony in this third order, but discussed some apparent discrepancies in the medical evidence. The Referee's ultimate conclusion was that "the party with the burden of proof cannot prevail" because "the evidence is in equipoise."

The parties find little, if any, common ground on review. Claimant argues that the knowledge of ulnar transposition surgery he revealed at the time of his alleged left elbow injury here in issue arises from prior right elbow injuries. Likewise, claimant suggests that the medical histories that record prior left elbow injuries, which claimant continues to deny, could be the result of doctors confusing left and right. The employer responds that it is difficult to believe that three different doctors on three different occasions could separately make such a gross mistake.

We conclude that "difficult to believe" is an appropriate summary of our reactions to this record.

There is evidence of prior left elbow injury, both in claimant's contemporaneous history as recorded by three physicians and in claimant's statements to Darryl Pape, a supervisor, and implied by claimant's statements to Bruce Leonard, another supervisor. The Referee's orders do not suggest any reason to disbelieve Mr. Pape or Mr. Leonard in this regard.

We do not understand any party on review to dispute the Referee's finding in his original order that the grab bar on claimant's truck "was intentionally pried loose from its mounting between the time the unit was placed on the ready line and the time that claimant was dispatched." This finding was based on the Referee's "jury view" of the truck and cogent evidence that the driver last using the truck prior to claimant would have but did not notice such a defect. There is no direct evidence about who damaged the grab bar, but just the existence of intentional damage is a suspicious circumstance.

Nobody actually saw claimant fall. The testimony of a co-worker, Robert Graber, could circumstantially support a finding that claimant fell, but it is far from conclusive.

Despite an alleged fall of up to three feet from his truck onto Graber's truck, little is reported in the way of external signs of trauma to claimant's elbow. We have considered Dr. Smith's statement that it is possible to sustain ulnar nerve damage at the elbow without visible damage to overlaying skin, but the fact remains that the lack of visible damage remains one of the suspicious circumstances in this case.

There is ambiguity about the location of the injury. One doctor noted that claimant was "point tender on the olecranon," i.e., the tip of the elbow, while another doctor seems to suggest that the trauma was at the ulnar groove "on the inside of the elbow." We would probably regard this ambiguity, standing alone, as rather insignificant; in this record, however, this is just one of several smaller problems that cumulatively make it difficult to accept claimant's story at face value.

Finally, there is the critical question of credibility. We do not understand any of the Referee's orders to have made a point-blank credibility finding. However, we note that the Referee expressed qualms about the testimony of only one witness, claimant. We also note an apparent evolution in the Referee's three orders. Hearing sessions were held on November 4, 1982 and January 10, 1983. The Referee's first order, dated January 21, 1983, was published when impressions formed at hearing would have been freshest in the Referee's mind; and that order, regardless of the exact wording used, was the most critical of claimant's credibility. The Referee's subsequent orders, published in March and May when memory of impressions at hearing would necessarily be less graphic, say less about credibility and what is said is less critical of claimant's testimony. This appears to us to be a situation in which first impressions, i.e., in the January order, are most reliable. In any event, viewing credibility as involving shades of gray rather than just black and white, we share the Referee's apparent doubts about claimant's credibility.

For all of these reasons, we agree with the Referee's ultimate conclusion that the persuasive evidence does not preponderate in claimant's favor.

ORDER

The Referee's ultimate order dated May 16, 1983 is affirmed.

LYNNE D. ALDRICH, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-04261
December 14, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee St. Martin's order which upheld the SAIF Corporation's denial of her claim for a neck and shoulder injury. On review, claimant contends her claim is compensable and that she is entitled to interim compensation, penalties and accompanying attorney fees.

The Board affirms the order of the Referee with the following comment. Inasmuch as we agree with the finding that claimant was not a subject worker, it follows that she is not entitled to interim compensation. See Bell v. Hartman, 289 Or 447 (1980).

ORDER

The Referee's order dated May 15, 1984 is affirmed.

ERVIN EDGE, Claimant
Pozzi, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 79-04080
December 14, 1984
Order on Remand

This case is before the Board on remand from the Court of Appeals with instructions to adjudicate claimant's petition for attorney's fees.

As a reasonable attorney's fee for services in this matter, claimant's attorney is allowed an award of 25% of the increased compensation awarded under the Court of Appeals order not to exceed $3,000 to be paid out of claimant's compensation.

IT IS SO ORDERED.

DONALD G. PERKINS, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-04408
December 14, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Seifert's order which upheld the SAIF Corporation's denial of his aggravation claim. On review, claimant contends his low back condition has materially worsened.

The Board affirms the order of the Referee with the following comment. To prove a compensable aggravation, the evidence as a whole must show a worsening of claimant's condition resulting from the original compensable injury. ORS 656.273(1) and (7). A physician's report is not required to be statutorily sufficient, but the worker's or other lay testimony may or may not carry the worker's burden. Garbutt v. SAIF, 297 Or 148, 151 (1984). Although claimant has submitted medical reports from several physicians which basically support his claim, as well as his own testimony that his condition has worsened, because of the contrary medical evidence and claimant's activities during the time in question, we are not persuaded that claimant has established a compensable aggravation claim.

ORDER

The Referee's order dated July 3, 1984 is affirmed.

FRANK AMATO, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-83007
December 17, 1984
Third Party Distribution Order

This matter is before the Board on application of the SAIF Corporation for an order distributing the proceeds of a third party recovery obtained by claimant. ORS 656.593(1)(d).

Claimant was injured in a motor vehicle accident in December of 1977 while working in the course of his employment. He filed a workers' compensation claim for injuries sustained as a result of this accident and also elected to pursue a civil action against the allegedly negligent third party. ORS 656.154, 656.578. The workers' compensation claim was accepted by the SAIF Corporation. SAIF periodically provided claimant's attorney with a statement of its claim costs.

On March 2, 1982 the third party action was settled for the sum of $145,000. SAIF approved this settlement. See ORS 656.587. By letter dated March 25, 1982 SAIF indicated that its claim costs exceeded $69,000. SAIF proposed a distribution according to the formula set forth in ORS 656.593 and stated that its auditors had projected $15,660 in future claim costs, including $7,500 in medical expenses and $8,160 in permanent partial disability. SAIF's letter stated: "These projected costs do not preclude the possibility of other costs as well, but are sufficient to allow the retention of the excess balance without dispute."

In a letter dated May 3, 1982 addressed to the Board and

SAIF, claimant's attorney took issue with the amount of current expenditures then claimed by SAIF. Counsel forwarded to SAIF a draft for about $64,750 "as reimbursement for the presumably legitimate expenditures." According to claimant's calculation, after deduction of attorney fees and litigation costs, claimant's statutory minimum percentage and SAIF's claim expenditures, a balance of $6,130.76 remained. This balance was placed in trust. With reference to SAIF's claim for anticipated future expenditures, counsel's letter stated:

> "These figures are interesting since SAIF denies that they owe [claimant] anything. Therefore, we think they ought to prove they are entitled to any of this money before they get it. In short, we are putting them on their proof."

By letter to the Board dated May 14, 1982 SAIF advised that their total claim costs as of that date exceeded $71,600. Because current claim costs exceeded the remaining balance subject to distribution (i.e., $70,880.07), SAIF suggested that the question of its projected future costs was irrelevant.

Claimant had requested a hearing contesting the permanent disability awarded by the Determination Order closing his claim. By letter dated October 22, 1982 the Board advised the parties that, in view of the pending litigation concerning extent of permanent disability, and since one of the issues in this third party distribution proceeding appeared to be the extent of SAIF's lien for anticipated future expenditures, if any, further proceedings would be held in abeyance pending final resolution of the permanent disability issue. See John J. O'Halloran, 34 Van Natta 1101, 34 Van Natta 1196, 34 Van Natta 1504 (1982).

By letter dated July 13, 1983, counsel for SAIF advised the Board that a June 1, 1983 Referee's order had awarded claimant compensation for permanent total disability and that the Referee's order had become final by operation of law. SAIF advised the Board that its lien for current claim costs amounted to $65,456.30. The actual expenditures claimed had been reduced as a result of "internal adjustments." See also John R. Blackman, 35 Van Natta 823 (1983); Shawn Cutsforth, 35 Van Natta 515 (1983). SAIF's current claim costs, deducted from the remaining balance of claimant's third party recovery ($70,880.07), resulted in a remainder of $5,423.77, which SAIF contended would constitute only a small portion of the reasonably to be expected future expenditures for compensation it would be required to pay claimant and/or claimant's wife as a result of the award for permanent total disabilty. SAIF has established a reserve of approximately $173,700 for claimant's permanent total disability award and an additional reserve of approximately $25,600 for compensation payable to claimant's wife.

On August 15, 1983 claimant's attorney advised the Board as follows:

> "SAIF has no lien for future expenditures and there is certainly no possibility they could have one.
>
> "In the past they were paid back a substantial sum on a lien out of the third party recovery. They were paid what they

told us in writing they were owed. They then attempted to claim further minor amounts. We objected and refused to pay. This was supposed to be brought up by SAIF at the hearing when the Referee declared claimant permanent and total. SAIF did not pursue the matter before the Referee and now for the second time has waived such claim.

"There is nothing before the Board to issue any kind of order on anything. The order has already been entered on the compensation claim."

In April 1984 the Board inquired whether the parties would be willing to stipulate that SAIF's reserve for claimant's permanent total disabilty award and additional reserve for benefits payable to claimant's wife, when reduced to their actuarial present value, would equal or exceed the sum of $6,130.86. See Denton v. EBI Companies, 67 Or App 339 (1984). In response the Board received SAIF's statement to the effect that it would be willing to so stipulate and further that, through May of 1984, SAIF's actual claim costs exceeded $89,450 (including more than $46,000 in temporary total disability benefits, $25,800 in medical benefits and $17,500 in permanent total disability benefits paid from June 1, 1983 through May 1, 1984). SAIF's letter stated: "Consequently, I think the Board could resolve this matter in favor of SAIF just based upon its actual claim costs to date without getting into the question of the 'present value of its reasonably to be anticipated claim costs.'"

The Board also received a response from claimant's attorney reiterating that SAIF had been paid "the amount of its claimed lien"; and asserting that claimant was entitled to be reimbursed for certain amounts paid to SAIF which constituted "charges . . . incurred by SAIF in an effort to defeat [claimant's] claim . . . [which] had absolutely nothing to do with his medical care and treatment." Counsel also stated that, at the time of claim closure, SAIF did not notify claimant of "the amount for which [SAIF] would still be responsible"; and suggested that the Board schedule a hearing in order to "put SAIF on their proof on all of the matters raised heretofore by me."

Initially, and in response to claimant's suggestion that an evidentiary hearing is appropriate to resolve this controversy, we note that the parties have submitted correspondence stating their respective positions concerning the issue before us, and that, in our opinion, these written submissions provide an adequate basis for resolution of this dispute. We also believe the record has been sufficiently developed for purposes of judicial review, in the event either party files a petition. See Schlecht v. SAIF, 60 Or App 449 (1982); Blackman v. SAIF, 60 Or App 446 (1982).

With regard to claimant's contention that he is entitled to reimbursement for charges incurred by SAIF in an effort to defeat his claim, this is apparently a reference to costs incurred by SAIF in connection with examinations and reports by the Orthopaedic Consultants. SAIF has already eliminated this expense (in the amount of $1,150) from its claim against the balance of the third party recovery, and claimant deducted this expenditure when the initial tender was made in May of 1982. Neither claimant nor SAIF has identified any other similar expenditure.

The question remains whether the balance of $6,130.86 should be paid to claimant or to SAIF. Claimant contends that SAIF has waived any possible claim to payment of additional sums from claimant's third party recovery. Although it is not entirely clear, we believe that claimant advances three reasons in support of this contention: (1) SAIF made a claim for a certain sum in satisfaction of its lien, and claimant's initial tender of approximately $64,000 satisfied this claim; (2) SAIF allegedly failed to inform claimant at the time of claim closure "of the amount for which [SAIF] would still be responsible"; and (3) at the time of the proceedings before the Referee concerning the extent of claimant's permanent disability, SAIF failed to pursue the matter of its lien.

SAIF has not waived any issue arising under the third party distribution statutes because the Referee who awarded claimant compensation for permanent total disability did not have jurisdiction to consider any issue concerning the proper distribution of the proceeds of claimant's third party recovery. See Marvin Thornton, 34 Van Natta 998 (1982).

Nor did claimant's tender in May 1982 satisfy SAIF's lien in its entirety. Shortly after SAIF approved the settlement of claimant's third party action, claimant was advised of the amount of expenditures claimed by SAIF in satisfaction of its lien, including anticipated future claim costs. Claimant tendered a check in the amount of those expenditures he believed were properly included as part of SAIF's lien for actual claim costs, and claimant essentially denied that SAIF would incur future costs in association with this claim. At no time did SAIF accept payment from claimant with the understanding that its lien had been satisfied in full. In fact, SAIF promptly initiated this proceeding when it became aware that there was an issue concerning the amount of its lien. There is no basis for concluding that claimant's tender was accepted in full satisfaction of SAIF's lien.

Claimant's apparent contention that SAIF was required to identify its anticipated future expenditures at the time of claim closure does not, under the circumstances of this case, appear relevant. Although this point is not entirely clear, there has been at least the suggestion in prior decisions that the juncture at which the paying agency is required to identify its anticipated future claim costs is the time that the third party recovery is obtained. "[T]he paying agency is repaid what it has paid out as of the time of recovery and may retain the present worth of estimated future expenditures." SAIF v. Parker, 61 Or App 47, 53 (1982). Similarly, in Henry Kochen, 9 Van Natta 95, 97 (1972), we stated:

> "The paying agency is required upon approval of the third party settlement to make a determination on what the future anticipated expenditures will be. It would appear on approving settlements, the paying agency may reserve rights on any additional sums which may be involved to this extent."

In this case, SAIF notified claimant, upon approving claimant's settlement, of what it anticipated that future claim costs would be. It was unknown at that time, however, that claimant

eventually (approximately one year later) would receive an award for permanent total disability. If there is any issue of substance in this case at all, it is the question of whether we should resolve this dispute on the basis of the facts and circumstances at the time claimant's third party action was settled, or whether we should rely on present circumstances.

In view of the passage of time since claimant settled his third party action in March of 1982, SAIF has incurred additional claim costs, as reflected by the most recent information submitted to the Board. The above-quoted statements from Parker and Kochen suggest that, in addition to identifying its anticipated future expenditures at the time of a third party recovery, the paying agency is to be reimbursed for the amount of its actual claim expenditures as of that time. There is obviously a significant difference between the claim expenditures made by SAIF as of the time of claimant's settlement, and SAIF's actual expenditures as of May 1984. A large percentage of this difference is attributable to the fact that claimant has been adjudged permanently and totally disabled in the interim.

Because SAIF's current expenditures exceed the balance remaining after partial distribution pursuant to ORS 656.593(1)(a) and (b) ($70,880.07), it makes sense that SAIF is entitled to be paid the entire balance pursuant to ORS 656.593(1)(c). This may appear inconsistent with the notion that the paying agency is reimbursed for its accrued claim costs as of the time of a third party recovery; however, we believe it is entirely consistent and in furtherance of the underlying purposes of the third party recovery statutes: payment of the claimant's damages by the ultimate wrongdoer, and the avoidance of a double recovery by the claimant. 2A Larson, Workmen's Compensation Law, §§ 71.10, 71.20 (1983). We believe we are permitted, if not required, to decide the distribution question based upon facts and circumstances existing at the time a dispute is resolved (i.e. present circumstances). Although in some situations it may be appropriate to decide the question in consideration of the circumstances existing at the time a settlement is effected, see e.g. Robert T. Gerlach, 36 Van Natta 293 (1984), this is not such a case. Indeed, the reason that we held this proceeding in abeyance pending resolution of the extent-of-disability proceeding was to gain the advantage of knowing how disabled claimant is as a result of his industrial injury. Now that we have this knowledge, as well as the additional information that claimant has been receiving this compensation for over a year, we believe it is appropriate to consider it in making a proper distribution of claimant's third party recovery.

If we are mistaken in our conclusion that SAIF is entitled to retain the entire remaining balance in satisfaction of its total accrued expenditures (which presently exceed $89,000), and the issue remains one of SAIF's lien for reasonably to be expected future claim costs, we believe that SAIF has adduced sufficient evidence to establish that the present value of its future costs for payment of claimant's permanent total disability benefits and claimant's wife's related benefits are likely to equal or exceed the sum of $6,130.86. Claimant's statutory permanent total disability benefit is $868.07 per month. This amounts to a yearly payment of approximately $10,416. Claimant is presently 54 years of age. It seems beyond cavil that the permanent total disability

benefits payable to claimant for the remainder of his life, even without consideration of the related benefits payable to claimant's wife, when reduced to their actuarial present value, are likely to equal or exceed the sum of $6,130.86. Accordingly, SAIF is entitled to be paid and retain this remaining balance.

ORDER

The remaining balance of the proceeds of claimant's third party recovery shall be paid to and retained by the SAIF Corporation pursuant to ORS 656.593(1)(c).

GENE E. FISHER, Claimant
Carney, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03686
December 17, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Knapp's order which set aside its March 19, 1982 denial of aggravation for claimant's cervical condition.

Claimant, a truck driver, was originally injured on June 17, 1980 when his truck rolled over. His neck was fractured, resulting in a 30% displacement at C4-5. Claimant was discharged after one week in the hospital wearing a halo brace. Claimant came under the care of Dr. Ray Miller. On July 1, 1980 Dr. Miller noted that, although claimant's cervical spine had been placed in alignment by the brace, claimant was still experiencing neck pain, discomfort in his left upper arm and moderate weakness in his left bicep muscle. By July 14, 1980 Dr. Miller additionally noted mild weakness in claimant's left deltoid and triceps muscles and a weaker left hand grip. In October 1980 claimant moved to Arizona where he came under the care of Dr. R. Wayne Wood. As of November 20, 1980 Dr. Wood reported claimant's complaints as:

> "[P]ain in the posterior aspect of the neck which radiates to the left shoulder area whenever he places his neck in a forward position. Elevation of both arms causes a tingling sensation down the entire aspect of both hands to the fingers. He states that when he flexes the neck, he gets tingling into both hands. He complains of rare episodes of left leg weakness. He also complains of fasciculation-like activity in the left upper arm."

X-rays showed slight narrowing at C4-5 and slight bony calcification from C3 to C7. Dr. Wood found claimant unable to return to his occupation as a truck driver at that point because of his injury.

Claimant was then examined by Dr. George Martin, neurosurgeon, who reported on January 14, 1981 that claimant should be able to return to work within a couple of weeks' time. At the time of Dr. Martin's examination, claimant was complaining of some aches and pain in the left posterior neck. He had very slight weakness of the left tricep muscle. Then, on January 27, 1981, claimant reported he was asymptomatic, and Dr. Wood released him to return to work with no restrictions effective February 2, 1981.

In the first part of March 1981 claimant obtained a job with the Aptco Corporation in Arizona as a truck driver hauling asphalt oil. On that job, he had trouble lifting the oil drain pipes and turning his head to drive. By March 24, 1981 Dr. Wood reported that claimant's recent return to work had resulted in an onset of pain in the left shoulder and slight tingling in his left arm. He did not consider claimant's condition stationary at that point.

In April 1981 claimant changed his employment to an operator of a boom truck for Trico Electric in Arizona. In this job, he worked as a groundsman while assisting workers who were working in the boom bucket. This job required prolonged upward gazing towards the boom bucket and resulted in neck pain on the left side which radiated into his left shoulder. He also developed a grinding sensation in his neck when he rotated it to the right.

Claimant continued working at Trico Electric and, on May 13, 1981, Dr. Wood wrote:

> "Mr. Fisher is now approximately 11 months since sustaining a fracture dislocation of his cervical spine. He is currently working fulltime and has no significant symptoms relative to his injury. He still gets some pain when looking upward for long periods of time, but this is probably something that would be present in spite of his injury. His radicular symptoms and physical findings have resolved. At this time I feel that his condition can be finalized and that his condition is permanent and stationary. He is considered to have a 15% physical impairment and loss of physical function. I feel that no further followup is indicated at this time. However, because of this fracture dislocation, he may go on to develop a spontaneous fusion of the involved spinal segments or may develop premature degenerative disc disease and degenerative arthritis."

Claimant's Oregon claim was closed by Determination Order dated July 7, 1981 with an award of permanent disability equal to 16° for 5% unscheduled disability for his neck injury. Claimant appealed that award. Meanwhile, he continued to work for Trico Electric. He testified that his strength never did come back fully in his left arm and that he continued to have tingling in his arms that steadily grew worse. By January 1982 claimant noticed tightness in his neck and snapping. Claimant testified:

> "[I]t finally got to the point where if I would stand and look up for like fifteen, twenty minutes straight and start to bring my head down, quite often I would have to force my neck down, and it would snap and grind." (Tr. 19).

On January 7, 1982 Dr. Wood requested of SAIF that the claim be reopened for symptomatic care of claimant's neck. He noted

that claimant had increased pain in his neck with diminished motion, accompanied by popping and grinding. X-rays showed continued degenerative changes, but no acute changes. He advised claimant to rest his neck as much as possible and placed him on Clinoril medication.

Meanwhile, not knowing to whom the responsibility for his present neck disability accrued, claimant also filed a claim with Trico Electric. This claim was eventually accepted and claimant received time loss benefits from February 2, 1982 through September 17, 1982.

On February 2, 1982 Dr. Wood noted an acute flareup of neck pain that claimant experienced while turning his head while getting out of his car. He noted limited range of motion of the neck in all planes with muscle spasm and tenderness. Dr. Wood recommended rest and limited work. On February 9, 1982 Dr. Wood noted that claimant's pain had decreased, but that he still had tightness and limited motion in his neck. The chart note indicated: "We will see him again in one week, and can hopefully get him back to work."

By February 15, 1982 Dr. Wood wrote SAIF, stating he hoped he could get claimant back to work in approximately one more week, "however, his job requires that he work long hours with his head tilted back and looking up. This is not the ideal type of occupation for an individual who has had a cervical fracture dislocation." Dr. Wood prescribed physical therapy for claimant which significantly improved his neck mobility and pain. However, in his chart note of February 23, 1982 Dr. Wood stated, "I have again told him that the type of work he does with his head extended position is likely to aggravate his symptoms, particularly in view of his history of significant neck injury."

By March 4, 1982 claimant's physical therapist noted occasional tingling in claimant's fingers when turning his head to the right side. On March 10, 1982 Dr. Wood wrote SAIF, stating:

> "Mr. Fisher still has some discomfort in his neck when looking upward. Unfortunately, he chose a type of work which would require him to look upward for prolonged periods of time. This type of activity might be expected to aggravate his fracture dislocation. However, his neck pain symptoms, both current and in the past, could also happen in a person with no previous injury history simply because of the strain of looking upward continually. It is very difficult to say how much more likely he is to have his current symptoms based on the previous injury than if the previous injury had not existed. Because of altered mechanics from his fracture injury, I feel that he is more likely to have subsequent problems as previously discussed."

In March 1982 SAIF denied claimant's aggravation claim, stating as the reason:

> "The file shows that your original accident

involved a fracture dislocation of the cervical spine. The file also shows a subsequent recovery. The medical report submitted in support of your claim for aggravation indicates that your current problem is actually a cervical strain superimposed upon the previous fracture. Your treating physician indicates that no definite causal relationship can be established between your current cervical strain and your previous industrial injury. Therefore, we can see no relationship between your current condition which may have been brought about by your current work activity and your original industrial injury of June 17, 1980."

On March 30, 1982 Dr. Wood noted decreased sensation in claimant's left hand with a positive Rhomberg test suggestive of a central nervous system lesion, probably from his neck fracture. He diagnosed acute cervical strain and status post-fracture dislocation cervical spine with radiculopathy. Dr. Wood stated:

"Mr. Fisher continues to have pain in limited motion in his neck which prevents him from doing his usual occupation. Because of the pain experienced in looking up for long periods of time, he should indefinitely avoid this type of work and should seek an occupation which does not require prolonged neck extension."

During this recent exacerbation beginning January 1982, claimant testified that his cervical condition was similar to his condition as it existed immediately after his injury, but that it was also different in that the additional problem of neck snapping did not start until about January 1982, while he was working for Trico Electric. He testified that the neck snapping seemed to come on over a period of about three months:

"Well, it started off with just -- oh, look up and then I'd look back down, my neck would snap a little bit. It just progressed from that to the point where it would actually catch, and I would have to either just force my neck, my head down or I would have to raise it back up, move it from side to side, move it around a little bit and just finally work it down where it was level again." Tr. 20.

Dr. Martin, who had evaluated claimant in January 1981, reexamined him in April 1982. At this time, Dr. Martin noted pain with extension of claimant's neck. A neurological examination revealed decreased sensation in the left supra orbital nerve distribution from the halo brace pin. Motor examination revealed definite weakness of the triceps muscle bilaterally. Deep tendon reflexes were active and equal bilaterally. In the bicep, triceps and brachioradialis, Dr. Martin concluded:

"It is my opinion that we cannot exclude a

herniated intervertebral disc, either at C4-5 or another level. I recommend a cervical myelogram. It is quite possible that this herniated disc was caused by his injury of June 17, 1980, and was probably aggravated by the injury of February 1, 1982. I do not believe he can perform his job at [Trico Electric]."

On April 16, 1982 Dr. Wood noted that claimant had begun to develop radicular symptoms in both his right and left arms. Claimant had slightly decreased sensation in the C6-7 distribution of the left hand, and his finger flexor power was diminished in both hands. Dr. Wood noted that claimant was going to change occupations and try to return to work by starting a new job driving a convenience food truck. In April claimant started working for the Charles Chip Company delivering snack foods.

In May 1982 Dr. Martin stated that claimant should have a cervical myelogram to rule out a possible herniated disc. At that time, an issue arose as to who should pay for the myelogram -- the Arizona insurer for Trico Electric or the Oregon insurer for the original truck accident injury. Dr. Martin thought the Arizona insurer should pay for the myelogram because it would "tend to delineate whether or not the patient had a herniated disc which was caused by his previous injury or whether the present condition was related to his recent work activities where he extended his neck." Dr. Martin thought that if the myelogram was normal, he would tend to think claimant's current condition was simply a muscle strain which would be the responsibility of the Arizona insurer, rather than a herniated cervical disc which would be the responsibility of the Oregon insurer. On June 8, 1982 his chart note concluded: "It is my opinion that the extension of his neck has definitely aggravated his preexisting condition, and I would strongly recommend that he should desist from occupations which would require extension of the cervical spine."

A myelogram was performed on August 20, 1982 and, on September 2, 1982, Dr. Martin's chart note for that date stated: "I note that the patient most likely does have a muscle strain, and he should be on isometric exercises for the neck to help strengthen his neck muscles." However, on September 7, 1982 Dr. Martin's chart note stated that claimant still had some tingling in his upper extremities with more on the left side than the right. In an addendum to that chart note, Dr. Martin gave the opinion that claimant's aggravation from February 1982 was stationary with no permanent impairment. He thought that claimant's perexisting condition had been temporarily aggravated, but was now resolved. However, he also had the opinion that claimant "may have continuing symptoms based on the previous injury of June 17, 1980."

On October 4, 1982, in response to questions from claimant's attorney, Dr. Martin noted that claimant has continued to have off and on symptoms since the June 17, 1980 injury up to the present time. He thought the original injury contributed to claimant's worsened condition in February 1982 and he characterized the February 1982 condition as an exacerbation of symptoms due to a muscle strain of claimant's neck. He felt this aggravation was only temporary and had resolved and that the continuing symptoms were based on claimant's previous injury of June 17, 1980. The

continuing symptoms consisted of pain in claimant's neck, especially on the left side, with occasional tingling in his upper extremities. He attributed this to extradural defects at C3-4 and C4-5 that were revealed in a myelogram performed on August 20, 1982. He considered these defects to be the result of the June 17, 1980 injury. He then recommended several restrictions for claimant based on these continuing symptoms.

On October 21, 1982 Dr. Martin repeated his opinion that the original Oregon injury was a material contributing factor to claimant's worsened condition in February 1982, that the February 1982 incident was a relatively minor injury, and that it "would not have been disabling to him if he had not had the previous injury."

Claimant testified that he presently has trouble with lack of left hand grip strength, loss of left arm stamina, arm tingling, inability to push and pull strenuously, and an inability to lift over 40 pounds. He has a limited range of neck motion with pain on extension and flexion. His left shoulder motion is limited due to radiating pain.

We draw the following conclusions with regard to the above evidence:

(1) Ever since the original Oregon injury, claimant has suffered off and on symptoms stemming from his fractured degenerated cervical spine, i.e. tingling down the arms, radiating pain and weakness. These symptoms would tend to worsen with activity,

(2) claimant's work activities at Trico Electric in Arizona contributed in causing a temporary worsening of claimant's preexisting condition,

(3) claimant's work activities at Trico Electric also caused a new and separate condition of cervical muscle strain,

(4) claimant's cervical strain had resolved as of September 7, 1982, and

(5) claimant's degenerative condition continued after that date, but was due solely to the original Oregon injury after September 7, 1982.

FRACTURE/DEGENERATIVE CERVICAL CONDITION

The evidence shows that Trico Electric, an employer subsequent to the Oregon employer, exposed claimant to work conditions which actually, although temporarily, worsened claimant's preexisting fracture injury. This presents a classic "aggravation versus new injury" dispute. However, the Referee declined to apply the last injurious exposure rule from Smith v. Ed's Pancake House, 27 Or App 361 (1976), finding that rule to be effective only when the insurers involved in the successive exposures are subject to the same workers' compensation law forum. The Referee relied on 4 Larson's, Workmen's Compensation Law, § 95:22, 17-91 (1976) and Thomas v. Washington Gas Light Co., 448 US 261 (1980) for this holding. The Referee then applied the test set out in Grable v. Weyerhaeuser Co., 291 Or 397 (1981), and held that claimant's disability was still the responsibility of the Oregon insurer, SAIF, as long as claimant could show that his

original injury was a material contributing cause to his later disabling condition.

The last injurious exposure rule shifts responsibility of a condition to the last employment which contributed even slightly to the cause of the condition, while the Grable rule does not shift responsibility away from the originally responsible employer as long as that work injury remains as a material contributing cause of the disabling condition. The last injurious exposure rule applies to successive injurious work exposures, while the Grable rule applies to a situation where there has been a compensable, on-the-job injury and a subsequent off-the-job injury that contributed to the disabling condition. As between those two rules, the last injurious exposure rule is the more appropriate test to determine responsibility between successive injurious work exposures, regardless of whether one of those work exposures occurs outside Oregon. Daniel P. Miville, 36 Van Natta 1501 (1981).

Although the evidence shows that claimant's worsened fracture/degenerative cervical condition from January to September 1982 was due in part from claimant's original injury, the evidence also shows that the worsened condition was due in part to claimant's work activities at Trico Electric. Because claimant's work activities at Trico Electric actually, though temporarily, contributed to the worsening of claimant's condition, responsibility shifts from SAIF to Trico Electric for that condition from January to September 7, 1982 under the last injurious exposure rule. Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). Therefore, SAIF's denial is affirmed insofar as it denies responsibility for this condition between January and September 7, 1982. It is disapproved insofar as it may purport to deny this condition subsequent to September 7, 1982.

CERVICAL STRAIN

The evidence shows that Trico Electric was solely responsible for claimant's cervical strain. It appears from the record that Trico Electric accepted the cervical strain condition and paid benefits based on that claim. Therefore, SAIF's denial is affirmed insofar as it denied that condition.

In conclusion, we find that claimant's cervical muscle strain was properly processed as a temporary condition through the Arizona workers compensation law as the responsibility of the Arizona employer. We further conclude that claimant's ongoing residual symptoms, as outlined by Dr. Martin on October 4, 1982, remain the responsibility of SAIF. We affirm SAIF's March 19, 1982 denial insofar as it denies responsibility for claimant's cervical muscle strain which had resolved by September 7, 1982, and insofar as it denied responsibility for claimant's fracture/degenerative condition between January and September 7, 1982.

Finally, as indicated by the Referee in his order, claimant's current compensable neck fracture injury is not stationary, as Dr. Martin has recently discovered two disc herniations at C3-4 and C4-5. Claimant is not medically stationary, and, therefore, evaluation of claimant's extent of disability would be premature at this time.

ORDER

The Referee's order dated December 23, 1982 is modified in part. The SAIF Corporation's denial dated March 19, 1982 is affirmed insofar as it denies responsibility for claimant's cervical strain and fracture/degenerative condition from January to September 7, 1982. It is disapproved insofar as it denies compensability of claimant's fracture injury and its ongoing symptoms. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $600 for services on Board review for prevailing on the ongoing compensability of claimant's cervical fracture injury, to be paid by the SAIF Corporation.

DAVID M. LINDAMOOD, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-04069
December 17, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Quillinan's order which set aside the parties' settlement of claimant's knee injury claim. The settlement was based on the existence of "a bona fide dispute over compensability" within the meaning of ORS 656.289(4). The Referee vacated the settlement based on her finding that it was the product of a material mistake.

Both parties raise jurisdictional issues on review. SAIF argues that the Referee lacked jurisdiction to set aside the disputed claim settlement because that action exceeded the scope of our prior remand in David M. Lindamood, 35 Van Natta 851 (1983). Claimant argues that the Board lacks jurisdiction to review the Referee's order because it is only an interim order and not a final order. Both parties alternatively present their respective positions on the question of the validity of the disputed claim settlement, claimant now contending it is invalid and SAIF contending it is valid.

At the time of claimant's alleged work injury, a union contract provided that he would receive full salary while disabled. Since temporary total disability benefits are only two-thirds of wages, see ORS 656.210, this contract provision required claimant's employer to continue to pay him one-third of his wages while he was off work due to a work injury. The employer made some payments to claimant under this provision before the parties executed the disputed claim settlement. After that settlement was executed, the employer took the position that it was entitled to reduce claimant's accrued sick leave by the amount paid claimant while he was off work.

In an order entitled "Interim Order," the Referee set aside the disputed claim settlement. She found that a material mistake had occurred, i.e., that claimant was unaware of the union contract provision which could be interpreted to allow deductions from his accrued sick leave after his workers' compensation claim was resolved pursuant to ORS 656.289(4). The Referee reasoned that if claimant had a duty to inquire about the provision, the employer had a commensurate duty to notify claimant of the provision.

In a subsequent order entitled "Amended Interim Order," the Referee declined to retitle her previous order, concluding there had been no resolution of any substantive aspect of the claim. The Referee also ordered claimant to repay the $9500 paid him pursuant to the settlement that she had vacated.

We conclude that these two orders are reviewable at this time. The Referee's designation of an order as "interim" is not dispositive of our jurisdiction to review it. Harris E. Jackson, 35 Van Natta 1674 (1983); see also Price v. SAIF, 296 Or 311 (1984). The fundamental question is: Were the questions raised by the hearing request answered in the Referee's order? We conclude that they were with sufficient finality that review should proceed at this time. The issues included the terms and enforceability (and thus, by necessary implication, the validity) of a settlement. Those issues were addressed and resolved by the Referee in her orders; as to those issues, nothing remains to be resolved at the hearings level. Price v. SAIF, supra. In addition, significant rights have been altered by virtue of the Referee's orders. The claim is no longer settled. Claimant has been ordered to repay the sums paid to him pursuant to the settlement.

On the merits, we conclude that the disputed claim settlement has not been established to be invalid. We have previously concluded that such settlements should be set aside only in the most extraordinary circumstances. Mary Lou Claypool, 34 Van Natta 943, 946 (1982); see also James Leppe, 31 Van Natta 130 (1981).

We do not think that this record demonstrates sufficient grounds to justify such a drastic remedy. The most that can be said is that, at the time the disputed claim settlement was negotiated, neither party gave any consideration to claimant's sick leave benefits or the possible impact on those benefits that the provision in the union contract might have. Claimant testified that his sick leave benefits were definitely important to him and that if he had known they would be reduced he would not have agreed to the settlement. However, he admitted he had read the union contract; that he was aware he had a union steward; and that he did not discuss his sick leave benefits with his attorney before agreeing to the settlement.

The parties entered into the settlement to avoid litigation of a claim where there was a bona fide dispute about compensability. Their agreement achieves this purpose. We are convinced that the collateral effect of the union contract provision could not reasonably have been a material consideration in the mind of either party in the negotiated resolution of their dispute.

ORDER

The Referee's orders dated October 18, 1983 and November 7, 1983 are reversed. The disputed claim settlement dated April 27, 1982 is reinstated. Claimant's request for hearing in this case is dismissed.

PATRICK M. HANNUM, Claimant
Allen & Vick, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-11929
December 18, 1984
Order Granting Motion to Stay Briefing

The insurer has moved for an order staying the briefing in this case. Claimant opposes the insurer's motion.

This case is before the Board on the insurer's request for review of a Referee's order which granted claimant an additional award for permanent disability. After that Referee's order was published, the insurer issued a backup denial on the basis of fraud, and claimant has filed a request for hearing on that denial, which is now pending. The insurer moves to stay briefing in this case pending resolution of the pending case that involves the compensability of this claim.

It is not completely clear how this motion raises the question of the need to comply with an unsatisfied litigation order following a backup denial, but the parties argue the motion as though that were the central issue. For example, the insurer's motion states:

> "Until and unless the denial is reversed the present appeal is moot since there can be no award of permanent partial disability in a denied claim." (Emphasis in original.)

In further support of its motion, the insurer argues:

> "The fact remains, however, that there is no valid aggravation claim upon which to base an award of disability. The claim is presently denied. No permanent disability can be awarded in a denied claim." (Emphasis in original.)

Joining the parties in the assumption that the issue is now properly before us, we conclude that there is no duty to pay compensation, including compensation awarded by litigation order, after issuance of a backup denial.

ORS 656.262(2) provides:

> "The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto . . . except where the right to compensation is denied by the insurer or self-insured employer."

Paraphrasing this statute, it clearly states without qualification or limitation that compensation due or allegedly due under ORS chapter 656 need not be paid if the claim for the compensation in question has been denied.

The suggestion is made that ORS 656.262(2) conflicts with ORS 656.313(1) on the facts of this case. ORS 656.313(1) 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."

I.

In our opinion, these two statutes can readily be read so as to avoid any conflict. ORS 656.313(1) is often paraphrased as requiring that compensation be paid pending appeal, but paraphrases can be misleading. ORS 656.313(1) only says that the act of appealing to a higher level does not stay the duty to comply with the order issued at the lower level. Just saying that one specific act does not stay a duty does not mean that there cannot possibly be other contingencies and/or other statutes that could be relevant to that duty.

To illustrate, suppose a claimant died shortly after being awarded compensation by litigation order. If that order were appealed, ORS 656.313(1) tells us that the act of appealing would not stay the duty to pay pursuant to the order being appealed. But we would have to look elsewhere, specifically ORS 656.218, to learn what impact the claimant's death would have on the duty to pay. And reading ORS 656.218(5) together with ORS 656.204, we learn that the death of a worker would terminate the duty to pay compensation awarded by litigation order if the worker died without surviving spouse, children, dependents or parents.

In the same vein, there is no real conflict between ORS 656.262(2) and ORS 656.313(1). The latter says that the act of appealing does not stay the duty to pay compensation. The former says that there is no duty to pay compensation following a completely different event, the denial of a claim. Just as in the hypothetical death of a worker discussed above, different statutes cover different contingencies; and the only conflict between them arises from failure to appreciate the finite scope of each.

II.

Assuming, alternatively, that there is some possible conflict between ORS 656.262(2) and ORS 656.313(1), we turn to the usual rules of statutory construction. We conclude it is considerably more likely that the legislature would have intended the rule in the former (no compensation due after a claim is denied) prevail over the rule in the latter (compensation due pursuant to litigation order must be paid pending appeal).

Statutes should be interpreted to avoid absurd results. We believe it would be absurd to require an employer/insurer to continue to pay compensation after a backup denial is issued on the basis that the claim was fraudulent. Admittedly, the termination of compensation benefits could be a hardship for a claimant; but it is hard to imagine why the legislature might have viewed termination of benefits after a backup denial as different from termination of benefits (interim compensation) after a denial in the first instance.

Moreover, there are at least two significant safeguards for claimants. First, our rules of practice and procedure provide for an expedited hearing at the request of a claimant. OAR 438-06-075 and 438-06-110. Second, the employer/insurer will be responsible for fees for its attorney and for claimant's attorney if claimant prevails, ORS 656.386(1), and may be responsible for an additional penalty if the denial is found to be unreasonable, ORS 656.382(1).

On the other hand, if a backup denial does not terminate the duty to pay all compensation pending a decision that the denial is

wrong, there would not even be any incentive for an allegedly fraudulent claimant who was continuing to receive benefits to request a hearing on the denial.

It is quite possible that the legislature never contemplated this precise situation. As Justice Holman once stated in a different context:

> "We have to admit that the legislature probably never considered our present problem in adopting the language of the statute. However, if it had considered the problem, we suspect that it would have [written the statute consistent with the court's interpretation]." State v. Welch, 264 Or 388, 394 (1973).

We conclude that if the legislature had specifically considered the question of whether it was necessary to continue to pay compensation after a backup denial on the basis that the claim was fraudulent, it would have answered that question in the negative.

III.

Unlike our dissenting colleague, we do not believe that any prior appellate court decisions have considered or resolved the exact issue before us. In Maddocks v. SAIF, 295 Or 448, 454 (1983), the Supreme Court held that "a determination of disability would not be stayed pending an appeal of compensability." However, the facts in that case were the converse of the facts in this case. The claim in Maddocks was initially denied. A Referee set aside the denial and, pursuant to that decision, the claim was in accepted status when the issue of extent of disability began to wind its way through the litigation process. In the context of a claim in accepted status by litigation order, the Supreme Court held that the extent-of-disability litigation should not be stayed pending conclusion of the compensability litigation.

In this case, by contrast, the claim is not now in accepted status because of the insurer's backup denial. Given that the claim is in denied status, ORS 656.262(2) becomes relevant. That statute could not have been relevant in Maddocks because the claim was in accepted status, and thus the decision in Maddocks could not possibly have resolved any real or imagined tension between ORS 656.262(2) and 656.313(1).

ORDER

The insurer's motion to stay briefing is granted.

Board Member Lewis Dissenting:

I respectfully dissent.

The Supreme Court has held that the proceedings on the issue of extent of disability should not be stayed pending disposition of litigation on the underlying compensability of the claim. Maddocks v. SAIF, 295 Or 448 (1983). The court in Maddocks relied on ORS 656.313 and stated:

> "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. . . . We so hold." 295 Or at 454.

Although Maddocks involved a situation in which the extent issue was raised after litigation on the compensability issue had begun, the policy considerations which persuaded the court in Maddocks seem equally applicable when the compensability issue arises after litigation of the extent issue has begun. In Maddocks, the extent issue arose because the various tribunals had overturned SAIF's initial denial and therefore by order the claim was in open accepted status. In this case, the extent issue arose when the claim was in accepted status due to the insurer's actual acceptance of the claim. In both cases the possibility exists that the compensability issue will ultimately be resolved in favor of the insurer, thus mooting the extent issue. Nevertheless, the court held that the extent litigation should not be stayed pending ultimate resolution of the compensability litigation. I see no reason why this case should be treated any differently than Maddocks. Therefore, I would deny the motion to stay.

I also disagree strongly with the majority's dicta which approves the insurer's apparent unilateral termination of benefits ordered paid under the Referee's order. ORS 656.313 specifically provides that compensation shall not be stayed pending appeal. Thus there is no authority under 656.313 to stay payment of compensation.

The majority order states that this is not a situation in which compensation is being stayed pending appeal, but rather a situation in which the insurer is ceasing to pay benefits because it issued a denial pursuant to ORS 656.262(2). It is true that ORS 656.262(2) states that compensation due under Chapter 656 shall be paid "except where the right to compensation is denied by the insurer or self-insured employer." However, I believe that the statute is intended to apply to denials which deny claims in the first instance (whether claims for injury, occupational disease, aggravation or medical benefits) rather than to claims which are initially accepted and then later denied.

Although the statute is silent on this issue, I believe that had the legislature considered the problem it would not have written the statutes to allow an insurer to accept a claim, receive a Determination Order requiring payment, receive a litigation order requiring additional payment and then unilaterally stop paying benefits because of some newly developed evidence. Rather, I believe the legislature would have written the statute to require an insurer which once accepted a claim to continue paying benefits on that claim until some authority absolved it from that responsibility.

This is supposed to be an orderly process. I fail to understand how it is in the interests of maintaining an orderly process to allow an insurer to accept a claim and then unilaterally stop paying benefits when it develops evidence which calls into question the underlying compensability of the claim. Of course the Supreme Court does not even allow backup denials except in the case of fraud, misrepresentation or other illegal activity. Bauman v. SAIF, 295 Or 788 (1983). However, even where

backup denials are allowed, I believe an orderly compensation system is better served by requiring insurers to continue paying compensation ordered either by Determination Order or litigation order. Then if the insurer wishes to challenge the underlying compensability, it may do so by issuing a denial and requesting a hearing. Nevertheless, once a claim is accepted, I believe the insurer must continue to pay benefits it is ordered to pay pending a final order excusing it from paying.

RAMONA A. WAITS, Claimant
Allen & Vick, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08819 & 83-09909
December 18, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Fink's order which: (1) upheld the self-insured employer's denial of her injury claim for a "possible nerve" problem affecting her left hand; and (2) upheld the employer's denial of her occupational disease claim for a low back condition. On review, claimant contends the employer's denial of claimant's "possible nerve" claim is either precluded by: (1) Bauman v. SAIF, 295 Or 788 (1983), if viewed as a "back up" denial; or (2) Safstrom v. Riedel International, Inc., 65 Or App 728 (1983), if viewed as a partial denial. Claimant further contends her low back claim is compensable.

The Board affirms the order of the Referee with the following comment. Following our de novo review of the record, we conclude that the employer never accepted the claim. Consequently, its denial was not precluded by Bauman v. SAIF, 295 Or 788 (1983).

The employer processed the claim in "deferred nondisabling" status, paying for claimant's medical treatments and diagnostic examinations until it issued its denial approximately 3 months after the claim was filed. Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability. ORS 656.262(9). Claimant contends that the employer's attorney conceded at hearing that the claim had been "ultimately" accepted as a nondisabling injury. We do not interpret the attorney's opening statement as an admission or stipulation, and certainly not evidence, that the claim had been accepted; particularly where the record is contrary to such an interpretation.

ORDER

The Referee's order dated April 30, 1984 is affirmed.

GERALD L. MORRIS, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-01077
December 19, 1984
Order of Dismissal

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Presiding Referee Daughtry's order which directed claimant to sign certain medical release forms provided by the SAIF Corporation and declined to transfer this case to inactive status, as requested by SAIF. The issue on review, as framed by the parties' briefs, is the propriety of the Referee's order requiring claimant to sign the medical release forms.

Although neither party has raised the issue, we are constrained to consider whether we presently have jurisdiction to review the Presiding Referee's order. ORS 656.295 generally contemplates Board review of Referee's orders which are final. Whether an order is "final" and, therefore, subject to Board or judicial review may not always be readily determined. One definition of a final order is one which disposes of a claim or controversy so that no further action is required by the lower tribunal. Price v. SAIF, 296 Or 311, 315 (1984). Other relevant considerations were discussed in Harris E. Jackson, 35 Van Natta 1674 (1983), in which we mentioned "the reviewing body's interest in avoiding piecemeal review of multiple issues arising in a single case." 35 Van Natta at 1676.

By any definition, we believe the Presiding Referee's order is not a final order. It merely requires claimant to comply with SAIF's request for a current medical release. Furthermore, the order declines to transfer the case to inactive status and suggests that claimant's refusal to comply might be cause, in that event, to place the case inactive. The order does impose an obligation upon claimant, one of the considerations discussed in Jackson; nevertheless we conclude it is an interim order. See David Bartell, 29 Van Natta 876 (1980); John Swearinger, 29 Van Natta 269 (1980); Derral D. Kelley, 28 Van Natta 793 (1980).

In view of our conclusion that the Presiding Referee's order is not a final order, it necessarily follows that we presently lack jurisdiction to consider the issue raised by claimant's request for review.

ORDER

Claimant's request for review of Presiding Referee Daughtry's order dated July 26, 1984 is dismissed as premature.

FRANCIS G. SHAW, Claimant
Roll & Westmoreland, Claimant's Attorneys
Macdonald, et al., Defense Attorneys

WCB 83-04250
December 19, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Mulder's order which granted claimant an award for permanent total disability. Extent of disability is the only issue on review.

On June 3, 1977 claimant tripped over a hose while working in a fiberglass plant and injured his right knee. Five surgeries were subsequently performed on claimant's right knee. The last surgery was performed by Dr. Hazel on June 5, 1980. Claimant has received a total award of 240° for 75% scheduled disability to his right knee.

Prior to the last surgery in June 1980, claimant was participating in a vocational rehabilitation program to train him as an automobile painter. The program was interrupted due to surgery. Claimant reported to his counselor that he was unable to do the work required by the program. In October 1980 the counselor terminated the program stating:

"He does not feel that he is capable of engaging in a rehabilitation program at

this time and there is no intention to reinitiate a plan until such time as he obtains more medical improvement."

On February 16, 1981 Dr. Hazel reported:

> "This gentleman presents today and he has come to the end of a road as far as he is concerned, the therapist is concerned with physical therapy. He is at loose ends as to how to proceed. He wants to be trained in leather crafting- a craft that I'd hardly [sic] urge and endorse him to pursue but what he is finding is that the vocational rehabilitation people are unwilling to support him in that feeling that it is unrealistic for him to become self-employed. In any event, if that doesn't work, he is thinking of trying to go back to work in the fiberglass plant, and I must confess that I don't think he is going to make it although I will release him to do so--in extremis. I do believe he is now medically stationary and he has the following residuals: surgical excisions of both semi-lunar cartilages and chondromalacia of the patellar femoral groove and surgical absence of the patella and relaxation of the medial collateral ligaments and posteromedial capsule and in addition, he has a limitation of flexion that he can extend to neutral but can only flex to 110°. Taken conjointly, I would estimate his % of impairment of the lower extremity at around 65%."

In the fall of 1982 claimant entered a vocational rehabilitation program in drafting. In April 1983 the program was terminated because a new counselor felt that the drafting program was inappropriate for one of claimant's abilities. The counselor opined that a "hands-on" learning program would be better suited to claimant's abilities. Claimant declined any further vocational rehabilitation efforts.

We find that claimant has failed to prove permanent total disability. He is 37 years old with a ninth grade education. However, he is said to be functionally illiterate. Claimant has some brain dysfunction which causes him problems with learning and with memory. Claimant has a preexisting low back problem and a preexisting neck injury, however, there is no evidence that either condition is disabling.

Claimant is not permanently and totally disabled due to physical factors alone. Dr. Hazel estimated in May 1982 that claimant could frequently lift up to 25 pounds and could frequently carry up to 10 pounds. He opined that claimant could frequently bend and occasionaly climb and reach. He opined that claimant could not squat or crawl. He stated that claimant could sit four hours per day, could stand two hours per day and could walk two hours per day. He stated that claimant could do any one of those activities for two hours consecutively.

Claimant has an obligation under ORS 656.206(3) to establish that he is willing to seek employment and has made reasonable efforts to obtain employment. Claimant's only efforts at obtaining employment consist of an aborted vocational rehabilitation program in automobile painting which claimant declined to resume and vocational rehabilitation in drafting which was terminated by the counselor due to claimant's lack of abilities. Claimant has not sought work in any other way. He has also refused to accept further vocational assistance. We find that claimant has failed to satisfy the requirements of ORS 656.206(3) and accordingly reverse the Referee's order. We also find that claimant is not entitled to a greater award of scheduled disability for his right knee.

ORDER

The Referee's order dated October 7, 1983 is reversed.

ROBERT D. TUTTLE, Claimant
Robert Chapman, Claimant's Attorney
Mitchell, et al., Defense Attorneys

WCB 83-00642
December 19, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

The self-insured employer requests review of Referee Brown's order which set aside its denial of claimant's current low back and knee treatment.

Claimant has a long history of back problems which date back to the early 1950s. He has a military disability award for rheumatoid spondylitis. In 1966 a lumbar laminectomy was performed at L4-5. In 1969 claimant was examined by Dr. Gilsdorf who thought he had degenerative disc disease and a herniated disc.

The industrial injury here in issue happened in January 1978. Claimant compensably injured his low back while changing a tire on his delivery vehicle. An August 1979 Determination Order granted claimant an award of 128° for 40% unscheduled disability. In September 1979 Orthopaedic Consultants evaluated claimant. At that time they opined that he had moderate loss of function to his back with mild loss of function due to his compensable injury. His treating physician, Dr. McIntosh, concurred with the Consultants' report.

Claimant was treated by Dr. McIntosh for low back pain in November 1981 and September 1982. In February 1983, in response to an inquiry from the employer, Dr. McIntosh explained his recent treatment as follows:

> "I feel that his present back complaints are related to his back problem which antedated his January 20, 1978 injury . . .
>
> "In regards to his knee problem . . . I feel it is probable that his knee problems are on a degenerative basis, and are not directly related to his back. I do not feel it is related to his January 20, 1978 injury."

The employer then issued the partial denial here in issue.

We note that this is not a backup denial forbidden by Bauman v. SAIF, 295 Or 788 (1983). The employer is not trying to deny the claim ab initio. It is merely denying that claimant's current condition is causally related to claimant's compensable injury. Theoretically, even when such a denial is upheld, the claimant can later have his claim reopened or obtain medical benefits under ORS 656.245 if he can prove that his condition/treatment is then causally related to his compensable injury.

Claimant was examined by Dr. Morrison after the employer's partial denial was issued. Dr. Morrison focused on claimant's knee problem. He opined:

> "I think that his knee problems began at the time of the initial injury in the mid 60s which left his leg somewhat weaker. This was certainly aggravated by the 1978 injury, after which he became symptomatic. It should be noted that he had no symptomatic complaints regarding his right knee before the 1978 injury."

Both physicians were deposed. Dr. McIntire was adamant in his position that claimant's current back symptoms are unrelated to his 1978 compensable injury. He said there was a slight possibility that claimant's 1978 injury continued to contribute to his current problems, but he said it was no more than a possibility.

Dr. Morrison admitted that he was not particularly concerned with the back problems but was merely evaluating claimant's knee. He did opine, however, that claimant's compensable 1978 injury was a cause of claimant's current back and knee problems based on history. The doctor's analysis about the relationship of the knee condition to the compensable injury was specifically premised on the belief that the compensable injury continued to be a cause of claimant's back problems.

The Referee issued an order in which he indicated that he had made oral findings of fact at the conclusion of the hearing. For some reason those findings were not provided to us. A Referee who chooses to make findings on the record should make certain that those findings become part of the record. However, because we have the benefit of some of the Referee's reasoning in his written order and because, in any event, our review is de novo, we proceed to review this case without the Referee's oral findings.

The Referee summarized his findings:

> "I found that the medical evidence was not persuasive that claimant's medical care rendered by Dr. McIntosh September 14, 1982 was related to the January 20, 1978 injury; nor was it persuasive that it was not. In view of the fact that claimant had a 40 percent award which was not appealed by the carrier in 1979, I held that the employer had the burden of proving of non-compensability and had failed to sustain that burden."

We conclude that the Referee erred in assigning the burden of proof to the employer. Claimant has the burden of proving the compensability of his claim. We agree that the evidence is not persuasive that claimant's recent medical care rendered by Dr. McIntosh was related to the compensable injury.

Unlike the Referee, however, we find the evidence persuasive that it was not related. Dr. McIntosh treated claimant both before and after the compensable injury. He is rather certain and specific in expressing the opinion that, to a reasonable medical probability, his 1982-83 treatment is not related to the 1978 injury. We think this is an appropriate case to defer to the expertise of the treating physician rather than to a consultant who merely relies on a history.

ORDER

The Referee's order dated September 21, 1983 is reversed. The employer's denial dated March 4, 1983 is reinstated and affirmed.

JAMES W. WILEY, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-04506
December 19, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

The SAIF Corporation requests review of Referee Foster's order which granted claimant an award for permanent total disability in lieu of the 208° for 65% unscheduled disability previously awarded by Determination Order. Extent of disability is the only issue on review.

Claimant is a 54 year old former logger who on January 7, 1981 suffered an industrial injury which fractured his pelvis in several places. Prior to that injury claimant had suffered two additional industrial injuries for which he had been awarded 15% scheduled disability to his left leg and 15% unscheduled disability to his upper back.

On October 14, 1981 Dr. Filarski, claimant's treating physician, predicted that claimant's residuals from the injury to his pelvis would include degenerative arthropathy of the sacroiliac joints and residual nerve root pain. He also predicted that claimant's capacity for doing outdoor activities would be limited and that he would not be able to stand, walk, or sit for any prolonged amount of time. On October 21, 1981 Dr. Filarski wrote SAIF that claimant might be totally disabled and that his only potential for rehabilitation would be in very sedentary activities.

In March 1982 Dr. Filarski reported that claimant had not reached a medically stationary status, but would probably be stationary within six to eight months. Dr. Filarski again predicted claimant's status upon becoming medically stationary.

> "[Claimant] will likely be capable of sedentary activity, either with crutch or cane support and could, indeed, participate in a 'fix-it' business.

> "Other significant limitations would be bending, lifting and stooping. [Claimant] might likely require a high type stool for working at a bench for such 'fix-it' work."

In July 1982 the employer offered claimant a security job, modified to accommodate claimant's impairments. The security job consisted of sitting in a recliner or chair of claimant's choice observing an area of the employer's lot. Claimant could sit or stand as necessary. At the end of the afternoon work shift, claimant would have been required to collect ten pound radios from workers as they came off their shifts. The employer was willing to allow claimant to begin on a part time basis and see if he could later work up to full time. According to the safety coordinator for the employer, when he contacted claimant about this position claimant responded: "I have been trying to [sic] six months to make you 'so-and-sos' understand that I don't want no Goddamn job of no kind."

In September 1982 Crawford Rehabilitation reported on the results of an evaluation of claimant's work capacity.

> "At this point it appears that [claimant] can only stand a job that would allow for frequent changes in sitting, standing, and walking. Even with this, it would probably only be possible for him to work if his pain minimized to the level where he could concentrate more fully on a task. Combined with his inability to read or write, it is unlikely that such a job exists for him on today's labor market. It appears that his physical condition lowered his performance potential on every task attempted."

On October 15, 1982 Dr. Degge performed a closing evaluation of claimant. He concluded:

> "This workman appears to have made an excellent convalescence from a very serious pelvic injury. He continues to have residuals of sacroiliac pain, limiting his activities to 2-4 hours. There is also some residual first sacral neuropathy on the right. After reviewing the job description of Security Watch as proposed by [the employer], it is this examiner's opinion that the patient would be able to work in that capacity of a security watchman starting on an initial duration of 2-4 hours and gradually increasing his time as his comfort and tolerance dictated. It should be borne in mind that this workman is poorly motivated to return to work and that some instability of his pelvis may exist which will preclude a successful return to employment. However, there is no contraindication to his attempting to return to a watchman's job as outlined. He should at least make the effort from the standpoint of his overall well being."

On October 20, 1982 Dr. Filarski reported:

> "As a decision must be made, I could not disagree with Dr. Degge's considerations for return to light duty work anywhere from two to four hours and progress if tolerable. I feel on the other hand that [claimant's] side of this circumstance is to be well understood in the fact that he has had serious pelvic fractures, probably has SI joint arthritis, and is a very serious surgical candidate. Therefore, remaining conservative and considering permanent disability might be our only other alternative."

A Determination Order issued November 3, 1982 which granted claimant an award for 65% unscheduled disability.

On March 21, 1983 Dr. Filarski opined that claimant is "permanently disabled." On May 25, 1983 Dr. Filarski stated:

> "[Claimant] is slightly worse than when examined six months ago, has increasing evidence of arthritis, could be a future candidate for iliac wing and/or SI joint fusion, but because of his episodes of thrombophlebitis and potential for pulmonary embolus, this recommendation should be delayed unless symptoms are in the severe category. I don't feel [claimant] could consider even light duty work activity in which standing or walking was required."

The Referee concluded that based on claimant's medical condition alone, he is incapable of performing work in the general labor market. He, therefore, granted an award for permanent total disability. We disagree.

Dr. Degge stated that claimant is capable of performing the security job for two to four hours per day. He stated that it would benefit claimant to make the attempt. Dr. Filarski agreed. Thus the medical evidence establishes that from a physical standpoint alone, claimant could have performed the security job. This is unlike Phillips v. Liberty Mutual, 67 Or App 692 (1984), in which claimant was also offered a security job. In Phillips the court made the finding that claimant was physically incapable of performing the offered position. The court found it would have been futile for claimant to attempt to perform the offered job and, therefore, excused him from attempting to do so. In this case, we find that it would not be futile for claimant to attempt the security job offered by the employer. Because this attempt would not be futile and because claimant has not searched for work and has refused the offered employment we find that he has failed to satisfy the work-search requirements of ORS 656.206(3). Accordingly, we hold that claimant has failed to prove permanent total disability.

There is no doubt, however, that claimant is severely disabled. Based on de novo review of the record as well as the

guidelines contained in OAR 436-65-500 et seq., we conclude that claimant is entitled to a total unscheduled award for disability to his pelvis of 256° for 80% unscheduled disability. This award is in lieu of all previous awards for claimant's January 7, 1981 industrial injury.

ORDER

The Referee's order dated January 11, 1984 is reversed. Claimant is awarded 256° for 80% unscheduled disability in lieu of all previous awards for his January 7, 1981 industrial injury.

BETTY McGILL, Beneficiary
CLINTON S. McGILL (Deceased), Claimant
Haas & Benziger, Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-01436
December 20, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Fink's order that: (1) set aside SAIF's denial of claimant's claim that her deceased husband suffered from an occupational disease; (2) found that claimant is entitled to widow's benefits even though her husband committed suicide; and (3) awarded claimant's attorney a fee of $4000. Compensability of the occupational disease claim, claimant's entitlement to widow's benefits and the amount of attorney's fees are the issues on review.

The decedent was a respected physician in the Portland medical community. In the course of his specialty as a diagnostic internist he developed an expertise at testifying as an expert for defendants in personal injury cases. In May 1980 a malpractice action was filed against the decedent by someone upon whom the decedent had performed an independent medical examination. Shortly thereafter, in June 1980, the decedent experienced several short episodes of confused speech and numbness in his left side. The treating physicians diagnosed transient ischemic attacks, but were unable to find objective signs to support that diagnosis. In September 1980 the decedent began treating with Dr. Bloch, a psychiatrist. In October 1980 a second malpractice action was filed against the decedent.

In April 1981 the decedent suffered a manic episode during which his wife brought him before the Board of Medical Examiners. The Board temporarily suspended his right to practice medicine pending treatment at the Oregon Health Sciences University. The decedent was treated for bipolar disorder at OHSU by Dr. Kinzie, a psychiatrist, from April 9, 1981 through April 26, 1981. Thereafter, Dr. Kinzie continued to treat the decedent when Dr. Bloch was unavailable.

In August 1981 Dr. Bloch hospitalized the decedent with a diagnosis of depressive disorder. The decedent remained hospitalized continuously until his death. During the course of the hospitalization, Dr. Bloch became convinced that the major cause of the decedent's depressive disorder was the two malpractice actions. He opined that the episodes in June 1980 which had been diagnosed as tranisient ischemic attacks were actually manifestations of claimant's depressive disorder. In November 1981, following consultation with Dr. Kinzie, Dr. Bloch determined that the best course of treatment for the decedent included an effort to gradually return him to his normal life,

including the practice of medicine. As part of that return, Dr. Bloch issued day passes from the hospital for the weekend of November 7 and 8, 1981. On November 8, 1981 the decedent committed suicide.

Dr. Bloch, as noted, opines that the two malpractice actions are the major cause of the decedent's depressive disorder. Dr. Smith, another psychiatrist who was a personal friend of the decedent and who saw him in consultation, agrees. Dr. Kinzie opines that the two lawsuits "contributed greatly" to the decedent's condition. We find that the two malpractice actions were the major cause of the decedent's depressive disorder. Accordingly, we affirm that portion of the Referee's order which set aside SAIF's denial of the occupational disease claim.

A more difficult issue is whether claimant is entitled to widow's benefits in view of the fact that the decedent committed suicide. ORS 656.156(1) provides:

> "If injury or death results to a worker from the deliberate intention of the worker himself to produce such injury or death, neither the worker nor the widow, widower, child or dependent of the worker shall receive any payment whatsoever under ORS 656.001 to 656.794."

The appellate courts of this state have only discussed this statute once. In Jones v. Cascade Wood Products, Inc., 21 Or App 86 (1975) the Court of Appeals stated:

> "The workmen's compensation acts of 42 other states and the federal government contain similar provisions....[I]n most states where the issue has arisen, the courts have held that the restrictive statutes are not an absolute bar to recovery of death benefits in all cases where death is caused by suicide. See, Annotation, 15 ALR 3d 616 (1967). Although the language in many of the cases is confused, three different standards emerge from them. The most liberal could be called a 'but for' test. The suicide is compensable if 'but for' the injury the suicide would not have occurred. . . . Another standard often employed by the courts allows recovery only where decedent was acting while under the influence of an "irresistable impulse" which completely dominated his will, where this impulse resulted from a compensable injury. . . .
>
> "The most restrictive standard requires that the suicide take place where the actor is so deranged that the suicide is not the result of any conscious volition to produce death on the part of the actor, and the actor has no knowledge of the consequences of his act."

The court rejected the "but for" test and then found the claim was

not compensable because there was insufficient evidence to satisfy either the "irresistible impulse" test or the "insanity" standard. The court did not indicate which of those two standards should be applied in Oregon.

This case squarely raises the question of which of the two tests not rejected by the Jones court should be applied. The evidence in this case establishes that the "irresistible impulse" test is satisfied. Both Dr. Bloch and Dr. Smith testified that the decedent was under an "irresistible impulse" when he committed suicide. However, the "insanity" test is not satisfied. Dr. Bloch testified:

> "Q. Is there any doubt in your mind that Dr. McGill's death was inflicted by his own hand?
>
> A. No doubt.
>
> Q. And did he know what he was doing at the time?
>
> A. (Pause) He knew what was he doing on the basis of faulty reasoning.
>
> Q. How is that?
>
> A. He knew that he was going to end his life, but his reasoning was that he had no basis on which to continue living, which was incorrect."

Dr. Smith testified:

> "Q. Well let's talk about this. Did Dr. McGill know what he was doing when he shot himself?
>
> A. To some extent. The matter of forming intent I think is impaired grossly when an element of psychotic illness is present; so, I think that his ability to form intent to that extent was impaired."

On the basis of this evidence we find that claimant knew the consequences of his actions and consciously wished that result to occur.

Although the evidence in this case establishes that the decedent was acting under an "irresistable impulse", we believe that in general that test is a very difficult one to apply because it is inherent in that type of a test that expert opinions will significantly differ as to what constitutes an "irresistable impulse." The "insanity" test as described by the Jones court is much simpler to apply. Under the insanity test, the decedent must act with no "conscious volition to produce death." Jones, supra 21 Or App at 88.

Considering the very restrictive language of the statute which precludes recovery if death results from the "deliberate intention" of the decedent, we conclude that the "insanity" test is most consistent with the intention of the legislature. It is

only under this test that the decedent does not deliberately intend death. There is no doubt that in this case the decedent deliberately intended his death. Accordingly, his widow is not entitled to widow's benefits.

The attorney's fee of $4,000 awarded to claimant's attorney by the Referee's order is reduced to $2,500.

ORDER

The Referee's order dated July 22, 1983 is affirmed in part, reversed in part and modified in part. That portion of the Referee's order concerning the compensability of the occupational disease claim is affirmed. That portion of the Referee's order concerning widow's benefits is reversed. That portion of the Referee's order awarding an attorney's fee is modified. Claimant's attorney is awarded $2,500 for services at hearing in lieu of the $4,000 awarded by the Referee. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

DAVID W. BEENE, Claimant
Robert L. Chapman, Claimant's Attorney
Cowling, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08911 & 83-11858
December 27, 1984
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated November 30, 1984. The request is granted.

On reconsideration, claimant's attorney requests that we award him a fee for his services on Board review. The sole issue on review is responsibility between the SAIF Corporation and Boise Cascade. Notwithstanding claimant's urgings on review that Boise Cascade be held responsible, we affirm the Referee's order holding SAIF responsible for claimant's left shoulder condition.

OAR 438-47-010(1) provides:

> "Attorneys fees for claimant's attorney will be allowed only when the attorney is instrumental, with or without proceedings before a referee, the Board or a court:
>
> "(a) In obtaining acceptance of a denied claim; or
>
> "(b) In obtaining compensation or an increase to the claimant; or
>
> "(c) In successfully defending an award of benefits to claimant against reduction."

We find that claimant's attorney's services on Board review did not benefit claimant. Hence, claimant's attorney is not entitled to a fee for these services.

On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

LINDA L. CATES, Claimant
Pozzi, et al., Claimant's Attorneys
Bullard, et al., Defense Attorneys

WCB 83-01252
December 27, 1984
Order on Review

Reviewed by the Board en banc.

Claimant requests and the self-insured employer cross-requests review of Referee Shebley's order which: (1) upheld the employer's denial of claimant's request to reopen her claim for surgery on her left wrist; (2) denied claimant's request for penalties and attorney fees; (3) increased claimant's scheduled permanent partial disability award from 10% (15°) loss of right forearm to 25% (37.5°) loss of right forearm and from 5% (7.5°) loss of left forearm to 10% (15°) loss of left forearm; and (4) admitted into evidence documents offered by claimant in violation of the 10 day rule, OAR 436-83-400(3), now OAR 438-07-005(3). Claimant contends that she is entitled to left wrist surgery and to penalties and attorney fees for the employer's unreasonable denial of surgery, unreasonable delay in denying the surgery and unreasonable denial of other medical benefits. The employer contends that the permanent partial disability awarded by the Referee is excessive and that the Referee erred in admitting claimant's documents within 10 days of the hearing.

The Board affirms those portions of the Referee's order awarding permanent partial disability. The Board also affirms the Referee's refusal to award penalties and attorney fees claimant requested.

On the issue of whether the Referee erred in admitting into evidence documents submitted in violation of the ten day rule, we find that he did not. Claimant's attorney was on vacation when the documents were due under the rule. The attorney relied on the former practice that insurers would submit the entire exhibit packet to the Referee. There is no indication that the employer was in any way prejudiced by the submission of the documents because claimant's attorney had obtained the documents from the employer. At the initial setting for the hearing, the Referee ruled:

> "I feel that substantial justice requires, in this case, that the additional documents be allowed, and that will be my ruling."

The Referee, however, continued the hearing slightly over two weeks in order to allow the employer's counsel to review the documents with the thought in mind that they would be evidence at the hearing.

We agree with the Referee's ruling. There is no indication that the exhibits were submitted late due to gamesmanship. Nor is there any indication that anyone was prejudiced by their late submission. The delay occasioned by their submission was minimal. On the basis of these facts we agree with the Referee that substantial justice requires the admission of these documents.

The dissenting member fails to distinguish an important factual distinction in this case and Dale David, 36 Van Natta 1531, which he cites as a similar case with opposite results. In Dale David, although the insurer's counsel had the proffered

exhibit for more than a year, neither claimant's counsel nor the Referee had seen the document until it was offered the day of the hearing. In the present case the document had been obtained by the employer and both claimant's counsel and the employer were aware of its contents and were not prejudiced by its admission. Accordingly, we affirm that portion of the Referee's order which admitted the documents in question.

The Board reverses the Referee's denial of left wrist surgery.

After working as an electronic assembler, claimant suffered bilateral wrist symptoms which her treating doctor, Dr. Noall, diagnosed as deQuervain's syndrome. Dr. Noall performed a surgical release on claimant's right wrist in November 1981. Drs. Holland and Kemple agreed with Dr. Noall's diagnosis and the Orthopaedic Consultants basically agreed, diagnosing bilateral occupational disease tendinitis. Dr. Noall declared claimant medically stationary in October 1982 and claimant's claim was closed by a January 1983 Determination Order.

In February 1983 claimant saw Dr. Noall, again complaining of left wrist pain. Dr. Noall was reluctant to perform a surgical release on the left wrist because he did not think the surgery on the right had been of that much benefit to claimant, but he noted that the right wrist certainly was worse than the left. Dr. Noall asked for a second opinion from Dr. Button. Dr. Button examined claimant in February 1983, reported that he found no indication that claimant had inflammatory disease and recommended against the surgery. In March 1983 Dr. Noall requested authorization to perform the surgery on claimant's left wrist, noting that claimant felt the surgery on the right wrist gave some, though incomplete, relief and that Dr. Button considered the right wrist surgery to have been successful. We find no compelling reason to reject the treating doctor's recommendation for surgical treatment of claimant's condition. Therefore, we set aside the employer's denial of left wrist surgery. Lucine Schaeffer, 33 Van Natta 511 (1981). Claimant's claim is to be reopened on an aggravation basis on the date that she submits to surgery.

The employer contends that claimant cannot both be awarded increased permanent disability and have her claim reopened, arguing that the reopening indicates claimant is not medically stationary. Claimant was medically stationary in October 1982 and no evidence suggests that she was not medically stationary at that time. Therefore, rating claimant's permanent disability is certainly appropriate even though we anticipate reopening on an aggravation at some future time.

ORDER

The Referee's order dated October 3, 1983 is reversed in part and affirmed in part. The employer's denial of claimant's left wrist surgery is set aside. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $600 for services at hearing with regard to the surgery denial, and $600 for services on Board review, to be paid by the self-insured employer.

Board Member Barnes Dissenting in Part:

I disagree with that portion of the majority's decision that concludes that an attorney being on vacation excuses the attorney's noncompliance with the Board's rule which requires prehearing submission of proposed exhibits. I express no view on the other issues in this case.

In Dale R. David, 36 Van Natta 1531 (1984), my colleagues concluded that challenged evidence was properly excluded because an attorney's "inadvertence" did not excuse noncompliance with the administrative rule in question. Here the same Board members conclude that challenged evidence was properly admitted because an attorney's vacation did excuse noncompliance with the rule.

My colleagues expressed their adversion toward "rigid" rules in David. I cannot appreciate the concern about rigidity. We should really be concerned whether any rule, in any sense of that term, could possibly lead to the conclusions that being on vacation is an acceptable excuse for an omission, but inadvertence is not an acceptable excuse for the same omission. Apparently the result on the evidentiary issue in David would have been the opposite if the attorney who was inadvertent also went on vacation.

I would reverse the Referee's decision to admit the exhibits that were not submitted in the required manner because I favor a rule, in the real sense of that term, that an attorney's vacation is not good cause for noncompliance with our rules of practice and procedure. A principal reason that attorneys organize into law firms is so that one attorney can "cover" for another during vacations, illness and the like. I note in this regard that the attorney fee agreement that claimant executed retains an entire law firm, not an individual attorney. No cogent explanation has been offered, nor in my opinion could be offered, why one specific attorney could not have submitted proposed exhibits before he left on vacation or why another attorney could not have done so during his vacation.

This all assumes that the act of submitting proposed exhibits necessarily requires an attorney's attention. In reality, that act is often performed by paralegals without involvement of an attorney. In this case, for example, claimant's tardy submission of proposed exhibits included every single document that claimant had previously received from the employer through discovery. Especially if no judgment or discretion is going to be exercised about proposed exhibits, certainly it would seem that paralegal or even clerical personnel could be submitting proposed exhibits in the manner required by our rules even while all attorneys in the office were on vacation.

WILLIAM H. FLOHR, Claimant
SAIF Corp Legal, Defense Attorney

WCB 81-03508
December 27, 1984
Interim Order Remanding

This case is before the Board on claimant's request for review of Referee Cronan's order of June 18, 1984. Claimant has received copies of the transcript of the hearing held in this matter. He challenges the accuracy of the transcript in several particulars. The Board is not in a position to determine the accuracy of the transcript. Accordingly, we remand the case to the Presiding Referee to determine whether any of the transcript is inaccurate and then to transmit an accurate transcript to the Board for its review.

IT IS SO ORDERED.

PATRICIA M. KNUPP, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05092
December 27, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Seymour's order on remand which found that the SAIF Corporation's denial of responsibility for her thoracic outlet syndrome and surgery was not barred by the holding of Bauman v. SAIF, 295 Or 788 (1983). On review, claimant requests that her claim be remanded for the taking of further evidence and, alternatively, that her condition be found compensable.

The Board denies the request for remand. Our review of the record reveals that this case has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Even if we considered the record incompletely developed, claimant has not justified, to our satisfaction, her failure to submit into evidence, at the time of her prior hearing, documents which she acknowledges she had in her possession. Although the medical causation issue is complex, several medical opinions pertaining to the issue were in evidence. A number of these opinions refer to the findings contained in the additional evidence claimant has submitted. Claimant was unrepresented at the time of her prior hearing. However, she had legal representation leading up to the hearing and possessed copies of all medical reports, including this additional evidence, at the time of her prior hearing.

Moreover, should we consider the additional evidence, we are not persuaded that: (1) claimant's 1974 compensable injury to her knees was a material contributing cause of her December 1981 fall; and (2) the 1981 fall was a material contributing cause of her thoracic outlet syndrome and surgery.

We affirm the order of the Referee.

ORDER

The Referee's order dated May 18, 1984 is affirmed.

SANDRA J. MEDDOCK, Claimant
Putney & Schiveley, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11838
December 27, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Presiding Referee Daughtry's order that dismissed claimant's request for hearing. The issue is whether claimant has shown good cause for occasioning a delay of more than ninety days after requesting a hearing. OAR 438-06-085, formerly OAR 436-83-310.

Claimant requested a hearing on her claim on December 14, 1983. Then, and at all times since, claimant has been represented by counsel. On April 10, 1984 the Presiding Referee issued an Order to Show Cause why claimant's case should not be dismissed as having been abandoned. The record shows that the order was mailed to the claimant and to her attorneys. Neither claimant nor her

attorneys have asserted that the order was not received by them. No response was forthcoming within the thirty days allowed by the order. On June 7, 1984 the Presiding Referee issued an Order of Dismissal. That order was also mailed to claimant and her attorneys.

On July 6, 1984 claimant's attorney wrote to the Board requesting that the Order of Dismissal be set aside, or, in the alternative, reviewed by the Board. We have treated claimant's attorney's communication as a request for Board review of the Presiding Referee's order. The affidavit of claimant's attorney states that his office failed to submit an application to schedule a hearing. The affidavit does not state why no application was submitted and does not explain the lack of response to the Order to Show Cause. Good cause for delay has not been shown. See Sekermestrovich v. SAIF, 280 Or 723 (1977).

ORDER

The Presiding Referee's order dated June 7, 1984 is affirmed.

MARVIN W. NORTON, Claimant
Galton, et al., Claimant's Attorneys
John Snarskis, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 83-05936 & 83-05974
December 27, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Industrial Indemnity Company requests review of Referee Neal's order which set aside its denial of claimant's low back injury claim. The issues are (1) whether claimant's low back condition on and after May 23, 1983 is compensable, and (2), if so, whether it is the responsibility of Industrial Indemnity as the result of a new injury which occurred on May 16, 1983 or the responsibility of the self-insured employer, Consolidated Freightways, as the result of an aggravation of claimant's May 19, 1978 low back injury.

On our de novo review we find that claimant sustained a new low back injury while working for Industrial Indemnity's insured on May 16, 1983. This injury resulted in a low back strain which materially contributed to claimant's condition on and after May 23, 1983. Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated May 31, 1984 is affirmed. Claimant's attorney is awarded $700 for services on Board revidw, to be paid by Industrial Indemnity Company.

WILLIAM D. OLSON, Claimant
Emmons, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-04101
December 27, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Podnar's order that set aside its denial of claimant's claim of aggravation of his cervical spine injury. The issue is compensability.

Claimant sustained a compensable cervical spine injury in February of 1979. A myelogram performed in August of 1979 showed degenerative disc disease at the C5-6 and C6-7 spaces. Claimant was treated conservatively. His claim was closed by a Determination Order issued March 4, 1980 that granted an award of 32° for 10% of the total allowable unscheduled permanent partial disability for injury to his cervical spine. The Determination Order became final by operation of law.

Between March 1980 and February 1983 claimant sought no treatment for his cervical spine, although he was treated for a low back injury and an arm injury in California. On February 8, 1983, while working in California, claimant operated a backhoe for approximately four hours under conditions that required him to work with his neck in a twisted position. Claimant shortly thereafter began experiencing neck pain.

Claimant returned to Oregon and on March 10, 1983 submitted his aggravation claim. The insurer denied the claim April 25, 1983. Subsequently, claimant has undergone a discectomy and cervical fusion.

The insurer contends that it is not responsible for claimant's present condition because the condition was caused by a new injury, rather than an aggravation of the 1979 injury. The insurer relies upon Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). Claimant also relies upon Starbuck, asserting that the evidence proves that the present disability was caused by the 1979 injury. Three treatment-free years followed by a discrete incident bringing on almost immediate symptomatology, coupled with the medical evidence naming the California incident as a material and independent cause of claimant's disability persuades the Board that the insurer is correct. See Daniel P. Miville, 36 Van Natta 1501 (October 16, 1984); Wilma H. Ruff, 34 Van Natta 1048 (1982).

ORDER

The Referee's order dated January 24, 1984 is reversed. EBI Companies' denial dated April 25, 1983 is reinstated and affirmed.

DEMETRIO H. REYES, Claimant
Hayner, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06942
December 27, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Seifert's order which upheld the SAIF Corporation's partial denial of continuing responsibility for claimant's neck, arm and shoulder condition and which declined to award a penalty or associated attorney's fee for late acceptance or denial because the Referee found there were no amounts due upon which to assess a penalty. Claimant argues that he is entitled to interim compensation as well as a penalty and associated attorney's fee based on the interim compensation.

Claimant injured his neck, left shoulder and arm while pulling green chain on August 30, 1982. Claimant apparently missed four days of work and then returned to work. On November 5, 1982 claimant was involved in an off the job automobile accident in which he again injured his neck. At that time he had pains radiating into his left arm.

On May 19, 1983 SAIF accepted claimant's August 30, 1982 injury. SAIF paid no interim compensation or time loss. On May 23, 1983 SAIF issued a partial denial of "further responsibility for your neck, arm and shoulder condition as of November 5, 1982...."

The Referee upheld the partial denial on the merits and declined to award a penalty for late acceptance or denial because he found that there was no compensation due upon which to base a penalty. Claimant argues that the partial denial is invalid under Roller v. Weyerhaeuser Company, 67 Or App 583 (1984) and that in any event on the merits the denial must fall. Claimant also argues that he was entitled to interim compensation for the period following the on the job injury during which he was not working plus interim compensation for the period he was off work following the automobile accident and that a penalty for late acceptance or denial can be assessed on that amount.

We agree with claimant on the interim compensation and penalty issues. Bono v. SAIF, 66 Or App 138 (1983). SAIF is assessed a 25% penalty on the interim compensation due for late acceptance or denial plus an associated attorney's fee of $500.

On the compensability issue, we find that the partial denial is invalid and must therefore be set aside. In Joji Kobayashi, 36 Van Natta 1558 (1984) we considered Roller, supra as well as the related cases of Safstrom v. Riedel International, Inc., 65 Or App 728 (1983) and Maddocks v. Hyster Corporation, 68 Or App 372 (1984). We said:

> "We understand these cases to stand for the proposition that if a claimant has a single accepted condition or an accepted condition which cannot be separated from other conditions, an employer/insurer may not issue a partial denial of liability for continued medical services, time loss or permanent disability due to the accepted condition without first processing the claim to closure." 36 Van Natta at 1563 .

In this case, the condition partially denied by SAIF is either the same condition accepted by SAIF or is not sufficiently discrete to allow a partial denial. Accordingly, we find that SAIF's partial denial was procedurally improper and must be set aside.

ORDER

The Referee's order is reversed. The SAIF Corporation shall pay claimant interim compensation from August 30, 1982 until May 23, 1984 less time worked. SAIF is assessed a penalty of 25% of the interim compensation for late acceptance or denial plus an associated attorney's fee of $500. SAIF's partial denial of May 23, 1983 is set aside. The claim is remanded to SAIF for processing in accordance with law. Claimant's attorney is awarded $800 for services at hearing and $500 for services on Board review, to be paid by SAIF.

ANNA M. SCHEIDEMANTEL, Claimant
Steven Yates, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 81-00719
December 27, 1984
Order on Remand

This case is on remand from the Court of Appeals. The court has instructed the Board to order claimant's aggravation claim accepted and to determine penalties and attorney's fees for the SAIF Corporation's failure to pay interim compensation from July 20, 1981 until December 21, 1981.

Now, therefore, SAIF is ordered to accept claimant's aggravation claim and to process it according to law. SAIF is also ordered to pay to claimant as a penalty 25% of the interim compensation ordered paid by the Court of Appeals for the period between July 20, 1981 and December 21, 1981 as well as an associated attorney's fee of $450. The penalty and associated attorney's fee are in addition to the penalty and associated fee associated with SAIF's failure to pay interim compensation from May 26, 1981 until July 20, 1981, which the Board assessed in its Order on Review of May 31, 1983.

IT IS SO ORDERED.

MICHAEL J. SCOTT, Claimant
Robert Nelson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-04633
December 27, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of that portion of Referee Gemmell's order which set aside its denial of claimant's aggravation claim. SAIF contends claimant failed to prove his condition has worsened as a result of his compensable injury. We agree and reverse.

Claimant was 45 years old at the time of hearing. While working as a painter, he sustained two compensable back injuries. In 1972 he injured his low back while lifting buckets of paint. Following conservative treatment for his low back and neck pain, the claim was closed. Claimant received a low back disability award of 5%. In October 1979, again while lifting a paint bucket, claimant experienced the compensable injury upon which this claim is based. His condition was diagnosed as acute moderate thoracolumbar sprain, chronic right sacroiliac sprain and chronic cervical strain. After conservative treatment, claimant was awarded 15% unscheduled spine disability by virtue of a July 31, 1981 Opinion and Order. This is the last arrangement of compensation.

In March 1982 claimant returned to Dr. Fladoos, chiropractor, complaining of pain throughout his upper thoracic region. Dr. Fladoos had last treated claimant on July 15, 1981. Following one day of manipulation and physical therapy, claimant was released with no further treatment or complaints anticipated. Dr. Fladoos opined that claimant's complaints were directly related to his October 1979 injury.

In April 1982 claimant sought treatment from Dr. Pettigrew, chiropractor. Dr. Pettigrew had treated claimant periodically since January 1980. Claimant received Dr. Pettigrew's palliative treatment from April to October 1982, as well as in January and February 1983.

In February 1983, complaining of left arm, upper back and neck pain, claimant sought treatment from Dr. Schilbach, family practitioner. Dr. Schilbach authorized four weeks of time loss, but further advised that it might take 3 months to stabilize claimant's condition. Dr. Schilbach opined that claimant's pain was attributable to "an aggravation of an old injury."

In April 1983 claimant was examined by Orthopaedic Consultants. Considering the gradual development of claimant's cervical spine problems, left upper extremity radicular pain and minimal sensory findings, the Consultants concluded that claimant's problems were related to a gradual progression of degenerative disc disease. The Consultants conceded that their opinion was not supported by the cervical spine x-rays which did not indicate the presence of the disease. The Consultants opined that the possibility of radiculopathy indicated a change in claimant's condition since previous examinations.

Soon after, SAIF issued its denial, contending that the medical information indicated claimant's condition was attributable to the gradual development of degenerative disc disease of the cervical spine and not to the October 1979 injury.

In September 1983 claimant was examined by Dr. Duff, orthopedist, who diagnosed chronic myofascial pain of the neck, dorsal and lumbar spines. Dr. Duff reported that the cervical x-rays showed no significant degenerative changes nor any osteoarthritic process. The doctor advised that it was doubtful that any single episode of lifting such as reported would result in claimant's long term problem. Dr. Duff opined that claimant had an ongoing permanent physical impairment that was probably not directly related to the October 1979 injury.

Claimant testified that for the past 10 years, he could not recall when his neck did not hurt. He felt his back condition had gradually worsened. However, he conceded that since he became involved in Alcoholics Anonymous approximately 4 years ago and had stopped drinking, he may not be experiencing a greater degree of pain, only feeling it more.

Dr. Pettigrew, claimant's treating chiropractor, testified that claimant's upper back and neck condition materially worsened and that the worsening was attibutable to the October 1979 injury. Dr. Pettigrew also testified that x-rays of claimant's cervical spine did not show any degenerative disc disease. The doctor felt claimant had subjectively and objectively worsened. However, Dr. Pettigrew conceded his notes concerning claimant's objective measurements, taken before and after the last arrangement of compensation, were "pretty similar." In addition, Dr. Pettigrew acknowledged that he was unaware that claimant had experienced neck pain since 1970.

The Referee found the aggravation claim compensable. She felt Dr. Schilbach's opinion and the Orthopaedic Consultants' report established that claimant's condition had worsened. Concerning causation, the Referee found the treating physicians' opinions more persuasive than Orthopaedic Consultants or Dr. Duff.

To sustain an aggravation claim, claimant must prove that his condition is worse and that the worsening was causally related to his compensable injury. Van Horn v. Jerry Jerzel, Inc., 66 Or App 457 (1984), ORS 656.273(1).

We find that claimant has failed to prove a causal relationship between his present condition and his October 1979 compensable injury. In reaching our conclusion, we are not persuaded by the opinions of the treating physicians. Dr. Pettigrew was unaware of claimant's prior neck complaints. Dr. Schilbach did not specify to which "old injury" he was referring when he opined that claimant had experienced an aggravation. Dr. Fladoos related claimant's condition to his October 1979 injury, but apparently did not believe that his condition had worsened. Moreover, we find Dr. Fladoos' opinion devoid of analysis in support of his conclusion.

We consider the opinions of Dr. Duff and the Orthopaedic Consultants more persuasive. The thrust of their opinions is that claimant's current condition is not attributable to an isolated minor strain which occurred 3 1/2 years ago. We do not disregard the Consultants' opinion simply because the evidence does not substantiate their theory that claimant's condition was attributable to degenerative disc disease. The burden of proof is not on SAIF to prove the cause of claimant's condition, it is on claimant to establish a causal relationship between his condition and the October 1979 injury. We believe claimant has failed to meet that burden.

Additionally, we are not convinced that claimant's condition has worsened. The evidence in support of a worsening primarily relies upon claimant's subjective complaints. Since claimant's recent sobriety has resulted in a lack of "anesthetization," we have reason to question the reliability of his perceptions of an increase in pain.

ORDER

The Referee's order dated November 23, 1983 is reversed. The SAIF Corporation's denial dated April 27, 1983 is reinstated and affirmed.

JUNIOR L. WEATHERFORD, Claimant
SAIF Corp Legal, Defense Attorney

WCB 84-01138
December 27, 1984
Order of Dismissal

The SAIF Corporation moves to dismiss claimant's request for review on the grounds that it was not provided timely notice of claimant's request for review. The motion is granted.

Referee Nichols issued an opinion and order on June 21, 1984. Thereafter claimant requested reconsideration and the Referee abated her order. The Referee issued an amended order on July 10, 1984. Pursuant to ORS 656.289(3) claimant had until August 9, 1984 in which to file a request for hearing. The request for review was mailed on August 9, 1984, thus the request for review was timely filed with the Board. However, the request for review must also be mailed to the other party within the thirty days or the other party must actually recieve notice of the request for review. Argonaut v. King, 63 Or App 847 (1983). There is no indication in the record that claimant mailed a copy of the request for review to SAIF. Further, by affidavit, SAIF asserts that it did not receieve actual notice of the request for review until well after the thirty days had passed. Accordingly, claimant has failed to satisfy the jurisdictional prerequisites to requesting Board Review.

ORDER

Claimant's request for review is hereby dismissed. The Referee's orders dated June 21, 1984 and July 10, 1984 are final by operation of law.

MICKEY M. WILCOX, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 84-0396M
December 27, 1984
Order Postponing Action on Own Motion Request

Claimant has requested that the Board exercise its own motion authority and reopen his claim for an alleged worsening of his July 18, 1977 industrial injury. The Board issued an order on August 28, 1984 postponing action on the request for own motion relief due to a pending hearing in WCB Case No. 84-06291. One of the issues in that case is the extent of claimant's permanent disability. Because claimant is now contending he is worse and not medically stationary, the Referee stated she could not properly determine his true permanent partial disbility. Consequently, she put the case in an inactive status and recommended the Board address the own motion request at this time.

The Board has considered the matter and decided not to review the own motion claim at this time. Were we to reopen this claim, it might ultimately create a situation at the time of closure in which it would be difficult to determine which portions of claimant's permanent diability were attributable to an aggravation under the Board's own motion jurisdiction and which portions of his permanent disability were attributable to his condition prior to expiration of his aggravation rights.

In Jeffrey Barnett, 36 Van Natta 1636 (1984) we said:

> "Proceeding on his understanding that claimant was not medically stationary at the time of hearing, the Referee concluded that the only viable alternative was to evaluate claimant's disability as it existed at the time of claim closure. . . . [W]e think that the Referee's analysis comes close to the mark if a claimant whose aggravation rights have previously expired is not stationary at the time of a hearing.

While we have no jurisdiction over the case pending before the Referee, it is our view the proper procedure would have been to rate claimant's permanent disability as of the last claim closure as we suggested in Barnett.

ORDER

Claimant's request for own motion relief is deferred pending the Referee's disposition of WCB Case No. 84-06291.

DANNY D. BEERS, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11873 & 83-11874
December 31, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Michael Johnson's order that ordered the SAIF Corporation to pay for two chiropractic treatments per week from August 1, 1983 through January 27, 1984 pursuant to ORS 656.245. SAIF urges that we affirm the Referee's order. The frequency of chiropractic treatments which are reasonable and necessary is the sole issue on review.

Claimant has an accepted back condition for which he received chiropractic treatments beginning June 2, 1983 at a frequency of approximately three times per week. SAIF refused to pay for treatments in excess of four per month pursuant to OAR 436-69-201(2) after August 1, 1983. Claimant's chiropractor, Dr. Llewellyn, has opined that claimant's pain was reduced by chiropractic treatments three times per week. Dr. Fechtel, SAIF's chiropractic consultant, opined that it would have been appropriate for claimant to receive chriopractic treatments at the rate of three per week for the first four to six weeks following the injury, that is until approximately August 1, 1983. Thereafter, in Dr. Fechtel's opinion any treatment in excess of the administrative guidelines would not be appropriate.

The Referee ordered SAIF to pay for chiropractic treatments at the rate of two per week for the period between August 1, 1983 and January 27, 1984. Based on the evidence before us, we conclude that any treatments during the relevant period in excess of the guidelines of four per month is excessive. However, SAIF argues only that we affirm the Referee's order rather than that we reverse the Referee and allow payment only for treatments within the administrative guidelines. Thus, SAIF apparently concedes that treatment at the rate of two per week for the relevant period is reasonable. Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated July 10, 1984 is affirmed.

RALPH W. COMPTON, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-10404
December 31, 1984
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Quillinan's order which set aside its denial of claimant's occupational disease claim for his hearing loss. In the alternative, claimant seeks remand for the admission of additional medical evidence.

Before he began working for this employer in August 1966, claimant experienced periods of unprotected exposure to high noise levels. A pre-employment hearing test in 1966 showed substantial preexisting high frequency hearing loss. After August 1966 -- until very recently -- claimant worked almost exclusively in an environment of potentially hazardous noise levels. However, after

the first six months of this employment, claimant wore ear protection at all times when exposed to high noise levels, except during brief conversations.

After he filed his hearing loss claim, claimant was evaluated by an audiologist, Dr. Ediger. Claimant explained to Dr. Ediger that he had been aware of a handicapping hearing loss since 1978. He stated that the problem came on gradually; that he was aware of occasional tinnitus; and that he had difficulty discriminating speech, especially when background noise was present. Audiological testing in 1983 revealed only a slight worsening of claimant's hearing since the 1966 test. Dr. Ediger stated:

> "I believe that an effective hearing conservation program has effectively prevented substantial change in hearing from 1966 to the present time. There does however appear to be slight change in hearing. I cannot rule out the possibility that his employment at Weyerhaeuser might have caused that change in hearing."

Claimant was then referred to Dr. Hiatt, an ear, nose and throat specialist, for evaluation. In his August 29, 1983 report Dr. Hiatt noted claimant's high frequency sensorineural hearing loss and stated:

> "The cause of the additional hearing loss which has been noted during his employment at Weyerhaeuser must be listed as undetermined. If we assume adequate ear protection, I do not feel his hearing loss is related to noise exposure at Weyerhaeuser."

Dr. Ediger subsequently reviewed Dr. Hiatt's report and stated that he did not consider it likely that claimant's hearing loss was due to his employment.

Claimant has requested remand for the admission of Dr. Ediger's October 1, 1984 report. In that report Dr. Ediger notes a further slight reduction in hearing since his 1983 report. After reviewing and rethinking the case, Dr. Ediger concludes that it seems most probable that claimant's hearing loss was caused by noise exposure at work.

Recognizing that once the record closes it is in the interests of administrative economy that the record be as final as possible, the Board has adopted a restrictive policy toward remands for additional evidence. Such remands are allowed only where relevant evidence is discovered which could not reasonably have been produced and discovered before the hearing. Casimer Witkowski, 35 Van Natta 1661, 1663 (1983). Dr. Ediger's report explaining his rethinking of his earlier position is not such evidence. To allow remand in cases such as this would open the door for remand every time a claimant obtains a new medical opinion. We deny remand and do not consider the October 1, 1984 report.

The ultimate question, of course, is whether claimant has established that his work exposure was the major cause of the slight worsening of his preexisting hearing loss. We conclude

that claimant has not so established. Claimant's unprotected noise exposure in his employment over the past 17 years has been minimal. In reliance on this fact, Dr. Hiatt's opinion and Dr. Ediger's ultimate opinion are adverse to claimant's position, certainly under the applicable major-cause test. It is possible that the slight reduction in claimant's hearing acuity is due to the natural progression of his preexisting disability or to the aging process; in any event, the evidence does not preponderate in favor of a finding that employment exposure was the major cause.

ORDER

The Referee's order dated April 6, 1984 is reversed. The employer's denial dated October 4, 1983 is reinstated and affirmed.

Board Member Lewis Dissenting:

Claimant seeks remand for the admission of Dr. Ediger's October 1, 1984 report. The majority reads this report as primarily an explanation of his rethinking of his earlier position, and denies remand. However, the majority fails to adequately take into account that Dr. Ediger's reanalysis is based to a substantial degree on new evidence. The pertinent portions of Dr. Ediger's report state:

> "Mr. Compton indicates that he has not used hearing protection consistently at work during the past twelve months. Special ear muffs were worn approximately 25% of the time by his estimate. These muffs were altered to contain a speaker to improve his hearing of two-way radio communications. He finds them difficult to use when he must also be able to communicate with other employees, so that earmuffs are worn primarily when he is working alone. He reports that he now does not consistently use ear protection when working around other employees with whom he must communicate because he cannot understand speech while wearing hearing protection and finds frequent removal of hearing protection to communicate highly cumbersome.
>
> * * *
>
> "I indicated in my 1983 report that Mr. Compton had reportedly used hearing protection 'all the time'. He now indicates that during the past twelve months he has not used hearing protection all the time because he cannot communicate with other employees while wearing hearing protection. If that has been a difficulty during the past 12 months, it probably also has been a difficulty during the past several years. If so, despite his best intentions, ear protection may have been worn 'all the time' except when it was necessary to communicate with fellow employees.
>
> * * *

"In my July 29, 1983 report (page 2, second to last paragraph) I stated that I could not rule out noise exposure at Weyerhaeuser as a cause of hearing loss. Change in hearing was seen as marginal, and Mr. Compton did report consistent use of hearing protection.

"On March 16, 1984, in response to his attorney's request for clarification of my opinion in light of a medical report, I essentially indicated my concurrence with the conclusions of that medical report. The medical report also found that change in hearing during employment at Weyerhaeuser was of 'undetermined' origin.

"At the present time there appears to be evidence of further reduction in hearing, over last year, beyond the amount attributable to presbycusis. Change continues to be slight.

"After once again reviewing and rethinking this case, including currently obtained information, I feel that it would be impossible to say that change in hearing from 1966 to 1984, though relatively slight, could absolutely not have resulted from excessive noise exposure as result of employment at Weyerhaeuser. The absence of evidence of medical disease (as indicated in the medical report) would seem to leave the most probable cause of hearing loss to be noise exposure at work, probably during occasions when hearing protection was removed for verbal communication and not immediately replaced."

One of the objectives of the Workers' Compensation Law is to provide a fair and just administrative system for the delivery of medical and financial benefits to injured workers. ORS 656.012(2)(b). In pursuing that objective, I believe that we are to favor those procedures most likely to achieve substantial justice over rigid formalities and administrative expedience. See ORS 656.283(6). We have discretion to remand cases we find improperly, incompletely or otherwise insufficiently developed. Bailey v. SAIF, 296 Or 41 (1983); ORS 656.295(5). I would find this case insufficiently developed and order remand.

In Casimer Witkowski, 35 Van Natta 1661 (1983), we remanded for the admission of new medical evidence where the claimant first received a satisfactory explanation of the cause of his medical problem after hearing but before a final order, noting that the new evidence could not reasonably have been provided and discovered before hearing. Similarly, the medical evidence in the record before us lists the cause of claimant's hearing loss as undetermined, assuming adequate hearing protection at work. Only with the evidence from another year's progression of claimant's condition does Dr. Ediger develop a definite opinion as to the cause of claimant's hearing loss.

I share the majority's unwillingness to open the door to remand every time a claimant or insurer obtains a new medical opinion. However, this is not a case where, when faced with an adverse professional explanation of medical causation, the claimant has shopped around the medical community and ultimately found professional support for his theory of causation. In this case medical causation was heretofore without professional explanation. Absent a trained professional's explanation of medical causation where such an explanation is available, the record is needlessly incomplete. Remand for the admission of this explanation is in the interest of substantial justice.

If the case must be decided on the record before us, I would find the claim compensable. The majority's finding that after the first six months of employment, claimant wore ear protection at all times when exposed to high noise levels, except during brief conversations, does not take into account the substantial noise exposure claimant has received. Claimant credibly testified that he has worked for Weyerhaeuser since August, 1966. He initially worked as a clean up man on a paper machine in a very loud environment. Initially he used cigarette filters in his ears. After about the first six months, he used earplugs, except when he would remove them to converse 10 to 15 times a day. Claimant became a millwright in about February 1983. He continued to work in the loud environment, removing his earplugs 10 to 15 times a day for five to ten minutes per instance. He worked as a millwright for about three years. Ten to 15 unprotected exposures per workday of five to ten minutes each for nine years, plus six months of work without hearing protection would result in a total unprotected noise exposure of about 3,000 to 6,900 hours.

Based upon the assumption of adequate ear protection, neither Dr. Hiatt nor Dr. Ediger related claimant's slight hearing loss since 1966 to his employment. However, the Board is not bound by these expert opinions, and in weighing them it must consider the reasoning behind them. Edwin Bollinger, 33 Van Natta 559 (1981), aff'd. mem. sub nom., Bollinger v. SAIF, 58 Or App 222 (1982). As the Referee noted:

> "Claimant's uncontroverted testimony is that there were periods during the day in which he did not wear earplugs or other forms of ear protectors. There is no indication that either Dr. Ediger or Dr. Hiatt were aware of this fact which might conceivably change their opinions."

I agree with the Referee's well reasoned order, which concludes as follows:

> "In my estimation, this is a straightforward, uncomplicated case. Claimant has objective findings of a hearing loss. The work environment either caused or contributed to it or it did not. Under Uris v. State Compensation Dept., 245 Or 420 (1967), in an uncomplicated case a claimant's lay testimony may be sufficient to establish medical causation.

"* * * There is credible testimony to the effect that claimant was exposed to high-level noise for many years, even in dosages of 5 to 10 minutes. The only other noise exposure concerns some shooting activity in which claimant wore ear protection. I therefore find, from the preponderance of the evidence, that the work environment was the major contributing cause of claimant's hearing loss from 1966.

"I therefore find claimant has met his burden of proof and that this claim is compensable."

Accordingly, I respectfully dissent.

WARREN W. DYE, Claimant
Robert Chapman, Claimant's Attorney
Schwabe, et al., Defense Attorneys
Rankin, et al., Defense Attorneys

WCB 83-02870 & 83-02048
December 31, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of those portions of Referee Brown's order which upheld the denials issued by two insurers of claimant's occupational disease claim for his asthma condition. One of the insurers, Underwriters Adjusting Company, cross-requests review of those portions of the Referee's order which assessed a penalty against it for failure to pay interim compensation from April 17, 1982 until June 1982.

We affirm the Referee's conclusion on the compensability of claimant's asthma condition, although for somewhat different reasons. The Referee concluded that claimant had failed to prove that his exposure at work caused a worsening of his preexisting condition. On de novo review, we find that claimant has failed to prove by a preponderance of the evidence that his work exposure was the major contributing cause of any worsening of his asthma condition.

We modify the Referee's order on the penalty issue. Although not as precise as would be ideal, the Referee apparently ordered Underwriters Adjusting to pay interim compensation for a period of about two months; and the Referee clearly assessed a 25% penalty and awarded an associated attorney fee of $400. We disagree with the Referee's apparent conclusion that claimant was entitled to interim compensation between April and June 1982; it necessarily follows that there is no basis for imposing a penalty or attorney fee.

On January 5, 1982 Dr. Robinson, claimant's family physician, wrote Underwriters Adjusting to report on the history of claimant's pulmonary difficulties. That letter does not mention any possible work connection. Claimant was hospitalized for bronchitis on April 17, 1982. None of the medical reports generated at the time of that hospitalization indicate any possible connection with claimant's work. Mere knowledge that a worker has been hospitalized is hardly effective notice of a claim

for compensation which would trigger the duty to pay interim compensation pending acceptance or denial. The first notice of an occupational disease claim which we are able to find in the record is an 801 form claimant executed on August 23, 1982. Interim compensation cannot be awarded for any period of time before August 1982 because interim compensation cannot be awarded for any period of time before effective notice of a claim. Donald Wischnofske, 32 Van Natta 136 (1981), 34 Van Natta 664 (1982).

ORDER

The Referee's order dated September 15, 1983 is affirmed in part and reversed in part. Those portions of the Referee's order concerning interim compensation, a penalty and associated attorney fee are reversed. The balance of the Referee's order is affirmed.

HERMAN T. HARRAL, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-03925
December 31, 1984
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Shebley's order which awarded claimant compensation for permanent total disability as a result of his November 11, 1980 industrial injury. SAIF contends that claimant has failed to establish that he is permanently and totally disabled.

As a result of his industrial injury, claimant suffers from a severe psychological disorder which has seriously impaired his short-term memory and his ability to concentrate on any task of extended duration. The diagnosis of attention deficit disorder has been suggested. It is suspected that claimant suffers from organic brain syndrome, although this has not been confirmed by neurodiagnostic testing. Claimant suffers from a psychophysiologic musculoskeletal disorder manifested by chronic pain in various portions of his body. Claimant's treating psychiatrist and former treating neurologist are of the opinion that, as a result of his psychological disorder, claimant is permanently and totally disabled. Dr. Rollins, a vocational consultant who evaluated claimant, testified that claimant is incapable of resuming any of his former occupations and, further, is incapable of performing any employment on a continual, regular basis.

The evidence is convincing that, as a result of his industrial injury, claimant suffers from a debilitating psychological disorder, variously diagnosed as adjustment disorder with mixed emotional features and chronic post-traumatic stress disorder. Although there is no convincing evidence of organic pathology to explain claimant's condition, this does not gainsay the fact that claimant's psychological disorder is significantly, if not severely, disabling.

The Referee concluded that, as a result of the combined effect of claimant's physical and psychological impairment, claimant was totally incapacitated from regularly performing any gainful and suitable occupation. Furthermore, he concluded that claimant was excused from the seek-work requirement of ORS 656.206(3), as it would be futile for him to attempt to find employment. On our de novo review, we agree with the Referee's conclusions, and we, therefore, affirm his order awarding claimant compensation for permanent total disability.

ORDER

The Referee's order dated May 23, 1984 is affirmed. Claimant's attorney is awarded $1,000 for services on Board review, to be paid by the SAIF Corporation.

ROBERT P. KUBLY, Claimant
Cash R. Perrine, Claimant's Attorney
Minturn, et al., Defense Attorneys

WCB 81-11146
December 31, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests and the SAIF Corporation cross-requests review of Referee Baker's order which: (1) found that claimant was entitled to no compensation for temporary total disability in addition to that awarded by Determination Order; (2) found that SAIF had properly computed the amount of claimant's temporary disability benefits; and (3) awarded claimant's attorney a fee, payable in addition to and not out of claimant's compensation, for services rendered in obtaining the reopening of claimant's claim.

We affirm and adopt those portions of the Referee's order concerning the amount and duration of claimant's temporary disability benefits.

We also affirm the Referee's attorney fee award. Claimant's attorney's services in obtaining claim reopening were somewhat akin to having the denial of an aggravation claim set aside. Under these circumstances, it is appropriate to award an attorney fee to be paid by the employer/insurer for the reasons stated in Edward M. Anheluk, 34 Van Natta 205 (1982); Elmer C. Gregory, 35 Van Natta 93 (1983); and Anita Gilliam, 35 Van Natta 377 (1983).

ORDER

The Referee's order dated August 19, 1982 is affirmed.

BETTY E. MADARAS, Claimant
Carney, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07509
December 31, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of Referee Knapp's order which granted claimant an award for permanent total disability in lieu of the 80° for 25% unscheduled disability previously granted by Determination Order. Extent of disability is the only issue on review.

Claimant is a 58-year-old former custodian who slipped and fell on her back and right side on August 12, 1982. Claimant had preexisting problems with her knee, back and shoulder. Dr. Wisdom, the treating physician, diagnosed lumbosacral strain and treated claimant conservatively. He opined that claimant should be retrained because she could not return to work as a custodian. Orthopaedic Consultants examined claimant in December 1982 and opined that she had a lumbo-sacral strain superimposed on degenerative disc disease. They felt that claimant could return to lighter work and that her loss of function was moderate, but the loss of function due to the injury was mild.

In January 1983 claimant was evaluated at the Callahan Center. The staff noted that claimant has an eighth grade education. Test results indicated that claimant's reading skills are marginal and that her math skills are poor. In general her aptitude tests were below average. Based on the test results, it was felt that claimant could not be expected to do well in any of 66 occupational aptitude areas. Based on her testing, claimant's prognosis for return to work was considered fair. Dr. Storino, the center medical examiner, opined that claimant could not return to her previous work. He thought claimant could do some light work. A vocational evaluator at the center opined that claimant did not have the aptitudes or abilities to become employed in any type of clerical work. He suggested modification of her work as a custodian.

In February 1983 Dr. Wisdom opined that claimant was medically stationary. He stated that claimant could not return to her previous occupation and that in his opinion she would have difficulty obtaining work in another field. In April 1983 Dr. Wisdom opined that claimant should not lift over ten pounds repeatedly.

In June 1983 claimant was again admitted to the Callahan Center. Upon claimant's discharge, Dr. Storino opined that claimant is capable of some continuous gainful employment in the light to sedentary range. The vocational counselor's discharge summary indicates that claimant is unable to return to her previous work and is mentally unable to learn a new job requiring any amount of sophistication. However, the summary notes that while claimant was eligible for vocational assistance, she declined it because it would interfere with the long-term disability insurance she was receiving.

Claimant was again evaluated by Orthopaedic Consultants in August 1983. The panel opined that claimant is physically capable of some type of sedentary work in which she could change positions at will.

On January 10, 1984 Dr. Wisdom opined that claimant is limited to lifting ten pounds and that she should not work above shoulder level nor should she perform work requiring squatting, stooping, prolonged walking or frequent climbing of stairs. He also noted that fine movements of her hands were limited due to degenerative arthritis.

The Referee concluded that claimant is excused from the work search requirements of ORS 656.206(3) because it would be futile for her to look for work. Consequently, he granted an award of permanent total disability. We disagree.

The medical evidence clearly indicates that at the very least claimant is capable of sedentary work. Claimant has made no attempt to look for sedentary work. In Home Insurance Co. v. Hall, 60 Or App 750 (1982), claimant was a 57-year-old woman with a tenth grade education and no special job skills. She had limited ability to sit, to stand for extended periods, to bend, to twist, to climb stairs and to drive a car. The medical evidence indicated that the claimant was confined to light work. Nevertheless, the court concluded that claimant was not excused from searching for work. We are unable to find a meaningful

distinction between the circumstances in Hall and those of claimant in this case. We find that claimant is not excused from the work search requirment of ORS 656.206(3) because it would not be futile for her to look for work. Accordingly, we reverse the Referee's order.

Based on claimant's impairment as well as the relevant social and vocational factors, we conclude that claimant would be appropriately compensated by a permanent partial disability award of 240° for 75% unscheduled disability.

ORDER

The Referee's order dated February 17, 1984 is reversed. Claimant is awarded 240° for 75% unscheduled disability in lieu of all previous awards.

JOHN PACHE, Claimant
Callahan, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07481
December 31, 1984
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of Referee Danner's order that upheld the SAIF Corporation's denial of claimant's aggravation claim. The issue is compensability.

Claimant suffered a compensable injury to his cervical spine on January 18, 1980. Ultimately, after the 1982 hearing in a prior proceeding, claimant was granted an award of 80° for 25% unscheduled disability.

In March 1983 claimant's treating chiropractor, Dr. Robinson, wrote to SAIF Corporation pursuant to OAR 436-69-320(2) to explain the frequency of his treatment. He stated, "On February 21, 1983 (claimant) was complaining of recurring headaches and back pain which I see as a continuation of his previous sprain."

In a report dated May 17, 1983 Dr. Robinson stated:

> "On April 13, 1983 (claimant) was complaining of severe back(,) neck and head pain which had reoccurred without intervening trauma. My objective findings were decreased and painful spinal range of motion, paraspinal muscle tenderness and spasm. This I see as a direct aggravation (sic) of his previous sprain.
>
> "(Claimant's) condition seems to have worsened both subjectively and objectively and more frequent treatment has been required."

Claimant testified at the hearing that in April 1983 he began to experience a worsening of symptoms in his neck, upper back and shoulder, the same area of his body affected by the earlier compensable injury. He also testified that he felt better in July 1983, when he underwent an independent medical examination at SAIF's request, than he did in April when he began seeing Dr. Robinson again.

Claimant was examined by Orthopaedic Consultants in July 1983. The panel opined that claimant's cervical strain appeared to be resolved, and noted that the bulk of claimant's complaints appeared to be of psychological origin.

Claimant's claim of aggravation was denied by SAIF on August 1, 1983.

ORS 656.273(7) provides that, "If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed." The Referee found that there was "a complete failure of supporting evidence . . ." to substantiate claimant's aggravation claim. We disagree.

Claimant testified that he felt his condition had become worse in April 1983. The Referee did not find claimant to lack credibility. If claimant is believed, his testimony is generally sufficient to meet his burden of proof. Garbutt v. SAIF, 297 Or 148 (1984). Dr. Robinson's May 17, 1983 report, quoted above, corroborates claimant's subjective complaints with contemporaneous objective findings. We conclude that the evidence as a whole shows a worsening of claimant's condition as of April 1983.

ORDER

The Referee's order dated April 25, 1984 is reversed. The SAIF Corporation's denial dated August 1, 1983 is set aside and claimant's aggravation claim is remanded to SAIF Corporation for acceptance and processing according to law. Claimant's attorney is awarded $1,200 for his services at the hearing level and $500 for his services on Board review, for a total of $1,700 to be paid by the SAIF Corporation.

JERRY W. SARGENT, Claimant
Evohl Malagon, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 83-05910
December 31, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Foster's order which set aside its denial and remanded this claim for acceptance and processing as a new industrial injury. In his respondent's brief, claimant contends that the Referee erred in failing to impose a penalty and associated attorney's fee for the employer's failure to initiate interim compensation payments. We have authority to consider the issue raised in claimant's respondent's brief notwithstanding claimant's failure to cross-request review. Jimmie Parkerson, 35 Van Natta 1247, 1249-50 (1983).

The primary issue is whether claimant's worsened condition on May 12, 1983 and thereafter is compensable as a new injury with this employer, as found by the Referee or an aggravation of claimant's 1975 industrial injury. Based upon our de novo review of the record, we conclude that claimant sustained an aggravation rather than a new injury; therefore, we reverse the pertinent portions of the Referee's order.

Claimant sustained a compensable low back injury in June 1975. The claim was initially closed in September 1975 with an award for temporary total disability only. The claim was

subsequently reopened and reclosed by Determination Orders in 1977, 1979, 1980 and 1981. The December 1981 Determination Order awarded claimant temporary total disability and 32° for 10% unscheduled low back disability. In January 1982 the employer denied an apparent request for claim reopening on the basis that claimant's aggravation rights had expired in September of 1980. In a prior proceeding, a Referee's order in February 1983 upheld the employer's denial, declined to set aside the December 1981 Determination Order as prematurely issued and modified the Determination Order by increasing claimant's permanent disability award to 96° (30%) unscheduled low back disability.

Claimant worked continuously from December 1982 until May 12, 1983, when the "new injury" in question occurred. Claimant was performing his regular job as a clipper operator when there was a "plug up" of wood on the line. While claimant was attempting to remedy this situation, which necessitated pulling and tugging on the piled up wood, he experienced the onset of back pain. This incident occurred during the middle of claimant's shift. He did not stop working, although he was slowed down as a result of his increased pain. He worked the remainder of that shift, and he worked the following day, which was Friday. He did not work over the weekend, and during that time he found it necessary to use a cane. Claimant saw his attending orthopedic physician, Dr. McHolick, the following Monday. Dr. McHolick's May 16, 1983 office note states the following:

> "He just twisted and pulled on 5/12 (but worked Friday) and something went out in his back again. He is having pain this time in his right leg. It has previously been usually the left leg. He has spasms and grabbing type pain at this time across his low back, a vague aching into his left leg without definite neurologic deficit. He has no other changes and I think this is just another flare-up of protrusion of degenerating disc and have so informed him."

Dr. McHolick advised claimant to remain off work, which he did. Claimant's right-sided back and leg pain persisted, and Dr. McHolick referred claimant for a neurosurgical consultation in order to obtain another opinion concerning the propriety of surgery.

In a letter to the employer, dated June 3, 1983, Dr. McHolick reported as follows:

> "The above patient, as your records will reveal, has had repeated episodes of flare-up of back pain with some vague radiation into one or both legs, primarily the left initially, more recently the right. With relatively trivial injuries this man's back will go into spasm and will suddenly subside and he does very well. He has had myelograms, tomograms of the spine, etc. that have been essentially negative with the exception of ongoing low back problems. He has been worked up extensively. Yet, his most recent episode that developed in May has persisted now for three weeks."

By letter dated June 22, 1983, the employer formally denied claim reopening for payment of time loss benefits, stating as reasons the absence of evidence indicating a worsening of claimant's condition and the expiration of claimant's aggravation rights. See ORS 656.273(4).

The employer referred claimant for examination by Dr. Rosenbaum, a neurosurgeon. When Dr. Rosenbaum examined claimant in July 1983, claimant's chief complaint was noted as pain in the lumbar paraspinal on the left in the low lumbar area. Dr. Rosenbaum diagnosed chronic lumbosacral strain, as evidenced by claimant's repeated difficulty throughout the years.

Exactly one month before the hearing, claimant filed a supplemental hearing request raising for the first time the allegation that he had sustained a new injury. No formal denial of claimant's "new injury claim" was issued by the employer.

As of the time of the hearing, claimant had been back to work for approximately three weeks. Initially, he went back to his regular job for four hours a day. After two weeks, he went back full time, although he only performed his regular job for four hours. The remaining four hours were spent performing guard duty. He indicated that he was experiencing problems performing his regular job during the four hour period. He experienced problems with standing, sitting and twisting. Between December of 1982 and May of 1983, prior to the incident in question, claimant testified that he experienced continual low back pain, for which he took Norgesic Forte tablets on a daily basis. He always wore his back brace at work, which afforded some relief of pain.

The employer has denied that claimant sustained a new industrial injury in May 1983. The employer does not deny its continuing responsibility for payment of medical expenses pursuant to ORS 656.245. If the employer prevails, any disability compensation to which claimant is entitled will be payable under the provisions of ORS 656.278, the statute governing the Board's continuing own motion jurisdiction.

The only medical opinions in the record support the conclusion that claimant's condition on and after May 12, 1983 is the result of his ongoing chronic back strain resulting from the original 1975 injury. Arguably, these medical opinions do not directly address the question of whether claimant's May 1983 incident independently contributed to his continuing low back problem; however, we cannot ignore the fact that, after being apprised of the circumstances leading up to claimant's May 1983 worsened condition, Dr. McHolock characterized claimant's problem as another flare-up. Dr. McHolick has been claimant's attending physician for a number of years. In addition, Dr. Rosenbaum, who appears to have taken a complete and accurate history, was of the opinion that claimant's low back condition in July 1983 was the result of a chronic lumbosacral strain, as opposed to a new condition or injury. These medical opinions support the conclusion that claimant's problems in May 1983 and thereafter are the result of his original industrial injury with no material, independent contribution resulting from the May 1983 incident.

The circumstantial factors supporting the conclusion that claimant did sustain a new injury are the facts that claimant

returned to his regular work in December of 1982 and worked continuously until the incident in question; that claimant sought no medical attention for his low back condition during that period; that claimant described a new type of symptom which he had never before experienced, and that, after the May 1983 incident, it was necessary for claimant to increase his pain medication. In addition, claimant was totally incapacitated from work for a period of approximately six and one-half months. Even after his return to work, claimant has been capable of performing his regular work as a clipper operator for only four hours a day, with the remaining four hours spent performing lighter duty.

The circumstantial factors which support the opposite conclusion are as follows. Claimant has a long history of continuing back problems on and off the job since his original industrial injury. These problems have necessitated claim reopening on numerous occasions. Although during the year preceding the May 1983 incident, the radicular complaints that claimant experienced were on the left side, it is also a fact that during the major portion of 1980 claimant was experiencing radiating pain in his right leg. Claimant had been taking medication for his low back pain on a continual basis preceding the May 1983 incident, and he found it necessary to wear a back brace at all times while working. When Dr. Rosenbaum examined claimant on July 14, 1983, two months after the May incident, claimant's primary complaint was left-sided lumbar pain, suggesting that the May 1983 incident resulted in increased right-sided pain of a minor and temporary nature, further suggesting that if this incident independently contributed to claimant's preexisting, chronic lumbosacral strain, any such contribution was not material.

Considering this circumstantial evidence and the medical evidence which fails to even suggest that claimant sustained a new industrial injury in May of 1983, we find that claimant has failed to satisfy his burden of proving a new industrial injury.

With regard to the issues raised in claimant's respondent's brief concerning payment of interim compensation, penalties and attorney fees, we affirm and adopt the relevant portions of the Referee's order.

ORDER

The Referee's order dated January 20, 1984 is affirmed in part and reversed in part. That portion of the Referee's order which set aside the self-insured employer's de facto denial of claimant's new injury claim is reversed, and the employer's denial is affirmed. The remainder of the Referee's order is affirmed.

RUBY J. SCHULTZE, Claimant
Foss, Whitty & Roess, Defense Attorneys

WCB 84-00783
December 31, 1984
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Danner's order that denied her request for a penalty for an alleged unreasonable denial of her claim for medical services. The penalty is the only issue on review.

The Board affirms the order of the Referee, however, for a different reason. Claimant sustained a compensable industrial injury to her cervical spine in January of 1974. In July of 1981 Dr. Echevvaria, an otolaryngologist, diagnosed right sided tinnitus that seemed to coincide with claimant's use of large doses of aspirin. In August of 1983 Dr. Echevvaria opined that claimant's tinnitus resulted from cerebro-vascular insufficiency caused by cervical muscle spasm related to claimant's 1974 injury.

The SAIF Corporation consulted with its in-house neurologist, who after reveiwing all of claimant's medical records opined that claimant's tinnitus condition could not with any degree of medical probability be connected to claimant's cervical spine injury. On that basis, SAIF denied claimant's claim for medical services for her tinnitus. Claimant requested a hearing on the denial on Jaunuary 19, 1984.

On April 4, 1984, roughly two month's prior to the hearing, Dr. Echevvaria authored a quite detailed report that explained clearly his opinion as to how claimant's tinnitus could be related to her cervical spine injury. The record is not clear as to when SAIF received this report, but it was prior to May 10, 1984. The hearing was held June 7, 1984.

On the above facts, the Referee concluded that a penalty was in order, but declined to award one because SAIF's behavior did not affect claimant's disability status. Without deciding whether the reason given by the Referee is correct, we conclude that no penalty is in order.

At the time SAIF denied claimant's tinnitus claim, the only medical evidence tending to connect the tinnitus to the cervical spine injury was Dr. Echevvaria's August 1983 opinion, which was apparently inconsistent with his July 1981 report and was controverted by the SAIF neurologist. SAIF's denial based upon that state of the record, while not necessarily correct, was not unreasonable.

Claimant asserted at the hearing, and the Referee apparently agreed, that SAIF should have accepted claimant's condition based solely upon Dr. Echevarria's April 4, 1984 explanation of his opinion. We disagree. SAIF had issued its denial, which based upon the evidence available to it was not unreasonable. Claimant chose to litigate. SAIF is entitled to its day before the litigation forum, as well.

ORDER

The Referee's order dated June 27, 1984 is affirmed.

JOHNNIE STEPP, Claimant
David Force, Claimant's Attorney
Coons & McKeown, Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-01242
December 31, 1984
Order on Review

Reviewed by Board Members Barnes and Ferris.

The SAIF Corporation requests review of those portions of Referee T. Lavere Johnson's order which awarded claimant benefits for permanent total disability. The only issue is the extent of claimant's disability.

Claimant, then 51 years of age, sustained compensable injuries to his head, neck, shoulders and back in January 1977 when he fell while pulling some timbers on a greenchain. Although the objective findings were quite minimal, claimant presented a blizzard of subjective complaints to his physicians. Claimant's compliants included: headaches, neckaches, backaches, chest pains, radiculopathy, dry mouth, sore fingers, numbness in both arms, numbness in his right leg and a "staggery" feeling. The examiners at the Callahan Center diagnosed claimant as suffering from post-concussion syndrome, chronic cervical and lumbar strain, tension headaches and a severe personality disturbance. Many of claimant's complaints were thought to be due to a chronic anxiety disorder. From a physical standpoint, claimant was found to be capable of moderate work and his physical findings were not felt significant enough to warrant surgical intervention. However, examiners at the Northwest Pain Center felt that it was very unlikely that claimant would ever return to gainful employment.

Claimant was awarded 15% (48°) unscheduled permanent disability by Determination Order in October 1978. This award was increased to 80% (256°) by stipulation in April 1979.

In May 1980 claimant contacted Dr. Boots with complaints of headaches and increased cervical and lumbar pain as a result of some work he was doing on a chicken coop. Dr. Boots diagnosed claimant's condition as paravertebral muscle tension, cephalgia, acute chronic low back syndrome, somatic anxiety depression and post traumatic arthritic changes. Dr. Boots treated claimant conservatively and found claimant medically stationary on June 12, 1980.

Claimant contacted Dr. Boots again on July 16, 1980 complaining of increasing back pain radiating to both legs, right leg numbness, and cervical pain. Dr. Boots administered further conservative treatment and found claimant medically stationary again on July 28, 1980. Claimant received further care from Dr. Boots from September 9 through September 18, 1980.

In a prior proceeding, a hearing on the denial of claimant's aggravation claim was held in November 1981. The Referee set aside the denial and ordered the claim reopened as of May 16, 1980. The Referee's order was affirmed by the Board. Johnnie L. Stepp, 34 Van Natta 1685 (1982).

On March 4, 1981 Dr. Boots reported that, although claimant's condition did worsen in 1980, that such exacerbations and remissions were to be expected considering the nature of claimant's injury and resulting impairment. Dr. Boots stated that there was no corrective treatment for claimant's condition and that only palliative care was being provided. Dr. Boots repeated these statements numerous times in several subsequent reports. Dr. Boots further reported on April 10, 1981 that claimant suffered no additional impairment as a result of his recent exacerbation. In a report dated August 17, 1982 Dr. Boots summarized:

> "It is my opinion that treatment is only palliative and not curative in general for this patient. He will always have exacerbations and remissions, and there is

> also an emotional component with his chronic, irreversible problems.
>
> "I feel his permanent partial disability or impairment, is adequately rewarded at 80% . . . ."

On December 7, 1982 claimant was examined by a panel of physicians from the Orthopaedic Consultants, with Dr. Colbach performing a psychiatric examination of claimant at the same time. The Consultants found that it was impossible to accurately determine claimant's limitations of motion. The Consultants concluded that claimant's subjective complaints could not be verified by objective findings. Dr. Colbach found claimant to have multiple psychiatric difficulties, some related to his injury and others unrelated. Dr. Colbach felt claimant's combined psychiatric difficulties constituted a severe impairment.

Claimant's claim was reclosed by Determination Order dated January 25, 1983 which granted no additional award for permanent disability.

The Referee stated:

> "Claimant's chronic headaches and his chronic physical symptoms and residual limitations pertaining to his neck area and low back area are not substantially different now than they were on November 5, 1981. If anything, claimant's course may have been degressive [sic]. Claimant's general mental state is not substantially different now than it was on November 5, 1981."

The Referee went on to conclude that claimant was entitled to an award for permanent total disability.

We agree with the Referee's finding that claimant's physical condition is not substantially different now than it was at the time of the prior litigation in November 1981. We also agree with the Referee that claimant's mental condition is not substantially different than it was at the time of the November 1981 hearing. In addition, and more important, we find that claimant's physical and mental conditions are no different now than they were at the time of the execution of the 1979 stipulation awarding clamant 80% permanent partial disability and we, therefore, disagree with the Referee's award of permanent total disability.

Although it is true that claimant suffered an aggravation of his condition in May 1980, the medical evidence clearly indicates that this was only a temporary exacerbation and that claimant has since returned to his pre-aggravation status with no additional impairment. As previously noted, Dr. Boots, claimant's treating physician, repeated the same assessment several times: That claimant had simply suffered another symptomatic exacerbation of his condition and that such exacerbations were to be expected. Dr. Boots' chart notes reflect just such a pattern of temporary increases in claimant's subjective symptomatology with subsequent remission following the administration of some palliative treatment.

In response to questions put to him by claimant's attorney, Dr. Boots reported on April 10, 1981 that claimant's condition had returned to its pre-aggravation status. Moreover, in his report of August 17, 1982 Dr. Boots specifically addressed the question of the extent of claimant's permanent impairment and disability, and concluded that claimant was no more impaired as a result of his aggravation than he had been prior to the aggravation. Dr. Boots opined that claimant's prior award of 80% permanent disability continued to be appropriate.

A comparison of the pre-aggravation medical reports with the post-aggravation medical reports is also instructive. The orthopedic and neurologic findings in the post-aggravation reports are virtually identical with the findings in the pre-aggravation reports. In fact, many of the symptoms claimant complained of prior to his aggravation appear to have disappeared. For example, claimant no longer complains of chest pains, dry mouth, bilateral arm numbness or a "staggery" feeling. It also appears that his complaints of radiculopathy have abated.

Although claimant's physical and mental condition may well be inseparable, it does not appear that claimant's mental condition was involved in his 1980 aggravation claim. There is nothing in the record so indicating. In any event, a comparison of Dr. Colbach's report of December 7, 1982 with the psychological reports predating claimant's 1980 aggravation indicate no permanent changes in this regard.

In this case claimant's treating physician, Dr. Boots, unequivocally indicates that claimant has experienced no increased impairment as a result of his May 1980 aggravation, and that the aggravation was only temporary in nature. Indeed, claimant's post-aggravation condition actually appears better than his pre-aggravation condition. We find no reason to question Dr. Boots' opinion. There is, therefore, no basis in this record for allowing an increased award of permanent disability. James G. Thomas, 35 Van Natta 714 (1983); Patrick R. Jefferies, 35 Van Natta 809 (1983); Betty L. Rogers, 36 Van Natta 615 (1984).

ORDER

The Referee's order dated September 13, 1983 is affirmed in part and reversed in part. Those portions of the Referee's order which awarded claimant permanent total disability and awarded claimant's attorney's an associated attorney's fee are reversed. The remainder of the Referee's order is affirmed.

THERESA L. WELCH, Claimant
Evohl F. Malagon, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 83-05016
December 31, 1984
Order on Review

Reviewed by Board Members Ferris and Barnes.

Claimant requests review of Referee Quillinan's order which denied all relief requested by claimant. Claimant contends that she is entitled to a penalty and attorney fee for the insurer's failure to provide medical reports and for the insurer's failure to process her claim to closure under ORS 656.268(2). Claimant also contends that she is entitled to time loss benefits from January 14, 1982 until her claim is closed under ORS 656.268(2).

The Board affirms the order of the Referee, but for different reasons.

Claimant suffered a compensable injury to her right hand in May 1980, which resulted in carpal tunnel surgery in January 1981. The claim was closed by Determination Order dated August 6, 1981. In January 1982 Dr. Teal removed a cyst from claimant's carpal tunnel surgery scar. Although Dr. Teal notified the insurer of the surgery within a few months, he did not authorize time loss until October 1983. Dr. Teal removed additional cysts from claimant's wrist in July 1983 and in October 1983, for which he also authorized time loss. Dr. Teal did not indicate whether claimant's condition had worsened.

The insurer promptly paid time loss benefits upon receipt of medical verification. In October 1983 Dr. Teal confirmed that he only authorized time loss for the following periods: for the January 1982 surgery, 4 days; for the July 1983 surgery, 4 days; and for the October 1983 surgery, 3 days. In each case, removal of the cysts was performed in Dr. Teal's office using a local anesthetic. Although the insurer paid the time loss authorized and the medical bills, the claims examiner testified that the claim was not "reopened," and that, therefore, no closure under ORS 656.268 was necessary.

The Referee found first that the claim was still closed and the insurer need not have reopened the claim since it was a medical claim only under ORS 656.245. Then the Referee found that the insurer properly closed the claim under ORS 656.268(3), which provides for insurer closure in certain circumstances. No such closure was issued, however. The Referee also held that claimant was entitled to time loss under ORS 656.273 upon medical verification of inability to work due to medical treatment.

We disagree with the Referee's reasoning. Claimant was not entitled to reopening of her claim and payment of time loss unless her condition worsened after the last award of compensation. Hutchinson v. Louisiana-Pacific, 67 Or App 577 (1984). Although Dr. Teal authorized time loss, he did not indicate that claimant's condition was worse.

In some circumstances, worsening can be inferred from just the nature or extent of rendered medical treatment. For example, in John T. Aleskus, 35 Van Natta 1153 (1983), we concluded that laminectomy surgery itself was persuasive evidence of a worsening. This case, by contrast, is very different from Aleskus. The removal of claimant's cysts was a routine office procedure, somewhat akin to the removal of sutures -- or, at least, certainly more analogous to the removal of sutures than to the laminectomy involved in Aleskus. Although claimant testified about increased symptoms before the surgeries, Dr. Teal never opined that her condition had worsened. Under the circumstances of this case, we are unable to find a worsening on the basis of the minor surgery alone.

It follows that claimant was not entitled to claim reopening under ORS 656.273 and further follows that the insurer's payment of time loss was gratuitous under ORS 656.018(4). Claim closure was not necessary under these circumstances.

We affirm and adopt those portions of the Referee's order which declined to award penalties and attorney fees for the insurer's delay in providing medical reports.

ORDER

The Referee's order dated November 25, 1983 is affirmed.

JOHN B. BRUCE, Claimant
Roll, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-10033
December 26, 1984
Order of Abatement

The Board has received the insurer's request for reconsideration of our Order on Review dated November 30, 1984.

In order to allow sufficient time to consider the motion, the above noted Board order is abated, and claimant is requested to respond to the motion within ten days.

IT IS SO ORDERED.

GILBERT R. CURRIE, Claimant
David Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-11175
December 17, 1984
Order of Abatement

The Board has received the SAIF Corporation's request for reconsideration of our Order on Review dated November 30, 1984.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and claimant is requested to file a response to the motion within ten days.

IT IS SO ORDERED.

TIMOTHY J. JENKS, Claimant
Michael Dye, Claimant's Attorney
Roberts, et al., Defense Attorneys
Garrett, et al., Defense Attorneys

WCB 83-10924 & 83-10923
December 31, 1984
Order of Abatement

The Board has received Diamond Internationl's motion for abatement and reconsideration of our Order on Review dated November 30, 1984 and corrected on December 12, 1984.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and opposing parties are requested to file a response to the motion within ten days.

IT IS SO ORDERED.

DELBERT F. TIEMAN, Claimant
Evohl Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-00868
November 21, 1984
Order of Abatement

The Board has received claimant's and the SAIF Corporation's motion to abate our Order on Review dated October 26, 1984 for submission of a stipulated settlement order.

In order to allow sufficient time to consider the stipulated settlement, the above noted Board order is abated.

IT IS SO ORDERED.

WORKERS' COMPENSATION CASES

Decided in the Oregon Supreme Court:

Decided in the Oregon Court of Appeals:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Sandra J. Hubbard, Claimant.

HUBBARD,
Petitioner,

v.

IMPERIAL FABRICS et al,
Respondents.

(82-04524 & 82-01681; CA A30189)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 9, 1984.

Jerry K. Brown, McMinnville, argued the cause and filed the brief for petitioner.

Alice M. Bartelt, Portland, argued the cause and filed the brief for respondents Imperial Fabrics, Employer, and Traveler's Insurance Company, Insurer.

La Vonne Reimer, Portland, argued the cause for respondents Elastomeric Silicone Products, Inc., Employer, and Argonaut Insurance Companies, Insurer. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Remanded for an award of interim compensation, penalties and attorneys fees against Elastomeric; otherwise affirmed.

YOUNG, J.

Claimant appeals an order of the Workers' Compensation Board which affirmed and adopted the referee's order. She contests the denial of unscheduled permanent partial disability for a low back injury, which occurred at Imperial Fabrics; compensability of an alleged new injury she suffered while employed by Elastomeric Silicone Products, Inc; and the denial of interim compensation, attorney fees and penalties against Elastomeric for untimely denial. We affirm the Board's denial of the claims. We reverse the denial of interim compensation, attorney fees and penalties and remand.

Claimant was employed by Imperial Fabrics when she injured her lower back on October 27, 1980. Dr. Moore, claimant's treating chiropractor, released her for work on December 1, 1980. He referred her to Dr. Poulson, M.D., who reported that claimant likely had a chronic lumbar strain and probably a degenerating lumbar disc. On March 31, 1981, he declared her medically stationary and released her for work. On the basis of range of motion measurements, he found a two percent impairment of the whole person. On April 24, 1981, a

determination order was issued awarding claimant temporary total disability benefits from October 27, 1980, through March 31, 1981, less time worked.

Claimant testified that, on December 7, 1981, she reinjured her back while working for Elastomeric.[1] On December 9, 1981, she notified her employer of the injury and requested a claim form. The claim form was not provided. On December 31, 1981, Dr. Moore sent Argonaut, Elastomeric's insurer, a "Form 827 First Medical Report." The section entitled "Worker's Statement of Cause and Nature of Injury" recites "lifting molds out of presses, aggravation of old injury." Argonaut forwarded the claim to Traveler's, Imperial's insurer. Argonaut did not send claimant a notice of denial. On January 13, 1982, Traveler's denied Dr. Moore's claim for fees, because his report indicated a new injury at Elastomeric rather than an aggravation of the 1980 injury.

On January 22, 1982, Dr. Moore's office wrote to Argonaut:

> "We received your letter of 12-31-81 * * * and after researching the file * * * I realized what you were thinking. THIS IS A NEW INJURY. HER OLD injury was treated and cured as of 3-30-81. She was completely released and had no further back problems until she hurt herself again on 12-8-81 while employed for Elastomeric Silicone Products."

Claimant was terminated at Elastomeric for absenteeism. Her last day of work was January 15, 1982. On February 17, 1982, she filed an 801 form stating that she was injured December 8, 1981, while lifting molds from the presses at Elastomeric. On March 16, 1982, Argonaut denied the new injury claim on the grounds that the claim was not timely filed and that it was unable to "substantiate any on the job accident incident or occupational disease while employed by Elastomeric Silicone Products on December 8, 1981, which could have produced this condition."

Concerning the claim for permanent partial disability, the referee determined that claimant had failed to establish a loss of earning capacity and that, according to claimant, she had "completely recovered from any residuals resulting from that injury." Claimant, in writing, stated, "I feel I made a complete recovery from my 10/27/80 injury as I was not having any symptoms in my lower back at all." She testified at the hearing that between March, 1981, and December, 1981, she had had no symptoms at all. "It was like I was 100% better." Dr. Moore, who treated her, was also of the opinion that she had completely recovered from the injury at Imperial Fabrics. We take claimant at her word. The Board correctly denied permanent partial disability for the injury at Imperial Fabrics.

Concerning the claim for a new injury at Elastomeric, the referee determined that claimant failed to prove compensability. The referee's conclusion was primarily based on his findings concerning credibility. Claimant's testimony was in

[1] Claimant initially contended that the injury occurred on December 8; however, at the hearing she testified that she was mistaken and that the injury actually occurred on December 7.

direct conflict with the testimony of Patty Jackson who, according to claimant, witnessed the injury causing incident. Jackson testified that claimant had been transferred to a sewing job two weeks before the incident, and that she and claimant were shopping for a sewing machine on the day in

question. The referee found that "[c]laimant's testimony is considered less credible than that of Patty Jackson." In *Hannan v. Good Samaritan Hosp.*, 4 Or App 178, 192, 471 P2d 831 (1970), we held that "[i]n so far as the resolution of an issue turns upon the credibility of witnesses the court should give weight to the findings of the hearing officer who saw and heard those witnesses." We have reviewed the record, agree that the question of compensability turns on the credibility of the witnesses and defer to the findings of the referee, which were adopted by the Board.

Claimant's right to interim compensation is based on ORS 656.262(2) and (4). ORS 656.262(2) provides:

> "The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of the claim, except where the right to compensation is denied by the insurer or self-insured employer."

ORS 656.262(4) requires that an insurer pay the first installment of compensation no later than the 14th day after notice or knowledge of the claim.[2] The statutes require the employer or insurer to pay interim compensation if the claim is not accepted or denied within 14 days. *Jones v. Emanuel Hospital,* 280 Or 147, 570 P2d 70 (1977). The referee denied interim compensation because "claimant has not established that she was totally disabled for 14 days or was an in-patient at a hospital." In *Bono v. SAIF,* 66 Or App 138, 673 P2d 558,(1983), *rev allowed* 296 Or 829 (1984), we determined that the obligation to pay interim compensation until the claim is accepted or denied is imposed regardless of the merits of the claim and regardless of whether claimant continues to work.[3]

"Claim" is defined as "a written request for compensation from a subject worker or someone on the worker's

behalf, or any compensable injury of which a subject employer has notice or knowledge." ORS 656.005(7). Claimant testified, and Norma Jacobs, Elastomeric's office manager, agreed, that claimant reported the injury and requested a claim form on

[2] ORS 656.262(4) provides:

> "The first instalment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim. Thereafter, compensation shall be paid at least once each two weeks, except where the director determines that payment in instalments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules."

[3] Although the evidence is inconclusive, it appears that claimant may have missed five days of work, but not consecutively, between December 7, 1981, and January 15, 1982, when she was terminated.

December 9, 1982.[4] Accordingly, Elastomeric had notice and knowledge of the injury on December 9, 1981.[5] Claimant is entitled to interim compensation from December 9, 1981, to April 16, 1982, the date of denial.

Argonaut failed to deny the claim within 14 days or pay interim compensation as required by ORS 656.262. It also failed to give claimant written notice of denial within 60 days of notice or knowledge of the claim as required by ORS 656.262(6). We find the delay in denial of the claim and the failure to pay interim compensation unreasonable and remand for determination of penalties and attorney fees. ORS 656.262(10);[6] *Likens v. SAIF*, 56 Or App 498, 642 P2d 342 (1982).

Remanded for an award of interim compensation, penalties and attorneys fees against Elastomeric; otherwise affirmed.

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[4] Norma Jacobs, the bookkeeper for Elastomeric, testified:

"Q You recall the claimant's testimony that, on or about December 9th, she informed you that she had been injured while at ESP?

"A Um-hum.

"Q Is that correct.

"A Yes."

Claimant requested a claim form on the 9th. Elastomeric did not provide claimant with a claim form until she again requested one sometime after Argonaut received the medical report of injury from Dr. Moore on December 31.

[5] ORS 656.262(3) provides in part:

"Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. * * *"

[6] ORS 656.262(10) provides:

"If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SAIF CORPORATION,
Respondent,
v.
HARRIS,
Appellant.
(50932; CA A27568)

Appeal from District Court, Washington County.

John J. Tyner, Jr., Judge.

On respondent's petition for reconsideration filed May 2, 1984. Former opinion filed March 28, 1984, 67 Or App 493, 678 P2d 1255 (1984).

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, Robert M. Atkinson, Assistant Attorney General and Donna Parton Garaventa, Assistant Attorney General, Salem, for respondent.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, J.

Petition for reconsideration allowed; former opinion withdrawn; defendant's petition for attorney fees denied.

Van Hoomissen, J., dissenting.

WARDEN, J.

This case is before us on SAIF's petition for review of our decision in *SAIF v. Harris,* 67 Or App 493, 678 P2d 1255 (1984). The petition for review serves as a petition for reconsideration by this court. ORAP 10.10. In that decision we allowed defendant's petition for an award of attorney fees and awarded him $3,164. We now withdraw our former opinion and deny defendant an award of attorney fees.

Our earlier award was based on ORS 182.090, which provides:

> "In any civil judicial proceeding involving as adverse parties a state agency as defined in ORS 291.002 and a petitioner, the court shall award the petitioner reasonable attorney fees and reasonable expenses if the court finds in favor of the petitioner and also finds that *the state agency acted without a reasonable basis in fact or in law.*" (Emphasis supplied.)[1]

In *Johnson v. Employment Division,* 64 Or App 276, 283, 668 P2d 416 (1983), we construed language identical to that in ORS 182.090 emphasized above to mean either that "the

[1] For the purposes of this case, we assume without deciding that defendant is a "petitioner" as that term is used in ORS 182.090.

agency's action under the facts as found by the agency must be such that a reasonable agency would not have so acted" or that "an agency's construction of the law applicable to the case before it must be such that a reasonable agency would not have so construed the law."

SAIF is a state agency as defined in ORS 291.002(7). This controversy arises out of an action filed by SAIF in district court to recover a sum paid defendant for permanent partial disability, to which it was later determined he was not entitled. The district court awarded SAIF summary judgment in the amount of the overpayment. On appeal, we reversed, because the district court lacked jurisdiction over the matter. *SAIF v. Harris,* 66 Or App 165, 672 P2d 1384 (1983).

In the decision now under reconsideration, we found to be implicit in our finding that the district court lacked jurisdiction that SAIF acted without a reasonable basis in fact or in law. In finding that the district court did not have

jurisdiction to award SAIF a judgment for damages for money had and received, we did not expressly state that SAIF acted unreasonably in bringing the action in district court. We recognized that the issue had not been previously addressed. We concluded that SAIF, as an insurer under the Workers' Compensation Act, was limited to the remedies provided for in that act. 66 Or App at 167.

To have implied from our finding that the district court did not have jurisdiction "that SAIF acted without a reasonable basis in fact or in law," 67 Or App at 495, we must have concluded that no reasonable agency would bring an action to recover money wrongfully paid or that no reasonable agency would construe the applicable law as allowing it to maintain an action for money had and received. Neither conclusion is warranted by the facts of this case.

Petition for reconsideration allowed; former opinion withdrawn; defendant's petition for attorney fees denied.

VAN HOOMISSEN, J., dissenting.

I dissent for the reasons stated in our former opinion, *SAIF v. Harris,* 67 Or App 493, 495, 678 P2d 1255 (1984).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Bill R. Ferguson, Claimant.

FERGUSON,
Petitioner,

v.

INDUSTRIAL INDEMNITY COMPANY,
Respondent.

(WCB No. 81-01210; CA A29970)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 9, 1984.

W. A. Franklin, Portland, argued the cause and filed the brief for petitioner.

Marshall C. Cheney, Portland, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed; claimant awarded permanent total disability as of January 2, 1981.

WARREN, J.

Plaintiff appeals an order of the Workers' Compensation Board, claiming that he is permanently and totally disabled.[1] We find that as a result of claimant's compensable physical and psychological conditions he is permanently and totally disabled and reverse.

Claimant is a 44-year-old former supervisor in a frozen food plant. He sustained a compensable injury in October, 1977, while he was attempting to move a 500 pound barrel. Dr. Gillespie, the first of over 25 doctors claimant has seen for his back condition, initially stated: "Though his complaints may be related to some anxiety, he certainly seems to be a hard-working fellow who wants to stay on the job." On January 25, 1978, claimant was hospitalized for psychiatric evaluation and treatment for his compensable anal fissure and back pain. In February, 1978, he underwent a myelogram. Within 48 hours, he was rehospitalized with very acute right chest pain and pain on the inner side of the right arm. Although he recovered and no cause was ever diagnosed for this condition, claimant became convinced that the myelogram caused the pain. A discectomy was done at L4-5 on

[1] Claimant was awarded 15 percent unscheduled disability by determination order. The referee found that claimant's psychological condition was not related to the injury but increased the unscheduled disability award to 60 percent. The Board held that the psychological condition was compensable and awarded a total of 75 percent unscheduled disability for all conditions.

April 25, 1978. Shortly after the surgery, claimant complained of loss of libido and sexual capacity, which has continued since that time. Drs. Laurnen and Aberle, orthopedic surgeons, concluded that the surgery did not correct the defective L4-5 disc, because the wrong side of the interspace was operated on. Dr. O'Brien disagrees with that conclusion.

In June, 1978, claimant was evaluated at the Northwest Pain Center. The consensus there was that he was suffering from moderate to severe depression. The center's psychologist felt that claimant had fair motivation for pain rehabilitation, retraining and returning to employment.

In August, 1978, claimant was released for part-time work at his previous job, which he did from then until January, 1979, when he was hospitalized and fitted with a

flexion body jacket. Thereafter, he was given a back brace, which he was still wearing at the time of the hearing. In May, 1979, he was hospitalized for an allergic reaction to penicillin, which was being taken for a noncompensable condition. In December, 1979, Dr. Laurnen recommended that claimant undergo further surgery at the L4-L5 level. Dr. Platner agreed with the recommendation. Industrial Indemnity denied liability for the surgery, because the recommendation was "directly contrary to the consensus of medical opinion." Claimant did not contest that denial, because he does not want any more surgery.

Through 1979 to the present, claimant has been seen by several psychologists for mental problems. An MMPI administered to claimant revealed "very severe hypochondriases." In May, 1981, Dr. Shafer, a clinical psychologist, reported that since December, 1978, he had not seen any improvement in claimant's physical or emotional condition. In June, 1981, Dr. Shafer noted that claimant was slightly more hopeful than he had been before and stated: "Granted these are very minimal and tenuous changes but in this difficult situation any movement is better than none at all."

The medical evidence in this case consists primarily of the report of claimant's treating physician, Dr. Platner, who has stated repeatedly that claimant is totally disabled from gainful employment. That is supported by claimant's chiropractor, Dr. Ames. That, in and of itself, might be sufficient even in the absence of proof of motivation to establish that claimant is permanently and totally disabled. *Wilson v. Weyerhaeuser,* 30 Or App 403, 409, 567 P2d 567 (1977). In addition, claimant has severe psychological problems that we find are related to his compensable conditions and seriously impairs his ability to seek or obtain work.

Before the accident, claimant had never sought or received psychological treatment. Within three months of the injury, he was hospitalized partly for psychiatric evaluation. As noted by the Board, his treating psychologist testified that claimant's

> "* * * marital problems had stemmed from claimant's failure to adjust following his industrial injury. Dr. Shafer felt 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."

The end result of this spiral was "marked loss of self esteem sinking into a passive, helpless victim role and self image," which, together with other emotional factors, "militate[s] against his successful rehabilitation." Claimant's severe psychiatric problems, when combined with his physical disability, make it impossible for him to seek or obtain gainful employment.[2] *See Patutucci v. Boise Cascade Corp.*, 8 Or App 503, 495 P2d 36 (1972).

We find that claimant has established by a preponderance of the evidence that, because of his physical and psychological conditions, he was permanently and totally disabled from gainful employment as of January 2, 1981, when he was found to be medically stationary.

Reversed; claimant is awarded permanent total disability as of January 2, 1981.

[2] Claimant also claims that he was not medically stationary when the claim was closed due to his psychological problem. We disagree.

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56 September 26, 1984 No. 553

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Julian E. Pournelle, Claimant.

POURNELLE,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB No. 82-04317; CA A30010)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 16, 1984.

Quintin B. Estell, Albany, argued the cause for petitioner. With him on the brief was Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed; claimant awarded permanent total disability as of April 12, 1982.

WARREN, J.

Claimant appeals an order of the Workers' Compensation Board contending that he is permanently and totally disabled. We agree and reverse.

Claimant initially injured his back while loading ammunition into trucks in the Navy in 1941. He has had intermittent problems with his back since that time. After being in the Navy for 21 years, claimant, in approximately 1963, became a welder at Oregon Metallurgical Company, the employer in this case. He continued to have intermittent problems with his back but was able to be employed successfully as a welder until 1979. On June 28, 1979, after completing his fourth day of working on his hands and knees inside a 22 to 24-inch corer pot doing grinding and welding, his back was sore. He saw his physician, Dr. Deming, that same day. After an unsuccessful trial of returning to work, claimant was off work until November 16, 1979, when he was returned to work with restrictions on heavy lifting and bending. In addition to his compensable injury, he suffers from high blood pressure, partial hearing loss and partial loss of vision in one eye.

Dr. Deming noted in March, 1980, that claimant was able to work only because his employer allowed him light duty and had agreed that he could leave when he was in pain. On October 9, 1980, he again had an exacerbation of his condition. He returned to work on October 20, 1980, with instructions that if his back hurt he was to rest for an hour. If that did not relieve the pain, he was not to return to work until the next day and not then unless his symptoms had abated. Dr. Deming again noted that without the employer's cooperation claimant was not employable at all.

On April 2, 1981, claimant once again was taken off work because of an aggravation of his condition. He returned to light duty work on July 14, 1981, even though he was still in considerable distress. He was told that he should rest 30 minutes when the pain occurred. If it did not end in that amount of time, he was to leave work and take his medication. He was also told that he would not be allowed to work more than six hours a day. Dr. Deming stated that claimant had discomfort even on light duty work and that, if it became more frequent, he would not be able to do even light duty work.

Claimant was taken off work again on August 4, 1981. Dr. Deming noted that, although he had only worked 22 out of 40 hours per week in light duty, that work had caused his symptoms to flare. He concluded:

> "At the present time, after a trial of light duty with prompt exacerbation, I feel the patient should be considered for medical retirement disability. I recommend that Mr. Pournelle be recommended for permanent disability by the disability board * * *."

He further concluded that claimant was not a good candidate for vocational rehabilitation. Orthopaedic Consultants examined claimant and concluded that his injury became exacer-

bated when he attempted to work. They also noted that claimant had made up his mind to retire and stated:

> "With this in mind, as well as the repeated difficulty attempting to do his job, it is doubtful that he could pursue his usual occupation or related occupation even with limitations and retraining would not be feasible."

Dr. Rosenbaum examined claimant for the employer in October, 1981, and concluded that, if claimant were retrained, he should be able to do a sedentary occupation. That doctor also concluded that claimant could do a four to six-month job offered by the employer making a training film. Dr. Deming again stated in November, 1981, that claimant could not be retrained and that a sedentary occupation was not feasible, because sitting would exacerbate his pain in a very short time. However, he further noted that claimant had called and said he was going to try the filming project. Claimant began the filming project in January, 1982. Although he had flexible hours and was performing sedentary work, after only a few days he returned to Dr. Deming, who noted that his pain was exacerbated to the point that he needed increased pain medication, which the doctor could not support. He again recommended permanent medical retirement. Dr. Rankin examined claimant for the employer and stated in his deposition that he could not do a sedentary occupation which required him to remain stationary but could work if he could vary his activities. The referee noted that claimant testified "quite openly and frankly and I do not question his credibility" but stated that merely because claimant had to work with pain did not justify an award of permanent total disability. The referee noted that he did not

believe that claimant had taken full advantage of the jobs offered to him by the employer and had not even considered other types of work. The Board affirmed the order of the referee.

In order to establish his claim of permanent total disability, a claimant must prove that he is unable to perform any work at a gainful and suitable occupation. *Wilson v. Weyerhaeuser,* 30 Or App 403, 567 P2d 567 (1977). The ability to work on a permanent part-time basis is sufficient to avoid a finding of permanent total disability. *Hill v. SAIF,* 25 Or App 697, 701, 550 P2d 752 (1976). A claimant may prove permanent total disability under either of two theories. First, if he can establish that he is permanently and totally disabled from the medical evidence of his physical incapacity alone, he is entitled to such an award. *Wilson v. Weyerhaeuser, supra,* 30 Or App at 409. Under the facts of this case, claimant may have been able to establish such a disability. His treating physician, Dr. Deming, has stated in repeated reports, dating from as early as March, 1980, that claimant is unable to be gainfully employed in the regular job market. That doctor's consistent opinion is that the only reason claimant was able to be employed at all is that his employer was very cooperative in allowing him a job within his specific restrictions. His opinion is, of course, balanced by the opinions of the employers' experts, Dr. Rosenbaum and Dr. Rankin, who concluded that claimant could do some type of work.

We need not decide which of these experts' opinions to follow, because, even if claimant has not proved his claim entirely as a physical incapacity, he has established the second basis, *i.e.*, the so-called odd lot permanent disability, and has shown that he has the motivation to seek and work at gainful employment. *Deaton v. SAIF,* 13 Or App 298, 305, 509 P2d 1215, 1218 (1973). This is not a case in which a claimant was injured and then only made token efforts to obtain work. Although claimant was in increasing amounts of pain and was placed under increasing restrictions, he returned to his employer over and over again, attempting to find a job that he could perform. The final time that he returned to work was in a job which was limited in time to only four to six months and had total flexibility of hours and of position in which the job would be performed. He took the job against the advice of his treating physician, who had urged him to retire. However,

even under those ideal conditions, claimant was only able to be employed for a few days before his back became aggravated and his doctor took him off work. Although the referee noted that claimant was credible, he failed to award permanent total disability, at least in part because he held that claimant had failed to look anywhere but his employer for work.

We find no basis under the facts of this case for requiring claimant to look beyond his employer to obtain work. The employer had consistently found jobs which were within claimant's restrictions and cooperated fully in attempting to find work which he could perform. Further, claimant's treating physician repeatedly stated that he was only able to return to work because he was getting the cooperation of his employer. We see no reason why an employe should be required to go beyond his employer to try to find work within severe restrictions placed on him when his employer is readily offering him jobs within any restrictions given.

The simple fact of this case is that claimant is a highly motivated individual who has spent nearly 20 years working successfully for this employer and who has tried over and over again to return to work and to be gainfully employed in some capacity. He continued to attempt to return to work in spite of the repeated advice of his physician to retire. After all of his attempts to return to work failed, he decided that he was not able to be employed. Claimant is entitled to a permanent total award as of April 12, 1982, the last date on which he was found to be medically stationary.

Reversed; claimant awarded permanent total disability as of April 12, 1982.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Fred Chatfield, Claimant.

CHATFIELD,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB No. 82-03927; CA A30331)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 29, 1984.

Kathryn H. Clarke, Portland, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed; referee's order reinstated.

WARREN, J.

Claimant appeals an order of the Workers' Compensation Board that reversed the referee and held that claimant had failed to prove that the worsening of the symptoms of his preexisting psychological condition was related to the compensable injury. We reverse.

On August 21, 1981, claimant was employed as a truck driver and was involved in an accident that resulted in his immediate admission to the hospital. He was treated for multiple abrasions, lacerations to his right knee, left hand and left eyelid and a possible head injury. He was discharged on August 25, 1981. Initially, his chief complaint was of locking in his right knee. He returned to work one month after the accident but could only work two weeks, because his knee would lock and become painful. In November, 1981, claimant underwent arthroscopy on his knee. At the time of the hearing, his knee would still lock and go numb, so he was not able to drive a truck. In April, 1982, Dr. Kim diagnosed right tempormandibular joint (jaw) dislocation, relating the condition to the compensable truck accident. Bilateral arthroplasties were performed on his right knee in June, 1982. Both the knee and the jaw condition were accepted as compensable.

Claimant became unhappy with the treatment given him by his treating physician and in December, 1981, went to see Dr. Kim for a second opinion. Dr. Kim noted that claimant

had depression secondary to his on-the-job accident and felt that he might be a suicide risk. On February 25, 1982, the doctor stated: "He is, in my opinion, not able to work for psychiatric reasons, let alone his knee pain now." After receiving that opinion, SAIF sent claimant to Dr. Colistro, a psychologist. Thereafter, claimant was seen by Mary Lansing, a counselor, Dr. Zigrang, a clinical psychologist, and Dr. Turco, a psychologist. Although they place different diagnostic names on claimant's mental disease, all concur that claimant has a serious psychological disability. All except Dr. Turco believe that he is disabled by his psychological problems. The issue therefore is whether his preexisting psychological condition was worsened by his industrial accident.

Claimant's psychological history consists of such a long series of traumatic events that, as noted by the referee: "It is not surprising that he has an underlying psychiatric

condition that is subject to episodic aggravation." As a child, he was subjected to severe physical abuse. According to claimant, out of all of the children in the family, he was the only one that was so abused. He ran away from home at the age of 14 and was placed in the Vancouver Boys Academy. At 15, he was informally adopted by friends of the family. At 17, he dropped out of high school, having only completed the ninth grade, and joined the army. On his eighteenth birthday he received orders to go to Vietnam. Psychological testing revealed that claimant's experience there was at the highest stress level possible. While in Vietnam, claimant became addicted to several drugs. He was shipped to Germany, where he continued to have a drug problem and was eventually put in a detoxification center. The treatment was not successful. He went AWOL and was eventually discharged from the army. He returned to Washington, still having his drug use problem, and stole some property to support his habit. He was turned into the police by his parents and convicted on three counts of burglary. He served two years in prison, during which he attempted suicide once. After getting out of prison, he stayed off drugs but continued to have an unstable lifestyle for five or six years.

Beginning in 1979, claimant's life began to stabilize. He completed, with merit, a truck driver training course and was immediately employed. Although he quit his first job after ten months, and his second after five months, he always obtained another job and was never unemployed for long. According to his 801 form, he had been on the job for approximately six months at the time of the injury. During that period of time, he had also had a continuing relationship with a woman with whom he lived and by whom he had a child. He was actively involved in community work and was on the board of the North Community Action Council, where he was extremely helpful organizing, revising and spearheading programs. Thus, it appears that any psychological difficulties that claimant had were basically asymptomatic from 1979 until the time of the injury.

While claimant was in the hospital recovering from the injury, his girlfriend left him, accused him of sexually abusing his two-year-old daughter and obtained a restraining order barring him from any contact with her or his daughter. Criminal charges based on that allegation have since been

dropped, but claimant is still under a restraining order barring him from any contact with his daughter.

Since claimant's hospitalization, his memory has decreased, he is more belligerent and he isolates himself in his bedroom, hardly going anywhere, except to work on his car. He cries a lot and does not believe that he is mentally able to work now. He testified: "It just seemed like a chain reaction, just something . . the wreck just triggered something up inside me, you know."

In this complex case, in which many different types of trauma intertwine in claimant's psychological makeup, we rely on the opinions of experts to determine whether the psychological condition was worsened by his compensable accident. *See Hart v. SAIF,* 31 Or App 181, 570 P2d 92 (1977). Unfortunately, the medical evidence in this case is not uniform. Four experts agree that claimant's current mental condition is attributable to the accident. Dr. Kim, a general practitioner, who first noted claimant's psychological problems after the injury and who is claimant's treating physician, has stated unequivocally on several occasions that his current state of mind or psychological disability was triggered by the accident. Lansing, a counselor who treated claimant, concluded: "I believe that [claimant's] negative experiences in his military career, his truck accident, and the sexual abuse charge are all contributing factors to his mental status." Dr. Achar, a psychiatrist, saw claimant at the request of Dr. Kim. He concluded:

> "The condition he is suffering from is greatly exacerbated by the accident without a doubt. * * * I have no doubt in my mind what we are seeing now to a large extent is the direct result of the truck accident he was involved in and only a small portion is due to the exacerbation of his personality character traits."

Dr. Zigrang, a clinical psychologist, testified at the hearing. He was with claimant for three hours, administered several tests and had extensive conversations. He also reviewed all of the medical records and stated that at least two of the tests indicated that claimant had sustained some injury to the left hemisphere of his brain. He noted that claimant had been put on 18 different drugs since his injury, a number of which were anti-depressant, anti-anxiety, major or minor

tranquilizers. He concluded that the industrial injury was a major contributing factor to claimant's current mental problems.

Two experts believe that claimant's underlying psychological disability was not worsened by the accident. Dr. Colistro believes that, although claimant suffers from serious mental disturbances, they are not caused or significantly aggravated by the accident. However, his mental problems do make it impossible for him to benefit from medical treatment and vocational rehabilitation. He recommended hospitalization.

Dr. Turco, a psychologist, also testified at the hear-

ing. He saw claimant on one occasion, during the time when claimant's jaws were wired shut because of treatment he was undergoing for the tempormandibular joint dislocation. The doctor concluded that claimant's industrial injury worsened his symptoms but did not worsen his underlying condition. However, it is evident from Dr. Turco's entire opinion that this is a conclusion that he would uniformly make, because he appears to view any increase in symptomatology as merely temporary and not affecting the underlying condition. He does note that claimant's personality disorder lengthens the time that it will take him to get over the injury and that claimant's symptoms are an expression of the mental disease becoming active. Dr. Turco stated that "you know schizophrenia has worsened when you see an increase in the symptomatology."

We agree with the referee that claimant failed to submit adequate evidence either that he has sustained actual physical brain damage or that, if such brain damage is present, it is related to the compensable injury. The only evidence in the record of such brain damage is the testimony of Dr. Zigrang, who has no medical training, and there is no showing that he is competent to testify as to physical brain damage. The fact that several tests given by him indicate possible brain damage may point to the need for further testing, but they do not establish either that such brain damage actually is present or that, if present, it is related to the compensable injury.

We conclude that claimant has met his burden of proving that his psychological impairment was worsened by

the compensable accident. Clearly, he had a serious preexisting mental disability but, as noted by the referee:

> "What seems significant is that for a period of almost three years, from 1979 to the time of the accident of August, 1981, claimant's life situation became stable and useful. He became involved in community action groups, completed a truck driving training program and worked fairly consistently at this profession until his accident. This period of stability persuades this trier of fact that events occurring after August, 1981, materially contributed to claimant's worsened emotional condition."

We conclude that claimant's mental condition worsened after the compensable accident. The issue therefore is whether claimant's truck accident contributed to the worsening of his mental condition or whether the worsening of the symptoms after that date is totally attributable to his preexisting condition, aggravated by his girlfriend leaving him, the charges of sexual abuse and the visitation restraint.

The preponderance of the medical evidence establishes that both the accident and claimant's personal life were significant contributing factors to his current mental condition. That is the conclusion of the treating physician, Dr. Kim, the counselor, Lansing, the psychologist, Dr. Achar, and the clinical psychiatrist, Dr. Zigrang. Even SAIF's experts, who conclude that claimant's underlying psychological disability was not worsened by the accident, appear to agree that the

accident did worsen claimant's symptoms. Dr. Colistro stated that the stresses claimant suffered from the pain resulting from the accident "appear to have caused an intensification of his symptoms." Dr. Turco stated that claimant's industrial injury did worsen the symptoms and that the symptoms are an expression of the disease becoming active.

At a minimum, claimant has established that his psychological condition was stable and not requiring treatment before the injury, the injury greatly increased his symptoms and his symptoms now make it much more difficult for him to obtain employment and made treatment necessary. That is sufficient to meet claimant's burden of proving that his psychological condition is compensable. *Hutcheson v.*

Weyerhaeuser, 288 Or 51, 602 P2d 268 (1979); *ASC Contractors v. Harr*, 69 Or App 405, 685 P2d 485 (1984); *VonKohlbeck v. SAIF*, 68 Or App 272, 680 P2d 1026 (1984); *Wheeler v. Boise-Cascade*, 66 Or App 620, 675 P2d 499 (1984).

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Betty J. Howerton, Claimant.

HOWERTON,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(81-05697; CA A30044)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 9, 1984.

Nicholas D. Zafiratos, Astoria, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Reversed; referee's order reinstated.

VAN HOOMISSEN, J.

This is a workers' compensation case. The issue is the extent of permanent partial disability claimant sustained as a result of a compensable injury to her lower back. In July, 1981, she was awarded 30 percent disability by determination order. The referee increased that award to 75 percent. The Workers' Compensation Board reduced the award to 45 percent. Claimant contends that the Board erred in reducing her award, and she asks us to reinstate the referee's award.

Claimant, age 55 at the time of the hearing, was employed as a nurse's aide. Her employment required her to do heavy lifting when moving patients. For three years before her injury she worked in physical therapy. That job required that she move patients from their beds to wheelchairs and therapy tables. She was injured in 1979, when she was knocked down by a patient. She also suffers from chronic tendonitis of the left hip. She has an eighth grade formal education and obtained her GED while recuperating from her injury. In 1980, she underwent a decompression laminectomy and partial discectomy.

All of claimant's examining physicians agree that because of the injury she cannot return to her previous job. Dr. Harris advised her to seek work that would not involve heavy lifting or stooping. Orthopaedic Consultants recommended that she find some other work. It rated her disability as "mildly moderate."

Claimant continues to work for the same employer. Her present job involves distributing medications to patients from a cart. She complains that after prolonged standing her left leg gets numb. That has caused her to fall at times, and she relies on the cart to stabilize herself. She frequently experiences back pain and has difficulty bending and lifting. It is necessary for her to take at least two breaks each morning and two each afternoon.

The referee found that claimant was a credible witness who was making the best of her situation. He stated:

> "I conclude that she has been ousted from most of her job opportunities and has a permanent loss of wage-earning capacity that is substantial considering her past work experience, training, and her age. Looking at her ability to compete

> in the open labor market for wages, her opportunities to obtain employment are grim. Claimant's having to take additional breaks in the morning and in the afternoon gives rise to a serious question of her ability to hold down a job. The inference is made that the claimant is well-liked and well-thought-of by the employer, because this is close to a sheltered workshop situation."

He concluded that she had lost 75 percent of her wage-earning capacity.

Applying the guidelines in OAR 436-65-600 *et seq.* for

evaluating the extent of permanent partial disability,[1] the Board concluded that claimant's injury merited a disability rating of 45 percent. In fixing that percentage, the Board ostensibly relied on its guidelines and on "other similar cases." What other cases the Board relied on it did not say.

Claimant first argues that the Board's guidelines are invalid, because they arbitrarily assign positive and negative points for each factor.[2] We disagree. *See Fraijo v. Fred N. Bay News Co.*, 59 Or App 260, 650 P2d 1019 (1982); *OSEA v. Workers' Compensation Dept.*, 51 Or App 55, 624 P2d 1078 (1980), *rev den* 291 Or 9 (1981). The guidelines are tools the Board may use in evaluating the extent of permanent partial disability. However, it may not strictly follow those guidelines, but must always consider the total circumstances of the claimant. *See Fraijo v. Fred N. Bay News Co., supra,* 59 Or App at 269; *accord Harwell v. Argonaut Ins. Co.*, 296 Or 505, 510, 678 P2d 1202 (1984).

Claimant next argues that, assuming that the guidelines are valid, the Board misapplied them here. We will not decide whether the numeric values the Board assigned are correct. Instead, on *de novo* review, we conclude that, considering all of her circumstances, claimant was inadequately compensated. We find that the Board gave insufficient weight to claimant's difficulty in finding employment on the open labor market. That she is now employed by the same employer and is receiving a higher wage than she was receiving at the time of her injury is not controlling. Our inquiry must focus on her earning capacity.

ORS 656.214(5) provides, in relevant part:

> "Earning capacity is the ability to obtain and hold gainful employment *in the broad field of general occupations,* taking into consideration such factors as age, education, training, skills, and work experience." (Emphasis supplied.)

See OAR 436-65-600(2). Claimant will experience considerable difficulty in obtaining gainful employment as a result of her physical limitations. The referee characterized her potential employability as "grim." Because of her loyalty and perseverance, her employer has been flexible in adapting her work to her condition. However, there is no indication that other potential employers would be as accommodating. She cannot stand or sit for extended periods. She can walk, but she will occasionally fall without the aid of something to support her. She must take frequent work breaks. Those facts, combined with other facts found in the record, satisfy us that the referee's assessment was correct. *See Ziegler v. Coast to Coast Stores,* 23 Or App 198, 541 P2d 1070 (1975); *Ford v. SAIF,* 7 Or App 549, 492 P2d 491 (1972).

Reversed; referee's order reinstated.

[1] Under the Board's rules, a claimant is first assigned an impairment rating. Various factors are then examined and positive or negative points are allocated, depending on whether the factor examined beneficially or adversely affects the claimant's earning capacity. Those factors include age, education, work experience, adaptability to less strenuous physical labor, mental capacity, emotional and psychological findings and labor market findings. OAR 436-65-602, 608. The Board assigned claimant an impairment rating of 30. It added +9 for age, +3 for work experience and +10 for adaptability. It assigned no points for the other factors but did not explain its reasons for this determination.

[2] Age, for example, is given a −10 if it mitigates the extent of disability, *see* OAR 436-65-602, but all other factors are given a maximum of −25.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Bobby Bush, Claimant.
BUSH,
Petitioner,
v.
SAIF CORPORATION,
Respondent.
(82-08805; CA A30312)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 20, 1984.

Ronald K. Cue, Ashland, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

YOUNG, J.

Reversed and remanded with instructions to accept claim.

YOUNG, J.

Claimant appeals an order of the Workers' Compensation Board which affirmed a referee's finding that the worsening of his preexisting varicose vein condition is not a compensable occupational disease. ORS 656.802(1)(a). We reverse and remand.

Claimant first noticed varicose veins in his legs in the late 1940s, when he was in his twenties. At that time he worked as a jockey, and he found that standing in the stirrups while riding made his condition worse. He stopped riding in 1949, although he has since worked as a horse trainer and riding instructor, as well as a cook. When he stopped riding, his varicose veins were relatively small and were limited to his upper thighs. A boxer-type swimming suit would cover them. The veins had not changed, nor had he had problems with them, before he went to work for the Ashland Hills Inn in March, 1982, as a cook.[1] At Ashland Hills he was required to stand on a hard surface floor for 90 percent of his work time. His previous cooking jobs had involved considerably more walking and much less standing.

About 10 days after starting work, claimant began feeling pain in his legs. He later noticed that his varicose veins were becoming more prominent, were spreading down his

[1] SAIF is the insurer for Ashland Hills.

thighs and were appearing in his calves. By mid-July, when he last worked for Ashland Hills, his legs were painful, the veins were prominent and he had what his physician described as an area of phlebothrombosis on his right calf. His physician had observed the varicose veins in the course of a physical examination in January, 1981, and noted their existence. He did not believe that treatment was necessary at that time. When claimant complained about his varicose veins soon after he stopped working, his physician found the condition to be much worse; he told claimant then that surgery would eventually be necessary.

According to the medical evidence, varicose veins are the result of the valves in the veins becoming "incompetent" and unable to keep the blood moving. As a result, blood collects in the veins, causing them to dilate further, leading to

increased incompetence of the valves. Walking retards this progression, because exercising the leg muscles helps the veins circulate the blood. Standing for long periods, particularly on hard surfaces, worsens the condition because gravity and inertia tend to hold the blood in the legs. There are other factors which may also contribute to varicose veins, including aging and general inactivity. There also seems to be an hereditary component, particularly for women.

There is no doubt, and the referee and the Board so found, that claimant's work contributed to the objective worsening of his condition. The Board found, however, that he had not shown that his work was the major cause of the worsening, because he had not shown that other possible causes did not contribute 50 percent to his condition. We find otherwise.

Claimant's condition represents the worsening of an underlying disease process. For it to be compensable he must meet the tests of *Weller v. Union Carbide,* 288 Or 27, 35, 602 P2d 259 (1979) by showing that

> "(1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services."

We find that claimant's work activity worsened the underlying disease.[2] Before he began work at Ashland Hills, his varicose veins were in a limited area, and they had not progressed for many years. His work involved conditions which could lead to a worsening. The worsening which occurred while he worked does not reflect simply an increase in his symptoms. Rather, the varicose veins increased both in location and size, indicating that the valves in his veins were in a significantly worse condition than before. His off-the-job activities did not expose him to the conditions that his on-the-job duties did. He has also shown increased pain and a need for medical services as a result of the worsening.

[2] We thus do not need to apply our decision in *Wheeler v. Boise Cascade,* 66 Or App 620, 675 P2d 499, *rev allowed* 296 Or 829 (1984), to this case. In *Wheeler* we held that the claimant did not need to show a worsening of the underlying condition if he had been asymptomatic before the work caused the symptoms to appear. Here claimant has shown a worsening.

The Board found that claimant's work-related activities were not "the major contributing cause of the disability." *SAIF v. Gygi*, 55 Or App 570, 639 P2d 655, *rev den* 292 Or 825 (1982). We need not decide whether the Board was correct in interpreting this statement as requiring that the work-related activity be at least 51 percent of the total cause of the worsening of the disease, because we find that claimant's work was the major cause under any test. If the natural aging process were significantly involved, the worsening would have been more gradual than it was. There is no evidence of off-the-job activity or of arteriosclerosis that could contribute to the condition. Claimant's physician testified that he is unaware of any medical evidence which would link claimant's hypertension to his varicose veins. The Board suggests no other conditions which might be involved, and we find none. Not only was claimant's work activity the major cause of the worsening, it is not clear that there was any other cause. *See Dethlefs v. Hyster Co.*, 295 Or 298, 667 P2d 487 (1983).

Reversed and remanded with instructions to accept the claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of David F. Barrett, Claimant.

BARRETT,
Petitioner,
v.
D & H DRYWALL et al,
Respondents.

(WCB No. 81-02757; CA A29349)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 20, 1984.

Merrill Schneider, Sandy, argued the cause and filed the brief for petitioner.

Scott H. Terrall, Portland, argued the cause for respondents. With him on the brief was Meyers & Terrall, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed and remanded for redetermination of extent of disability.

ROSSMAN, J.

Claimant petitions for review of the order of the Workers' Compensation Board, claiming that the Board erred in failing to consider his preexisting arthritis in determining

the extent of his permanent disability. We reverse.[1]

Claimant is a 42-year-old man and has worked for 19 years as a sheetrock taper. In 1960, while he was in the service, he injured his low back in a jeep accident and has had occasional difficulties with his back since then. However, he was asymptomatic for some time before the accident in this case.

On June 5, 1980, he fell four feet from a ladder onto a concrete floor, landing on his feet and hitting his back on a brick wall. He suffered pain and sought immediate medical attention. The claim was accepted, and benefits were paid for a substantial period of time. A determination order was issued on March 4, 1981, which awarded temporary total disability and 25 percent unscheduled permanent disability. Claimant requested a hearing. On September 14, 1981, he filed an amended request for hearing alleging that his underlying arthritic condition arose out of and in the scope of his employment. On February 23, 1982, the employer denied liability for the underlying arthritic condition but continued to accept responsibility for the June 5 accident. The referee upheld the denial and, after eliminating any disability caused by the arthritis, awarded claimant an additional 10 percent unscheduled disability. The Board affirmed.

We need not decide the procedural validity of the partial denial because, even if it was improper, it was harmless, because it was unnecessary. The so-called denial was issued 17 days before an already scheduled hearing on the extent of disability. Even without the denial, the issue of worsening of the underlying condition could have been raised at the hearing on the issue of extent of disability.

It is undisputed that claimant has an underlying degenerative intervertebral disc disease. Further, we agree with the referee's conclusion that claimant failed to establish a worsening of his underlying disease attributable to the accident. However, that does not resolve the issue. It is well established that an employer takes the worker as he finds him. *Martin v. SAIF*, 26 Or App 571, 553 P2d 377 (1976). This does not mean that an employer must pay compensation for preexisting conditions that are not worsened by the compensable injury. However, it does mean that a claimant is entitled to full compensation if a preexisting condition contributes to the permanent loss of earning capacity in combination with a compensable injury, ORS 656.215(5), even if the loss of earning capacity would have been minimal but for the preexisting injury.

In this case, the referee specifically excluded consideration of the preexisting osteoarthritis in determining claimant's loss of earning capacity. We cannot determine whether the referee would have reached the same conclusion on the extent of disability if the osteoarthritis had been considered as an element of claimant's total loss of earning capacity. We prefer to have the referee make that determination in the first instance.

Reversed and remanded for redetermination of extent of disability.

[1] Claimant also appeals on the issue of the extent of disability. Given our remand, we need not consider this issue.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Thomas L. Clark, Claimant.

CLARK,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB No. 82-07391; CA A30404)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 29, 1984.

James S. Coon, Portland, argued the cause for petitioner. With him on the brief were Douglas S. Green and Welch, Bruun and Green, Portland.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed in part; referee's order reinstated except that determination order of August 20, 1982, is not set aside.

ROSSMAN, J.

Claimant petitions for review of a Workers' Compensation Board order which reversed the referee and held that claimant had failed to prove his aggravation claim. We reverse.[1]

Claimant suffered compensable low back injuries in November, 1978, and June, 1979, for which SAIF was responsible. A determination order was issued in August, 1982, awarding him temporary total disability through June 11, 1982, and affirming an earlier award of 25 percent unscheduled permanent partial disability. In order to establish his aggravation claim, claimant must prove a worsening subsequent to that date.

The referee held that claimant had established that he was not medically stationary and that further curative treatment was necessary.[2] The Board reversed, agreeing with

[1] The Board also increased claimant's award of permanent partial disability to 35 percent. Claimant has appealed that as an insufficient award. Given our determination that claimant is not medically stationary, we do not need to reach this issue.

[2] The referee also ordered that the determination order be set aside. Because this is an aggravation claim in which a claimant must establish only a worsening since the date of the determination order, that part of the order, as recognized by the Board, was incorrect.

SAIF that "claimant is not entitled to reopening of his claim unless and until he undergoes the decompression surgery that has been suggested by Dr. Kendrick, and that claimant's condition remains medically stationary."

The primary medical evidence on which the referee relied in finding claimant's condition to be aggravated was the September 7, 1982, opinion of Dr. Kendrick, the treating physician, who stated that claimant has continued to worsen. He recommended that a decompression laminectomy be performed. Thereafter claimant saw Dr. Raaf, who stated that he should not go back to work as a millwright. Dr. Raaf noted that he would not recommend decompression surgery unless claimant were unable to do even light work. If a decompression were done, he would recommend that a fusion also be done. Dr. Kendrick stated that he agreed with the conclusion of Dr. Raaf that, if claimant could do light work, no further procedure should be done. Dr. Kendrick further stated that,

without the additional surgery, claimant could not return to work as a millwright, could not do any heavy lifting or mechanical work, could not be in any one position for a long period of time and could not do any crawling, stooping, frequent bending at the waist or frequent twisting.

The Board, in evaluating the medical reports, appears to have concluded that, because the doctors stated that surgery would not be recommended if claimant could do light work, his condition had not been aggravated. However, the issue is not whether claimant should or will undergo additional surgery. The issue in an aggravation claim is whether a claimant has established, by a preponderance of the evidence, that his condition has worsened since the last arrangement of compensation and that the worsening is causally related to the industrial injury. The worsening need not be substantial. *Mosqueda v. ESCO Corporation*, 54 Or App 736, 739, 636 P2d 431, *rev den* 292 Or 45 (1981). The best evidence in this case is the September 7, 1982, report by Dr. Kendrick, in which he specifically states that claimant has continued to worsen. Although he recommends a decompression laminectomy and in a later report states that, if claimant could do light work, he would not recommend the procedure, he never changed his conclusion that claimant had worsened as of September, 1982. Dr. Raaf, who only saw claimant on one occasion, did not attempt to give any opinion whether his condition had worsened since the date of the determination order.

Because the only medical evidence in the record establishes that claimant's condition worsened after the last arrangement of compensation, claimant was entitled to have his claim reopened. We therefore reverse the Board's order and reinstate the referee's order, except for the portion which states that the determination order of August 20, 1982, is set aside.

Reversed in part; referee's order reinstated except that determination order of August 20, 1982, is not set aside.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Ervin Edge, Claimant.

EDGE,
Petitioner,

v.

JELD-WEN, INC.,
Respondent.

(79-04080; CA A30606)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 23, 1984.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Brian Pocock, Eugene, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed; claimant awarded permanent total disability as of May 3, 1979.

BUTTLER, P. J.

Claimant appeals an order of the Workers' Compensation Board, claiming that he is permanently and totally disabled. We agree and reverse.

Claimant suffered a compensable injury to his lower back and left leg in August, 1978, for which he underwent a lumbar laminectomy. A determination order awarded him temporary total disability and 15 percent unscheduled disability. Although the employer never contested compensability, the referee, on appeal of the extent of disability, held that claimant had failed to prove that "his complaints are traceable to the compensable injury." The referee, therefore, affirmed the determination order, even though he noted that "the claimant is permanently and possibly totally disabled."

The Board affirmed. On the first appeal to this court, we reversed, holding that claimant had established the compensability of his condition. *Edge v. Jeld-Wen*, 52 Or App 725, 629 P2d 841 (1981). We noted that claimant's disability clearly exceeded the 15 percent previously awarded and remanded to the Board for further proceedings, because neither the referee nor the Board had focused clearly on the issue of extent of disability. On remand, the Board remanded to the referee who, following a hearing, awarded claimant 75 percent unscheduled disability. Again, the Board affirmed, and this appeal followed.

Claimant's condition as of the first hearing is summarized in our original opinion and need not be repeated here. *Edge v. Jeld-Wen, supra,* 52 Or App at 727-28. Two medical opinions have been rendered since the original appeal to this court. Orthopaedic Consultants, in their report of April 9, 1982, stated:

> "* * * We do not believe that he is employable because of a variety of reasons. These include a herniated disc with its residuals, his upper motor neuron disease, as well as his severe and extensive osteophyte formation in both dorsal and lumbar spine."

They rated the loss of function in claimant's lower back as severe, and concluded:

> "* * * Mr. Edge does not feel that it is possible for him to be employed, and the examiners are inclined to agree with this

> decision. We do not find any functional interference in this case. We do not believe that additional medical treatment is indicated."

The only other new medical evidence was provided by Dr. Klump, who saw claimant only once. In his opinion, dated April 13, 1982, he noted that claimant could not return to his former occupation; he gave no opinion as to whether claimant could do other work. He stated that claimant was not medically stationary and had not been since his accident. Dr. Klump recommended that claimant undergo a nerve conduction study, an electromyogram and a myelogram, all of which claimant refused. Dr. Klump believed that the refusal to undergo the myelogram was unreasonable, even though claimant's previous surgery had been unsuccessful. Dr. Klump volunteered that he would undergo 30 myelograms himself if he thought it might get rid of the pain. However, he admitted that the percentage of successful results from surgery decreased with additional surgery.

We conclude that claimant has met his burden of proving that he is permanently and totally disabled from the medical evidence alone. We find the most persuasive evidence to be the April 9, 1982, report of Orthopaedic Consultants, which states twice that claimant is incapacitated from employment as a result of his physical condition alone. The report and deposition of Dr. Klump do not express any clear opinion as to claimant's employability. His statement that claimant is not medically stationary, because additional tests and studies, including another myelogram, might show that further surgery might improve his condition is not persuasive.

Employer argues that claimant is not entitled to an award of permanent total disability, because he is not motivated and he refused to undergo "reasonable diagnostic procedures." Although Dr. Klump, who saw claimant on one occasion, recommended additional diagnostic procedures, which claimant refused, his recommendation was made only five days after three doctors at Orthopaedic Consultants examined claimant and concluded that no additional medical treatment was necessary. This is not a case where the preponderance of medical opinion is that a claimant should undergo diagnostic procedures to determine if his condition might be improved by additional surgery. Claimant's refusal to submit

to those procedures, recommended by only one physician who saw him once, is not unreasonable when, as here, claimant previously had undergone those procedures followed by a lumbar laminectomy, which was not successful.

Neither may claimant's disability be reduced under ORS 656.206(3) for his failure to seek regular gainful employment. The preponderance of the evidence establishes that claimant is completely incapacitated from employment by his physical conditions alone. Accordingly, claimant is not required to conduct a futile search for employment. *Morris v. Denny's*, 50 Or App 533, 623 P2d 1118 (1981); *Butcher v. SAIF*, 45 Or App 313, 608 P2d 575 (1980).

Claimant has proved by a preponderance of the evidence that he was permanently and totally disabled as of May 3, 1979, the date on which the determination order was issued.

Reversed; claimant awarded permanent total disability as of May 3, 1979.

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270 October 10, 1984 No. 589

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Alfred M. Norbeck, Claimant.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
NORBECK,
Respondent - Cross-Respondent,
CENTRAL MANUFACTURING CO.,
Respondent - Cross-Petitioner.

(81-06775, 82-05186, 82-06053; CA A28741)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 14, 1984.

Darrell E. Bewley, Appellate Counsel, State Accident Insurance Fund Corporation, Salem, argued the cause for petitioner. On the brief was Donna Parton Garaventa, Associate Appellate Counsel, State Accident Insurance Fund Corporation, Salem.

W. D. Bates, Jr., Eugene, argued the cause and filed the briefs for respondent - cross-respondent.

Scott H. Terrall, Portland, argued the cause for respondent - cross-petitioner. On the brief were Bruce L. Byerly, Daniel L. Meyers, and Moscato & Meyers, Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed on appeal and on cross-appeal.

VAN HOOMISSEN, J.

SAIF appeals from an order of the Workers' Compensation Board. It contends that the Board erred in affirming the referee's order that the back condition for which claimant received treatment in 1981 is compensable and that SAIF is responsible, in affirming the referee's award of interim compensation, and in awarding a penalty and attorney fees for unreasonable failure to pay temporary total disability when due. Central Manufacturing Co. had previously accepted claimant's 1979 back claim during a time when EBI was Central's insurer. It cross-appeals, contending that the Board erred in affirming the referee's award of unscheduled permanent disability for claimant's back disability resulting from his 1979 compensable injury.

On *de novo* review, ORS 656.298(6), we conclude that the weight of the medical evidence demonstrates that claimant's back problem has been worsened by his work activities while SAIF was on the risk, that his condition is compensable as an occupational disease, and that SAIF is responsible.

SAIF contends that the Board erred in affirming the referee's award of interim compensation from March 23 to June 28, 1982. It argues that claimant was off work during that period for reasons unrelated to his physical condition and that, therefore, he is not entitled to an award.

The Board found in relevant part:

> "Claimant filed his * * * claim directly with SAIF in March 1982. This filing constituted the notice or knowledge contemplated by ORS 656.262(4). SAIF had an obligation either to commence payment of interim compensation within 14 days of its receipt of this claim form, which was March 23, 1982, or deny the claim. The fact that claimant apparently was retired at the time the claim was filed does not excuse SAIF's failure to comply with this duty. * * * SAIF, therefore, is required to pay claimant interim compensation from March 23, 1982 until the date of the denial issued in behalf of Central Manufacturing Corporation, June 28, 1982, in accordance with the terms of the Referee's order. * * *"

We agree. *See Bono v. SAIF,* 66 Or App 138, 673 P2d 558 (1983), *rev allowed* 296 Or 829, 679 P2d 1366 (1984); *Stone v. SAIF,* 57 Or App 808, 646 P2d 668, *petitions for review*

dismissed as improvidently granted, 294 Or 442, 656 P2d 940 (1983); *Likens v. SAIF,* 56 Or App 498, 642 P2d 342 (1982).

As to SAIF's contention that the Board erred in affirming the referee's award of a penalty and attorney fees for failure to pay interim compensation when due, SAIF argues only that that was error because no compensation was due. We have already held that compensation was due and, therefore, we reject SAIF's contention.

On cross-appeal, the employer requests that we modify the Board's order that affirmed the referee's award of 15

percent permanent partial disability[1] for the 1979 injury, because it is excessive. We do not find it excessive.

Affirmed on appeal and on cross-appeal.

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[1] The referee stated:

"Since the 1979 EBI claim is not to be reopened for a worsened condition, it is appropriate to consider the permanent-disability issue on that claim. The claimant has contested the failure of the September 1980 Determination Order to grant a permanent disability award. That failure is puzzling, since Dr. Degge's uncontroverted, July-1980, closing report indicated that the claimant had a residual permanent functional impairment. In evaluating the permanent disability on the 1979 claim now, of course, it is necessary to look back to the claimant's condition in September 1980, when the claim was closed — since the subsequent worsening and increased impairment is SAIF's responsibility.

"The claimant testified about his condition in September 1980. From that testimony I find that he was then having some low-back and right leg problems. With respect to his right leg, his thigh bothered him the most, and he had some shooting pains into the toes of his right foot. However, he was not bothered by the low-back pain, which varied with his activity. It did not take much bending, twisting or walking at work to make him feel worse. He slowed down in his ability to do his regular job, but was able to continue with it because the declining economy reduced the number of lumber orders that the claimant had to handle.

"Back disability is an unscheduled disability, which is evaluated in terms of permanent loss of earning capacity. Such an evaluation requires consideration of medical factors, such as the residual physical impairment, in the light of non-medical factors, such as the claimant's age, education, work experience, adaptability to suitable employment and the availability of such employment — without regard to business booms or recessions. The basic question in evaluating unscheduled disability is the extent of the claimant's residual ability to obtain and perform regular, gainful, suitable employment, considering the broad range of occupations.

"The claimant had permanent impairment when the 1979 claim was closed. It was 'in the lower level of mild.' The claimant's testimony establishes that he had also been left with a loss of reserve capacity. While much of his pain would be categorized as non-disabling, which is not compensable, his ability to continue with his regular job was only because its physical demands somewhat lessened. I am persuaded that his 1979 injury foreclosed him from repetitive heavy work. No doubt some sawmill and lumber yard jobs that he did in the past were foreclosed by the 1979 injury.

"There was in this proceeding, however, little evidence on the specifics of his prior work experience. Also, he has not been seeking re-employment since he left Pitchford. He appears to have chosen retirement, on the assumption that employment would not be available to a 61-year-old man with a bad back. Yet, he has some demonstrated supervisory experience. The problem is that his self-chosen retirement, although it may have been stimulated by his later, worsened condition, has left this record barren of possible evidence of unsuccessful efforts to obtain employment.

"A retroactive evaluation of permanent disability is always difficult. However, considering the evidence in this record, the applicable law and rules, and the appropriate factors for evaluating unscheduled disability, I conclude that the claimant should be awarded, for the permanent loss of earning capacity resulting from his 1979 'injury', 15 percent of the statutory maximum for unscheduled permanent partial disability."

The Board affirmed that portion of the referee's order without comment.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Harold A. Lester, Claimant.

LESTER,
Petitioner,

v.

WEYERHAEUSER COMPANY,
Respondent.

(82-08239; CA A30497)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 9, 1984.

Mike Stebbins, North Bend, argued the cause for petitioner. With him on the brief was Hayner, Waring, Stebbins & Coffey, North Bend.

Paul L. Roess, Coos Bay, argued the cause for respondent. On the brief were Daniel M. Spencer, and Foss, Whitty & Roess, Coos Bay.

Before Gillette, Presiding Judge, and Joseph, Chief Judge, and Young, Judge.

YOUNG, J.

Reversed and remanded for determination of penalty and attorney fees.

YOUNG, J.

In this workers' compensation case claimant appeals the denial of a penalty and attorney fees for unreasonable delay in the closure of his claim and the payment of permanent partial disability. ORS 656.262(10). We reverse.

Claimant was injured on September 22, 1980, in the course of his work for respondent, a self-insured employer. On April 13, 1981, he returned to his regular work. On November 24, he was declared medically stationary. On February 11, 1982, respondent submitted a form 1503 to the Evaluation Division requesting a determination order. On February 19, respondent received a request from the Evaluation Division for more information, specifically a statement from claimant's doctor specifying "the injured part's active range of motion, in degrees." It was not until August 10, some six months later, that respondent sent the inquiry to claimant's physician. The physician promptly responded, and on August 31, 1982, a determination order awarded $1,350 in permanent partial disability benefits.[1]

The issue is whether the referee and the Board erred in determining that the six-month delay in obtaining the requested medical report in order to process the claim was not

[1] The determination order granted temporary total disability from September 22, 1980, through April 12, 1981, and awarded permanent partial disability amounting to 10 percent loss of the right foot (ankle).

unreasonable. The referee found that the delay was not unreasonable, because claimant suffered no prejudice and that there was no evidence that the delay was intentional, relying on *Newman v. Murphy Pacific Corp.*, 20 Or App 17, 530 P2d 535 (1975).

The relevant statute is ORS 656.262(10):

> "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

We first determine whether the statute provides a basis to assess a penalty and attorney fees under the facts of this case.

Respondent argues that the statute does not provide for a penalty or fees when the delay is in responding to a request by the Evaluation Division for additional medical information preliminary to claim closure. We disagree. In the words of the referee:

> "The processing of claims in providing compensation for a worker in the employ of the contributing employer is the responsibility of the self-insured employer. ORS 656.262(1). Penalties are provided for unreasonable delays or unreasonable refusals to pay compensation, ORS 656.262(9)."[2]

Further, promptness in the payment of compensation is mandated by ORS 656.262(2).

In *Georgia Pacific v. Awmiller*, 64 Or App 56, 666 P2d 1379 (1983), we held, *inter alia*, that the employer was responsible for a penalty and an attorney fee because it had failed to seek a timely claim closure. In the present case, the delay was the failure to obtain additional medical information preliminary and necessary to claim closure. We find no meaningful distinction between the facts in *Georgia Pacific* and the facts in the present case. We hold that respondent's failure timely to process the claim under ORS 656.262(1) and (2) triggers the sanctions of a penalty and attorney fees under ORS 656.262(10), if the delay is "unreasonable."

What constitutes an "unreasonable delay" has been determined by this court on a case-by-case basis. In *Williams v. SAIF*, 31 Or App 1301, 1305, 572 P2d 658 (1977), we stated:

> "We find no authority defining 'unreasonable delay' or applying the term in the context of the Workers' Compensation Act. Absent such experience, we * * * will look instead for case-by-case development of workable rules. It is enough to say in this case that we look to the length of the delay and the cause of or justification for it. We conclude * * * that [the] delay in making interim compensation payments was unreasonable."

The referee and the Board (one member dissenting) understood our decision in *Newman v. Murphy Pacific Corp., supra*, as requiring a finding of prejudice to the claimant and an intentional delay on the part of the insurer or self-insured

[2] When the referee made that statement, the present statute, ORS 656.262(10) was numbered ORS 656.262(9). Or Laws 1983, ch 816, § 7.

employer before assessing penalties and attorney fees under the statute. *Newman* concerned a delay in the payment of a medical bill and a 7-1/2-month delay in the issuance of a determination order. With respect to the medical bill, we held that the claimant failed to produce sufficient evidence to show an unreasonable delay. Concerning the delayed determination order, we stated:

> "We cannot, from the record, tell where the cause for delay occurred. In any event, we find claimant suffered no ultimate prejudice, and we see no proof of anything intentional about the carrier's having caused a delay; therefore, we do not consider it to have been proven 'unreasonable.' " 20 Or App at 23.

More recently, in *Georgia Pacific v. Awmiller, supra,* there was more than a year's delay in obtaining a determination order. The employer offered no explanation for the delay. We looked at the delay and the absence of any justification for it and held it was "unreasonable."[3]

Under the statute, a penalty and an attorney fee are assessed when the insurer or self-insured employer "unreasonably delays or unreasonably refuses to pay compensation." It is the duty of the factfinder to determine whether the delay or refusal are unreasonable. What constitutes unreasonableness must depend on the particular facts and circumstances of each case. *See, e.g., Barrett v. Coast Range Plywood,* 56 Or App 371, 641 P2d 1161 (1982). Assuming that *Newman v. Murphy Pacific Corp., supra,* holds that prejudice and intentional delay are *necessary* predicates to the imposition of a penalty and attorney fees, we disapprove of that holding and to that extent *Newman* is overruled.

Because a worker is entitled under ORS 656.262(2) to "promptly" made payments, *Williams v. SAIF, supra,* 31 Or App at 1306, diligence is required by the insurer or self-insured employer to process the claim for closing timely and to pay compensation found due. In the present case, the six-month

delay is without explanation. Absent an explanation, we are entitled to conclude that the delay was without justification. We hold that respondent's delay in furnishing the requested medical information to permit closure of the claim and the making of the determination order, which in turn delayed the payment of permanent partial disability, was unreasonable. We also conclude that respondent's delay constitutes unreasonable resistance to pay compensation under ORS 656.382, entitling claimant to his reasonable attorney fees. *Williams v. SAIF, supra,* 31 Or App at 1306.

Reversed and remanded for determination of penalty and attorney fees.

[3] In *Hutchinson v. Louisiana-Pacific,* 67 Or App 577, 679 P2d 338, *rev den* 297 Or 340 (1984), the self-insured employer refused to pay temporary total disability compensation after payment was ordered by the referee. We characterized the refusal as constituting an unreasonable delay in the payment of compensation. It may have been more accurate to have described the employer's failure as an "unreasonable refusal" under ORS 656.262(10), rather than an "unreasonable delay."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of Margaret L. Gray, Claimant.

GRAY,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB No. 82-10199; CA A30538)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 6, 1984.

Kenneth D. Peterson, Jr., Hermiston, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, Joseph, Chief Judge, and Rossman, Judge.

ROSSMAN, J.

Reversed in part and remanded for determination of attorney fees award; otherwise affirmed.

ROSSMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board, which failed to award claimant insurer-paid attorney fees for unreasonable refusal to pay time loss benefits. We reverse on that issue and otherwise affirm.[1]

Claimant incurred a compensable injury to her back in August, 1981, while driving a front-end loader on rough roads. Because her employer immediately put her to work in a modified job, claimant initially missed no time from work as a result of her back problems. She was laid off on the last work day in November, 1981. Her treating physician has never released her to return to her former job as a heavy equipment operator and did not declare her medically stationary until May 18, 1982. As noted by the referee and the Board, claimant therefore was entitled to temporary disability compensation from the date that she was laid off until the date on which she was declared medically stationary.[2] Neither the employer nor SAIF offer any explanation for their failure to fulfill the

[1] Claimant also appeals on the issue of extent of permanent partial disability. Our affirmance on this issue requires no discussion.

[2] Although the referee awarded claimant temporary total disability compensation, claimant appears to concur in the Board's reduction of this benefit to temporary partial disability.

requirement to begin temporary disability compensation within 14 days after claimant was laid off and to continue such payments until she was declared medically stationary. ORS 656.262(4), 656.268(2). Because no explanation was given, the referee correctly found that the failure constituted unreasonable resistance to compensation, for which a penalty must be assessed. ORS 656.262(10). The referee, however, failed to award insurer-paid attorney fees, although ORS 656.262(10) specifically authorizes them subject to ORS 656.382. The Board, in reviewing this issue, held that claimant was not entitled to attorney fees, because it had reduced the temporary total disability to temporary partial disability and, therefore, claimant could not be held to have prevailed on the appeal to the Board.

The Board has misconstrued the issue. Although it is true that a claimant must be held to be the prevailing party on

the appeal in order to be awarded attorney fees under ORS 656.382(2), and the Board's reasoning might be valid if claimant were seeking recovery under that statute, that is not true of ORS 656.382(1).[3] Under the latter statute, a claimant must only establish that the insurer unreasonably resisted payment of compensation.[4] We therefore hold that claimant is entitled to insurer-paid attorney fees for the attorney's efforts before both the referee and the Board in obtaining claimant temporary partial disability. ORS 656.382(1).

Reversed in part and remanded for determination of attorney fees award; otherwise affirmed.

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[3] ORS 656.382(1) and (2) provide:

"(1) If an insurer or self-insured employer refuses to pay compensation due under an order of a referee, board or court, or otherwise unreasonably resists the payment of compensation, the employer or insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney's fee as provided in subsection (2) of this section. To the extent an employer has caused the insurer to be charged such fees, such employer may be charged with those fees.

"(2) If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

The reference in subsection (1) to subsection (2) refers to the manner in which the fees are to be paid and does not incorporate the additional requirements contained in subsection (2). *Williams v. SAIF*, 31 Or App 1301, 1306 n 1, 572 P2d 658 (1977); *Wingfield v. National Biscuit Co.*, 8 Or App 408, 413, 494 P2d 905 (1972).

[4] Although there is discretion in determining the factual issue of whether an employer has in fact unreasonably resisted compensation, the statute gives no discretion as to whether attorney fees may be awarded when such a finding is made. If the employer has unreasonably resisted the payment of compensation, attorney fees must be awarded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Edward J. LaRoque, Claimant.

FMC CORPORATION,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE
COMPANY et al,
Respondents.

(81-11384, 81-11347; CA A28601)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 13, 1984.

Mildred J. Carmack, Portland, argued the cause for petitioner. With her on the brief were Dennis S. Reese and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Keith D. Skelton, Portland, argued the cause and filed the brief for respondent Liberty Mutual Insurance Company.

Robert K. Udziela, Portland, waived appearance for respondent Ilah LaRoque, beneficiary of Edward J. LaRoque, deceased.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

BUTTLER, P. J.

FMC Corporation (FMC) appeals a decision of the Workers' Compensation Board, which held that FMC, in its self-insured capacity, and not its former carrier, Liberty Mutual Insurance Company, was responsible for claimant's asbestos-related cancer condition. We affirm.

Claimant was employed by FMC and by its predecessor, Gunderson Brothers, from 1957 until his retirement in 1978. From 1967 to October 1, 1975, Liberty Mutual was FMC's compensation insurance carrier. Thereafter, FMC was self-insured. Claimant first sought medical attention in November, 1981, because of symptoms he had suffered for a period of about six months. Dr. Lawyer ultimately diagnosed squamous-cell lung cancer related to asbestos. It is undisputed that claimant's cancer is causally related to his employment. The sole issue is whether FMC's carrier, Liberty Mutual, or FMC in its self-insured capacity, is responsible for claimant's occupational disease.

Dr. Lawyer is the only physician to give an opinion as to the time frame within which claimant's cancer was caused. He testified that exposure subsequent to 1972 "would be a very minimal increase in risk and certainly substantially less

in terms of increased risk than his exposures prior to 1972," and that from 1972 through 1976, the increased risk from exposure gradually diminished. Subsequent to 1976, any exposure probably would not have contributed to any detectable or demonstrable increased risk. The doctor stated that the possibility that any exposure after October, 1975 (when FMC became self-insured), contributed to the risk of claimant's cancer was minimal, close to zero.

FMC contends that where, as here, claimant's interests are protected because all potentially liable employers are parties, responsibility as between those employers should be resolved by determining which employer is more likely to have caused claimant's occupational disease. No Oregon case has decided that question, although dicta in *Fossum v. SAIF*, 293 Or 252, 646 P2d 1337 (1982), and *Boise Cascade Corp. v. Starbuck*, 296 Or 238, 675 P2d 1044 (1984), have touched on the problem. Both of those cases recognize that the last injurious exposure rule operates arbitrarily in favor of a claimant to impose liability on the last employer where

working conditions *could* have caused the worker's occupational disease, regardless of whether the disease was, in fact, caused by the worker's exposure to those conditions.

In *Bracke v. Baza'r*, 293 Or 239, 646 P2d 1330 (1982), the claimant sought compensation for disability caused by an occupational disease. Although she joined all of her employers where working conditions could have caused the disease, her claim against the last employer was not timely. She succeeded in proving that her work exposure at her first employer was the cause in fact of her disease, and, by doing so, prevailed over that employer's contention that, under the last injurious exposure rule, liability to the claimant was shifted to the last employer. In *Fossum v. SAIF, supra,* decided the same day as *Bracke,* the question was which of several "potentially causal employers" was liable for the claimant's compensable occupational disease. In resolving that question, the court applied the last injurious exposure rule in the same manner as it is applied when a claimant relies on it to establish compensability. The court said:

> "* * * In applying the last injurious exposure rule to claims for occupational disease, however, the issue is not which employment actually caused the disease, but which employment involved conditions which could have caused it. If conditions of exposure at Grasle could have caused the disease, for example, the exposure would have been prior to the 20-year minimum period for disease development and Grasle would have been liable as potentially causative under the last injurious exposure rule. The Court of Appeals apparently excluded the Grasle employment because it was not an actual cause. The correct analysis under the last injurious exposure rule, however, is that Grasle is not liable because there is no evidence of exposure at Grasle to conditions which could have caused the disease. * * *" 293 Or at 256.

In a footnote, the court stated that

> "* * * it is arguable that a defense of actual impossibility should be allowed to reduce the otherwise arbitrary operation of the last injurious exposure rule. *Cf., Bracke,* n 5. * * *" 293 Or at 256 n 1.

The difference between *Bracke* and *Fossum* is that in *Bracke* the claimant did not rely on the last injurious exposure rule; instead, she proved that her disease was caused by work exposure at the first employer. The court pointed out that to

allow that employer to rely on the rule as a defense to defeat the very interests of a claimant that the rule is designed to protect would be questionable where the claimant has proven actual causation. 293 Or at 250 n 5. In *Fossum,* as here, the claimant relied on the rule, and the question was whether there was evidence of exposure to conditions that could have caused the disease. The rationale in *Fossum* appears to be that if it is shown that conditions at a given employer could not *possibly* have caused the disease, that employer would have a defense.

In the last of the recent series of cases involving the rule, *Boise Cascade Corp. v. Starbuck, supra,* the court said:

> "In some cases, a worker might assert a disability claim against two employers and establish the claim against the later employer by application of the last injurious exposure rule. That would not prevent the later employer from proving that the earlier employment was the *sole* cause in fact of the disability, in which event the earlier employer would be liable to the worker. But, as *Bracke v. Baza'r,* 293 Or 239, 646 P2d 1330 (1982), makes clear, the worker is not compelled to invoke the rule. The worker always has the option of proving that an earlier employment caused the disability." 296 Or at 244 n 3. (Emphasis supplied.)

Although the precise question presented here has not been decided squarely, we think that enough has been said in the cases cited to suggest strongly that in order for FMC, as the last employer where conditions existed that *could* have caused the disease, to shift responsibility to an earlier employer where working conditions could have caused the disease, it must establish that the conditions at the earlier employer were the *sole* cause or that it was *impossible* for conditions at FMC's plant to have caused the disease.

Because FMC has not met either burden, although it came very close to doing so, it is responsible. Dr. Lawyer testified that he could not say that it was impossible for claimant's employment at FMC, while it was self-insured, to have contributed to claimant's risk of cancer. He did say that there was only a minimal increase in risk from that employment. Because FMC during the period in question exposed

claimant to conditions that could have caused his cancer, actual causation is not impossible. Therefore, FMC is responsible under the last injurious exposure rule for claimant's disability.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
James Guse, Claimant.

GUSE,
Petitioner,

v.

ADMINCO et al,
Respondents.

(81-06833, 81-11397; CA A29908)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 16, 1984.

Evohl F. Malagon, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Patric J. Doherty, Portland, argued the cause for respondent Adminco. With him on the brief were Ronald W. Atwood and Rankin, McMurry, VavRosky & Doherty, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded for acceptance of hearing loss claim by SAIF.

BUTTLER, P. J.

Claimant appeals from an order of the Workers' Compensation Board affirming the referee's order upholding the insurers' (Adminco and SAIF) denials for claimant's hearing loss. We hold that claimant has established by a preponderance of the evidence that SAIF is responsible for his hearing loss and reverse.

Claimant is a 48-year-old man who has been employed by the Eugene Police Department since March, 1960. In 1959, claimant had his hearing tested in the Army and a binaural loss of less than 1 percent was noted. Sometime prior to 1970, claimant was working on a police car at the city hall. While he was working under the hood of the vehicle, the siren went off next to his ear. He testified that he has had constant tinnitus from that day to the present. From 1960 to 1970, claimant was in the patrol division and rode a motorcycle, which had a siren mounted on the rear. He had no ear protection. Throughout his employment, he was required to qualify with firearms twice a year. From 1960 to 1970, the firearm practice took place in the downstairs portion of the city hall, which had some acoustical tile. From 1970 to 1975,

that practice took place at the armory, which had no acoustical tile and had a low ceiling with "high echo" concrete floors, making for a very noisy environment. No hearing protection was provided for those who were waiting to shoot, and very little protection was provided for those who were engaged in shooting. The hearing protection provided to claimant did not fit him properly, because his glasses interfered. While waiting to shoot, he would be 10 to 15 feet away from the person firing. Two to four people would fire at a time. Claimant fired a .38 caliber pistol primarily, but others fired .357 magnums. In 1976, the firearm qualification was removed to the outside, where conditions were "100 percent better," according to claimant.

Claimant first noticed a problem with his hearing in 1975 to 1976, causing him to seek help from the Health Services of Lane Community College. He was referred to the University of Oregon for a series of hearing tests that revealed that he had a binaural loss of 13 percent. In 1980, claimant's hearing was retested, revealing a binaural loss of 18.3 percent. Claimant testified that after 1976, when he became conscious

of his hearing loss, he took steps to protect his ears from further loss while on duty. He testified that he had never had an ear infection in his life. There is no evidence of off-work noise exposure.

The medical evidence consists of the contradictory opinions of Dr. Conway and Dr. Ediger. The referee accepted the report of Dr. Conway over that of Dr. Ediger, because, in part at least, of claimant's alleged failure to establish Dr. Ediger's qualifications. It is true that the record contains no information regarding Dr. Ediger's education or training, other than that contained in one letter, which notes that he is the director of Audiological Services for the Eugene Hearing and Speech Center and lists after his name the initials Ph.D. and CCC-A. Although we agree that it would have been preferable for claimant to have established more fully Dr. Ediger's qualifications, we believe that the designation "CCC-A," which indicates that Dr Ediger has a certificate of clinical competence in audiology, is sufficient to establish that he is qualified to give an opinion on the issue of the cause of claimant's hearing loss.

Dr. Ediger stated in his report that, after he had subtracted from all of the calculations hearing loss that is normally attributable to age, it appeared "that more hearing loss has occurred from 1959 to 1980 than can be attributable to the aging process." He further stated that he had not taken claimant's employment history, but that if such history revealed that claimant was exposed to loud noises at work and was not exposed to similar noises at home, claimant's hearing loss is probably the result of an occupational disease.

Dr. Conway stated that the pre-1970 incident, when the siren went off near claimant's ear, could have produced permanent damage to claimant's ear. However, he believed that claimant's hearing loss was not due to noise exposure, because the profile and hearing curve and the history of a gradual progression of claimant's hearing loss did not indicate

that exposure as the cause. He concluded that claimant's hearing loss was the natural result of aging. However, he stated that when hearing loss is due to premature aging, one should be able, microscopically, to see the absence of hair cells in the inner ear, yet he was not able to identify that microscopic damage in claimant's ears.

By his own admission, Dr. Conway could not identify objectively the changes that should have been observable if his diagnosis of premature aging was correct. We find more persuasive Dr. Ediger's conclusion that claimant is suffering from an occupational disease. The history of claimant's noise exposure at work supports that conclusion.

The remaining issue is whether SAIF or Adminco is responsible for claimant's hearing loss. SAIF is responsible for insurance coverage prior to 1979, and Adminco is the responsible insurer thereafter. It is clear that claimant became disabled when he noticed the hearing loss and sought medical treatment for it in 1976 when SAIF was responsible. That responsibility does not shift under the last injurious exposure rule unless claimant's condition was aggravated or exacerbated during the period when Adminco provided coverage. *Boise Cascade Corp. v. Starbuck,* 296 Or 238, 675 P2d 1044 (1984); *SAIF v. Gupton,* 63 Or App 270, 663 P2d 1300 (1983). We conclude that the preponderance of the evidence establishes that claimant's condition was not worsened by exposure from 1979 or thereafter. The record establishes that the 1976 conditions to which claimant was exposed at work were noninjurious. After that date, claimant used adequate ear protection and fired his pistol only when he was on an outside range where acoustical conditions were "100 percent better." In addition, after claimant became aware of his hearing loss in 1976, he took precautions to protect his ears from loud noises. Consistent with those facts is the conclusion of Dr. Conway, who stated that the difference in hearing loss recorded in the 1976 and 1980 tests was not significant and that claimant had not been exposed to noise since 1976 that could have damaged his hearing. Accordingly, claimant's hearing loss is the responsibility of SAIF.

Reversed and remanded for acceptance of hearing loss claim by SAIF.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Robert N. Faught, Claimant.

FAUGHT,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(79-07797; CA A30248)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed July 23, 1984. Former decision filed June 20, 1984, 68 Or App 924, 683 P2d 171.

David C. Force, Eugene, for petition.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Petition for reconsideration granted; reaffirmed.

BUTTLER, P. J.

Claimant has petitioned for reconsideration and review of our affirmance without opinion of the Workers' Compensation Board's decision denying compensation for his psychiatric treatment. *Faught v. SAIF,* 68 Or App 924, 683 P2d 171 (1984). We grant the petition for the purpose of determining whether the Supreme Court's decision in *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1984), requires a different result. We find that it does not and affirm.

In *Bauman,* the Supreme Court held that once an insurer has accepted a claim it cannot later deny it in the absence of fraud, misrepresentation or other misconduct. No fraud, misrepresentation or misconduct is alleged here. Therefore, if SAIF has accepted the claim for claimant's psychiatric condition, it could not later deny it.

Claimant originally suffered an injury to his low back on December 2, 1976. That claim was accepted and is not an issue on this appeal. Throughout the treatment for his back condition, claimant's physicians noted that he had a functional, neurotic or hysterical element to his disability. The first record of claimant's having sought treatment for a psychological condition was on April 21, 1980, when he saw Dr. Englander, a neurologist, complaining of memory disturbance that he had suffered for two months. Dr. Englander referred claimant to Dr. Lewinsohn at the University of

Oregon, who recommended that claimant be referred for psychiatric evaluation and treatment. Thereafter, claimant saw Dr. Cook, a psychiatrist, who stated that the purpose of his evaluation was "to assess Mr. Faught's present level of depressed mood, and to suggest any appropriate recommendations for treatment." Dr. Cook saw claimant twice and determined that he was a "poor candidate for insight-oriented psychotherapy" and recommended that the dosage of claimant's tricyclic antidepressant be increased. Apparently, SAIF paid for the evaluations made by doctors Englander, Lewinsohn and Cook. It then sent claimant to doctors Holland and Henderson for a dual assessment of his psychiatric condition. After receiving a copy of the lengthy report from those two consulting psychiatrists, claimant's family physician, Dr. Bremiller, referred claimant to Dr. Carter, a psychiatrist, for

treatment. On March 16, 1982, SAIF denied Dr. Carter's billings for the commencement of such treatment, stating:

> "While we have accepted responsibilty for your back injury of December 2, 1976, under this claim, there does not appear to be a causal relationship between that injury and your current psychiatric condition as it is being treated by John L. Carter, M.D. Under the circumstances, any responsibility for your current psychiatric illness under the claim is hereby denied. * * *"

After a hearing, the referee ordered SAIF to pay Dr. Carter's bill. The Workers' Compensation Board reversed, holding that claimant had failed to establish that his industrial injury was a material contributing or aggravating factor to his psychological difficulties. We affirmed the Board without opinion.

In his petition for review, claimant contends that SAIF was barred under *Bauman v. SAIF, supra,* from denying the claim, because it had already accepted it by paying for "at least five psychiatrists or psychologists" without any denial.[1] SAIF contends that it never accepted the psychological condition because the only medical bills that it paid were for evaluation, not for treatment. We agree with SAIF.

Claimant's psychiatric condition presents a complicated medical issue. Mention of that condition appeared with increasing frequency throughout reports of many doctors. Claimant's family physician finally became concerned enough to refer claimant to a neurologist and later to a psychiatrist for evaluation of his condition to determine whether it was caused by any physical factors, by the drugs that he was taking for his back or by any other known condition. SAIF sent claimant to two psychiatrists for a thorough evaluation to determine the cause and extent of claimant's psychiatric condition. Claimant did not receive any treatment (other than a proposed increase in medication) for his psychiatric condition until he saw Dr. Carter.

It would work a disservice to claimants if we were to hold that an insurer could not pay for evaluations of the cause and extent of a condition without having waived its right to

[1] Claimant also asserts that he established the compensability of his psychiatric condition. We decline to reconsider that issue.

deny compensability after receiving the evaluation. Such a holding would force insurers to deny medical services, even at an early stage when it is possible that the medical reports might establish that those services are related to the claimant's compensable condition. SAIF did not accept claimant's psychiatric condition as compensable by paying for a thorough evaluation of claimant and, therefore, did not waive its right to deny compensability of that condition after receiving the medical evaluations.

Petition for reconsideration granted; reaffirmed.

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472 October 24, 1984 No. 620

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Michael J. Johannesen, Claimant.

JOHANNESEN,
Petitioner,

v.

N.W. NATURAL GAS CO. et al,
Respondents.

(82-03482 & 82-08599; CA A29728)

Judicial review of the Workers' Compensation Board.

Argued and submitted May 25, 1984.

Douglas A. Swanson, Portland, argued the cause for petitioner. With him on the brief were Royce, Swanson & Thomas, Portland.

Jerald Keene, Portland, argued the cause for respondents. With him on the brief were Roberts, Reinisch & Klor, P.C., Portland.

Before Richardson, Presiding Judge, and Rossman and Newman, Judges.

NEWMAN, J.

Reversed. Referee's order reinstated.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board that reversed the order of the referee and denied his occupational disease claim for degenerative arthritis in both knees. The issue here is compensability. We reverse.

Claimant, age 43, worked for Northwest Natural Gas Company as a serviceman for 18 years. He had to kneel or squat on almost all of his service calls. He made 10 to 35 calls a day and over 70,000 service calls during his employment. Claimant often worked overtime. Occasionally he worked up to 12 hours a day, seven days a week. On some of his service

calls claimant had to kneel in cold slushy water in below-freezing weather. Prior to his employment with Northwest Natural Gas Company in 1963, claimant had no symptoms of an arthritic condition.

Claimant has also suffered the following knee injuries:

(1) An injury to his left knee in a high school football game. He then had an operation called a meniscectomy to repair a torn cartilage.

(2) An injury in 1964 when he twisted his right knee while walking down stairs at work.

(3) Reinjury of his right knee during a touch football game in 1965. He had a meniscectomy to his right knee.

(4) A compensable injury to his left knee when he fell at work on June 20, 1980.[1]

Claimant's condition first became symptomatic during the winter of 1977-1978 after he had worked as a serviceman for the gas company for 15 years. At that time he began to have problems at work with both knees. Three times a week between February and October, 1978, claimant jogged a mile or two to strengthen his knees. He stopped jogging on the advice of Dr. Zimmerman, his treating physician at that time, from whom he then first learned that he had degenerative arthritis in his knees. He has difficulty at work getting up after

being on his knees and in climbing stairs and ladders. He has tried unsuccessfully to obtain a less strenuous job with his employer.

To recover claimant must show a worsening of the underlying arthritic disease, *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979),[2] and that his work activity was the major contributing cause of that worsened condition. *See SAIF v. Gygi,* 55 Or App 570, 574, 639 P2d 655, *rev den* 292 Or 825 (1982). We find that claimant has sustained his burden of proving compensability. Claimant's testimony and the reports of his two doctors establish that his arthritis has worsened and that his strenuous work activity, particularly his extensive kneeling, squatting and stair climbing, was the major contributing cause of that worsening.

The chart notes of Dr. Zimmerman show a pattern of recurring symptoms corresponding with claimant's service work:

> "I have told him that *his job as a serviceman for the gas company is probably in jeopardy because of his knees,* and in the future he will have to consider something else. January 16, 1979"
>
> "* * * * *
>
> "He was doing a different job for the gas company, then he had to go back to his old job. *Since he has been back his knees have gradually started hurting him again.* He says he gets

[1] Claimant fell at home in July, 1979, but only had "slight abrasions" on his left knee and buttocks.

[2] Claimant also argues that his work *caused* the occupational disease.

depressed when he thinks about what he will do in the future. But he has noted a real relationship between the type of work he does and how much his knees bother him. March 27, 1981"

"* * * * *

"Since being seen her *[sic]* last he states that he had some job change in December and January of 1981. He worked the relief shift and during that time his knees did not hurt him. Then he had to return to service work until July and through July and August he worked the relief and his knees were better. Then in October *he returned to service and his knees have bothered him. He says climbing ladders bothers him* * * *. 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.* January 2, 1982." (Emphasis supplied.)

Dr. Rusch, an orthopedist and claimant's treating physician at the time of the hearing, wrote on June 10, 1982:

"In my opinion, Mr. Johannesen's condition with regards to both knees are *[sic]* permanent and likely to become progressively more disabling with further passage of time and useage *[sic]* of the lower extremities.

"Upon review of the medial *[sic]* records of Dr. Zimmerman of October 1978, it is apparent that Mr. Johannesen had a clinically recognizable signs and symptoms of degenerative osteoarthritis of both knees as well as the ligamentous instability of the right knee at that time. It appears apparent that Dr. Zimmerman's chart notes (which is generally recognized to be a medical fact) that *any use of the lower extremities in walking, kneeling, squatting, or other active physical activities of the lower extremities would lead to progressive deterioration of the underlying degenerative osteoarthritis.*

"It is my opinion that *it is within the realm of reasonable medical probability that the work activity associated with Mr. Johannesen's work at the Northwest Natural Gas Company over the period of the last twenty years has materially contributed to a worsening of the underlying condition of both his knees.* 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." (Emphasis supplied.)

Most of claimant's walking, kneeling and squatting occurred on the job. *See* ORS 656.802(1)(a). Since 1978 he has done very little strenuous activity outside of his work. These other activities are minimal compared to claimant's work activity. The referee, who found claimant's condition compensable, also found he was a credible witness, discounted his jogging after 1978, and stated that he "has not engaged in

outside activities which may have been a major contributing cause as opposed to his work activities":

> "I believe claimant's testimony he has not jogged since 1978. He does not engage in outside sports. He has not engaged in weight lifting for 10 or 15 years or played in a basketball league since his twenties."

The Board ruled that claimant had not met his burden of proof that his work activity was the major contributing cause of his condition or its worsening. The Board, however, misread the evidence and incorrectly assessed the amount of claimant's previous exercise and its impact on his knees. The Board also stated that only Dr. Rusch addressed causation. Although it noted that "exact legal phraseology" is not required, the Board stated that Dr. Rusch referred to claimant's work activities as a "material" contributing cause "rather than the major cause." The Board did not give adequate weight to claimant's testimony on causation or to the chart notes of Dr. Zimmerman that do show the relationship between claimant's kneeling, squatting and stair-climbing at work and the worsened condition of his knees. The Board also emphasized Dr. Rusch's statement that he did not know the impact on claimant's arthritis of his physical activity outside of work and of the natural progression of the condition. The Board, however, incorrectly believed that claimant "regularly played basketball up to two times per week and was jogging, apparently daily, until he began suffering knee pain in 1978." Claimant stopped playing regular basketball ten years ago. He jogged a mile or two, two or three times a week for a nine-month period in 1978. He lived nine blocks from work and ran four miles twice to see how far he could go.

Although claimant's doctors did not use the words "major contributing cause" we find that medical and other evidence in the record establishes that the strenuous work activity of claimant's employment was the major contributing cause of the worsening of his arthritis. *See also Garbutt v. SAIF*, 297 Or 148, 681 P2d 1149 (1984). Claimant's condition is compensable.

Reversed. Referee's order reinstated.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Anna M. Scheidemantel, Claimant.

SCHEIDEMANTEL,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(81-00719; CA A28809)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed August 2, 1984. Former opinion filed June 27, 1984, 68 Or App 822, 683 P2d 1028.

David C. Force, Eugene, for petition.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Petition for reconsideration granted; former opinion modified; reversed and remanded.

VAN HOOMISSEN, J.

Claimant's petition for review of our decision in this case, *Scheidemantel v. SAIF,* 68 Or App 822, 683 P2d 1028 (1984), is treated by us as a petition for reconsideration. ORAP 10.10. We allow the petition to consider matters we did not address in our earlier opinion. On *de novo* review, we now withdraw our former opinion and reverse and remand.

We take the relevant facts from our earlier opinion:

> "Claimant sustained a compensable back injury in 1979. She was treated for a dorsolumbar strain and was determined to be medically stationary in 1980. Later, she made an aggravation claim that resulted in a stipulated award of 7.5 percent unscheduled permanent partial disability. In April, 1981, her attending physician, Dr. Cox, admitted her to a hospital for evaluation. She was diagnosed as having chronic back pain, cause undetermined. After being billed for that treatment, SAIF denied responsibility. It alleged that, if in fact her condition had worsened, it was due to a mud-wrestling incident in which she had participated.
>
> "The referee found that claimant was not entitled to temporary total disability compensation and affirmed SAIF's denial of her aggravation claim. The Board affirmed the referee's denial of the aggravation claim but found SAIF liable for disability payments from the time of her April, 1981, hospitalization until she was released to return to work by Dr. Golden in July, 1981." 68 Or App at 824.

Claimant's primary contention on reconsideration is that the evidence presented concerning her psychological or "func-

tional" difficulties is sufficient to sustain her aggravation claim.[1]

Although both the referee and the Board noted the evidence of psychological problems, neither discussed that evidence as a basis for sustaining claimant's claim. Instead, their focus was on the physical manifestations of a worsened back condition, which we concluded were insufficient to support her claim. Thus, the issue before us is whether an aggravation claim may be predicated on a claimant's psychological problems resulting from a compensable injury when no

physical worsening has occurred. There is little Oregon law on the compensability of psychological problems resulting from a physical injury. However, the available authority persuades us that such a claim should be compensable to the same extent that physical aggravation is compensable.

We have previously held that a worker's functional overlay may be considered in determining the extent of scheduled or unscheduled permanent disability. *See Ferguson v. Industrial Indemnity,* 70 Or App 47, ___ P2d ___ (1984); *Chatfield v. SAIF,* 70 Or App 62, ___ P2d ___ (1984); *see also Mesa v. Barker,* 66 Or App 161, 164, 672 P2d 1378 (1983); *Lucky v. SAIF,* 27 Or App 565, 556 P2d 712 (1976). Further, ORS 656.273(1), which speaks of "worsened conditions," does not limit such conditions solely to physical aggravation of a worker's condition.

The record here contains evidence that claimant has developed functional problems that are attributable to her compensable physical injury. Dr. Radmore, a psychiatrist who examined claimant twice in September, 1981, stated, in relevant part:

> "It is my impression that Anna is experiencing a significant adjustment problem which results from the alteration in her life style and self-perception secondary to her industrial injury and its sequelae. * * *
>
> "It is my opinion that further attempts should be made to guarantee the absence of organic pathology as the etiology for her pain and disability, and if these too are normal, that she be considered a candidate for intensive physical therapy and for some supportive psychotherapy to help her overcome the psychophysiologic response. I do believe these symptoms are the result of her industrial injury, and do not believe she is malingering. I do not believe she is medically stationary, and foresee an inexorable downward trend into true depression and helplessness if intervention is not both appropriate and timely. From a historical standpoint it is difficult to understand why she has not been on time loss since the original injury and why specific attempts to treat or rehabilitate her have not been made."

Other physicians who examined her reached essentially the same conclusion. Dr. Martin, a psychiatrist who examined her in June, 1980, was impressed by the possible presence of a

[1] In her petition claimant notes that her brief on this point was confusing, rendering it difficult to "recognize that a psychiatric, rather than a physical, aggravation of her injury was being contended therein."

conversion reaction. Dr. Cox, her attending physician, concluded that there was a functional overlay. Dr. Golden agreed with that conclusion.

There is no evidence in the record that claimant suffered significant psychological difficulties before her compensable injury and her difficulties have been linked directly to that injury. The medical evidence supports her claim that her condition has worsened and that the worsening is due to her compensable injury. ORS 656.273(1). We therefore conclude that the Board erred in denying her aggravation claim.[2] Accordingly, we remand the case with instructions to accept that claim.

Claimant also argues that we should not have remanded to the Board for it to determine the relevant dates for payment of interim compensation and to determine the amount of penalties and attorney fees. She argues that a goal of the Workers' Compensation Act is quick resolution of claims and that we should expedite matters by resolving all issues now. *See* ORS 656.012(2); *Surratt v. Gunderson Bros.*, 259 Or 65, 485 P2d 410 (1971). The dates for payment of additional compensation are certain. Interim compensation should be awarded for the additional period from July 20, 1981, when payments were erroneously terminated, to December 21, 1981, when SAIF issued its late denial. We now so hold. However, determination of the amount of penalties and attorney fees is a matter the Board must resolve initially. ORS 656.262(10), 656.382(1).

Petition for reconsideration granted; former opinion modified; reversed and remanded.

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[2] We find nothing in the record to support a contention that claimant's aggravated condition is due to a mud-wrestling incident in which she was involved.

No. 638 October 31, 1984 583

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Duane Kearns, Claimant.

INDUSTRIAL INDEMNITY COMPANY,
Petitioner,

v.

KEARNS et al,
Respondents.

(81-11626 and 82-05409; CA A28755)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 13, 1984.

John E. Snarksis, Portland, argued the cause and filed the brief for petitioner.

Charles Colett, Portland, argued the cause for respondent Duane Kearns. With him on the brief were Jill Backes and Galton, Popick & Scott, Portland.

Jerald P. Keene, Portland, argued the cause for respondent EBI Companies. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Industrial Indemnity seeks judicial review of a Workers' Compensation Board determination that it is responsible for paying claimant aggravation benefits. The sole issue is responsibility. On *de novo* review, ORS 656.298(6), we affirm.

Claimant strained his low back in 1968. He was awarded 5 percent unscheduled disability when his claim was closed in 1969. He was injured again in 1972. He was awarded an additional 5 percent unscheduled disability when that claim was closed in 1973. In 1976, he filed an aggravation claim, which was accepted by stipulation. He was awarded an additional 5 percent unscheduled disability when that claim was closed in 1978. Later in 1978, he was awarded an additional 12.5 percent unscheduled low back disability by stipulation. Throughout the whole period, he was employed by the same employer with SAIF as the insurer.

In February, 1979, claimant twisted his back. No time loss was incurred. EBI, the employer's insurer at that time, accepted the claim as non-disabling and paid his medical expenses. Claimant injured his low back again in October, 1979. After two days, he was released to return to work with restrictions on heavy lifting. Industrial Indemnity, the employer's insurer at that time, accepted the claim as non-disabling.

In 1981, claimant's physician asked to have claimant's 1979 claim reopened. He did not specify on which of claimant's 1979 injuries he was relying. All insurers denied responsibility for any aggravation. The referee found that Industrial Indemnity was responsible. In agreeing with the referee, the Board adopted a rule for successive injuries to the same body part:

> "* * * Where there are multiple accepted injuries involving the same body part, we will assume that the last injury contributed independently to the condition now requiring further medical services or resulting in additional disability, and the employer/insurer on the risk at the time of the most recent injury has the burden of proving that some other accepted injury last contributed independently to the condition which presently gives rise to the claim for compensation; e.g., that its accepted injury caused only symptoms of the

> condition or involved a different condition affecting the same body part."

Applying its rule, the Board held that Industrial Indemnity had failed to show that it is not responsible.[1]

In this court, Industrial Indemnity argues that the Board erred in establishing a presumption that the last injury contributes independently to a worker's worsened condition. It argues that the presumption improperly places the burden of proving the absence of a causal relationship on the insurer. It also argues that, even if the Board's rule is correct, it has carried its burden of proof here.

The "last injurious exposure rule" was first adopted by this court in *Mathis v. SAIF*, 10 Or App 139, 499 P2d 1331 (1972); *see also Smith v. Ed's Pancake House*, 27 Or App 361, 556 P2d 158 (1976). The rule, as it applies to successive injuries as opposed to occupational diseases, was examined and clarified by us in *Boise Cascade Corp. v. Starbuck*, 61 Or App 631, 659 P2d 424 (1983), *aff'd* 296 Or 238, 675 P2d 1044 (1984). In *Starbuck*, we noted that in successive injury cases the rule is more appropriately identified as the "last injury rule." We quoted from 4 Larson, Workmen's Compensation Law 17-71 - 17-78, § 95.12 (1976):

> "If the [last] injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer

> on the risk at the time of the original injury remains liable for the second * * *.
>
> "On the other hand, if the [last] incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributes the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition."

Unlike the "last injurious exposure rule," under which the last employer would be liable if the work environment "could have" caused the disability, the "last injury rule" requires proof that the traumatic accident "contributed independently" to claimant's disability, even though the contribution be slight. It is not sufficient to show that the last injury "could have" contributed to claimant's disability. *Boise Cascade Corp. v. Starbuck, supra*, 61 Or App at 639.

[1] The Board stated in relevant part:

"Applying that test to the facts of this case, we find that Dr. Hazel has issued statements which are ambivalent. Some of his statements would support a finding that the most recent injury, at which time Industrial Indemnity was on the risk, did independently contribute at least slightly to claimant's current condition and resultant disability and need for medical services. Other statements authored by Dr. Hazel would support a contrary conclusion; *i.e.* that claimant's current condition has developed, and would have developed, independently of his most recent injury which constituted nothing more than the symptomatology of an underlying degenerative process set in motion years before. Considering this evidence, as well as all of the other evidence bearing upon the issue of insurer responsibility, we find that Industrial Indemnity, the insurer on the risk at the time of claimant's most recent low back injury, has failed to satisfy its burden of proving that claimant's October 1, 1979 injury did not independently contribute at least slightly to claimant's underlying degenerative disease process and the resulting current condition. Accordingly, we affirm the Referee's finding that Industrial Indemnity is the insurer responsible for payment of claimant's compensation."

Under the Board's rule, a rebuttable presumption exists that a claimant's last industrial injury contributed independently to the worsened condition and that the insurer at that time is responsible. We conclude that that approach is not inconsistent with the Supreme Court's language in *Boise Cascade Corp. v. Starbuck*, 296 Or 238, 244, 675 P2d 1044 (1983):

> "The last injurious exposure rule is not intended to transfer liability from an employer whose employment caused a disability to a later employer whose employment did not. Once a worker proves that the disability is work-related, he or she need not prove that any one employment caused the disability. The rule accomplishes that and makes liable the last employer whose conditions of employment might have caused the disability. However, the rule does not prevent a worker from proving that an earlier employment caused the disability; nor does it prevent an employer from proving that the claimant's disability was caused by a different employment or that the disability did not arise from any work-related injury.
>
> "In a procedural context, if a worker presents substantial evidence of successive work-related injuries causing disability, a prima facie case for recovery from the last employer is made out. Either or any employer against whom a claim is made still can present evidence to prove that the cause of the worker's disability is another employment or a cause unrelated to the

> employment. In such a case, the trier of fact decides the case on the basis of the evidence presented. If the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability, the finding is for the worker against the last employer whose employment may have caused the disability. On the other hand, if the trier of fact is convinced that the disability was caused by an earlier injury, or was not work related, such a finding may be made." (Footnote omitted.)

It was stipulated that claimant's compensable condition has worsened. Industrial Indemnity, the insurer on the risk at the time of claimant's most recent low back injury, has failed to show that there is no causal connection between the worsening and claimant's October, 1979, injury. Therefore, it is responsible for payment of claimant's compensation. *See Guse v. Adminco*, 70 Or App 376, ___ P2d ___ (1984); *FMC Corporation v. Liberty Mutual Ins. Co.*, 70 Or App 370, ___ P2d ___ (1984).

EBI's June 23, 1982, *total* denial of claimant's previously accepted February, 1979, injury was correctly rejected by the Board. *Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983). However, we agree with the Board that, on the evidence here, EBI had no duty to pay interim compensation on this claim, because it never received a sufficient aggravation claim. *See* ORS 656.273(6). Therefore, EBI cannot be penalized for its failure to do so.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Harry A. Westmoreland, Claimant.

WESTMORELAND,
Petitioner,

v.

IOWA BEEF PROCESSORS,
Respondent.

(82-07779; CA A29764)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 4, 1984, at Pendleton, Oregon.

Milo Pope, Mt. Vernon, argued the cause for petitioner. With him on the brief was Kilpatricks & Pope, Mt. Vernon.

John M. Pitcher, Portland, argued the cause for respondent. With him on the brief was Roberts, Reinisch & Klor, Portland.

Before Gillette, Presiding Judge, and Young and Rossman, Judges.

GILLETTE, P. J.

Reversed; referee's order reinstated.

GILLETTE, P. J.

Claimant seeks review of a Workers' Compensation Board order denying him benefits for an allegedly work-related injury to his upper back. The referee had granted benefits. We reverse the Board and reinstate the referee's order.

According to claimant, he hurt his upper back and neck while cranking the landing gear on a loaded trailer he was connecting to his tractor preparatory to driving back to his home base in Pendleton. He reported the incident to his dispatcher on arrival in Pendleton and soon afterwards went to a hospital emergency room. His physicians found tenderness to the left of his upper spine and adjacent to his right scapula and a decrease in his right hand grip. They diagnosed an upper back strain and hospitalized claimant. After treatment with a cervical collar, analgesics and muscle relaxants, claimant was able to return to work.

Claimant's description of his injury is straightforward and, at first appearance, the Board's action is surprising. The problem is that claimant's credibility was severely damaged by evidence at the hearing. In a conversation with an insurance investigator while he was in the hospital, claimant denied having had a previous neck injury. At the hearing, he denied having seen any doctors for treatment of problems in his upper back or neck. However, he admitted on cross-examination that he had, in fact, seen three chiropractors in the month before the claimed injury for treatment of neck

problems. According to the chiropractors' notes, and according to his own written description to one of them, his complaints included pain between his shoulder blades, the precise area he claimed to have injured at work.

The referee awarded compensation despite his recognition of claimant's poor credibility. He also awarded attorney fees but no penalty. The Board, one member dissenting, found that claimant had lied, that he had not given adequate information to his treating physicians after the injury and that there was inadequate evidence in the record relating his injuries to the incident at work.

We find that claimant was injured as he claimed. Although he may have suffered an aggravation of a previous non-compensable injury rather than a new injury, he is

entitled to benefits in either case. Claimant's lies apparently came from his fear that his previous injury would prevent his being compensated for the work-related injury. Although his lies make his testimony as a whole less trustworthy, they do not deprive it of all value. Other evidence and the sequence of events adequately support his version of how he was hurt.

Claimant apparently was in good condition when he began his shift, which involved a round trip from Pendleton to Boise. When he returned from the trip he told his dispatcher that he had hurt his neck. He then went home and his fiancée took him to the hospital, where he had clear symptoms of such an injury. His injury must have occurred during his shift, and his description of how it happened makes sense. We do not require expert medical testimony to relate his neck and upper back pain to the activity of turning a stiff crank on a trailer's landing gear. He was injured in precisely the place and way we would expect a person to be injured who was doing what he says he was doing.

There is no need for expert medical evidence when the connection between the work and the injury is not complex. In *Uris v. Compensation Department,* 247 Or 420, 427 P2d 753, 430 P2d 861 (1967), the Supreme Court listed several factors to consider in determining if the connection is complex. They include whether the injury or its cause is complicated, whether there is an immediate appearance of symptoms, whether the injury was promptly reported to a superior and to a physician and whether the worker was previously in good health and free from disability of the kind involved. *See also Madewell v. Salvation Army,* 49 Or App 713, 717, 620 P2d 953 (1980). Claimant's injury passes all of these tests, except possibly the last. He testified that his chiropractic treatment involved his neck popping out and that that was a different problem from the one he experienced after the injury. The referee believed his testimony on this point despite claimant's poor credibility. We find that claimant has sufficiently shown a connection between his work and the injury.[1] *See also Garbutt v. SAIF,* 297 Or 148, 681 P2d 1149 (1984).

[1] We have noted that the *Uris* tests may be seen as descriptions of how we function as factfinders rather than as firm rules of law. *Hatfield v. SAIF,* 46 Or App 279, 282, 611 P2d 345 (1980). The important thing is that we be able to determine that causation is not complex; the *Uris* tests aid us in making that determination.

Our holding necessarily rejects the Board majority's concern with claimant's failure to give a full and accurate history to his physicians, a concern that we think led the Board astray in its analysis. If claimant's physicians had had a more accurate history, the most they could have done would be to determine that claimant's injury was an aggravation of a previous injury; there is nothing in the record which indicates that they would have denied that the reinjury was any injury at all.

Reversed; the referee's order is reinstated.

No. 654 November 7, 1984 683

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Benjamin G. Parker, Claimant.

PARKER,
Petitioner,

v.

D. R. JOHNSON LUMBER CO.,
Respondent.

(82-09534; CA A30940)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 11, 1984.

Dean Heiling, P.C., Roseburg, argued the cause and filed the brief for petitioner.

Rod R. Johnson, Roseburg, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded.

YOUNG, J.

This workers' compensation case involves a "backup" denial of a low back claim. Claimant appeals from an order of the Board that affirmed a referee's order that claimant's injury was not work-related. The dispositive issue is whether employer has met its burden to prove that claimant misrepresented that his injury had occurred on the job. We reverse.

Claimant moved to Oregon in the summer of 1981 and began working as a planerman at D.R. Johnson Lumber Company (employer). In March, 1982, he injured his back while lifting a feeder roll. Initially, claimant's doctors diagnosed a hernia. On June 16, 1982, the hernia was surgically

repaired. Although he recovered from the surgery, claimant's back pain continued. A myelogram was performed and revealed a herniated lumbar disc. On September 24, 1982, a laminectomy was performed.

Initially, employer accepted both the hernia and the back claims. Employer alleged, however, that it began to suspect the validity of the claims when it learned that claimant had never mentioned his on-the-job injury to his wife. It further alleges that it discovered from one of claimant's coworkers, Wyer, that claimant had told Wyer that he had hurt his back in California in February, 1982. On September 24, 1982, approximately three months after it had accepted the claim, employer issued its "backup" denial.

The referee affirmed employer's denial of the claim, stating:

> "The law imposes on claimant the burden of proving every element of his claim by a preponderance of credible evidence. There is evidence in this record of prior back complaints. There is evidence of a specific off-job incident in California shortly prior to the alleged work injury. There are discrepancies in the evidence regarding the date of the alleged work injury. There is a conflict in the testimony regarding the reporting of the alleged incident. There is a conflict in the testimony regarding back complaints following a trip to California in February 1982. There are discrepancies between the testimony and the recorded medical histories. On the entire record of testimony and documentary evidence, I am constrained to conclude that the burden of proof has not been

> sustained. This conclusion is not based on demeanor evidence, but on the content of the testimony and the exhibits. While it appears that claimant has a back condition, the evidence does not establish that the condition arose out of and in the course of employment."

In affirming the referee, the Board reviewed *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), and stated:

> "The insurer initially accepted claimant's claim. It attempted to retroactively deny the claim more than sixty days after receiving notice thereof. The Supreme Court recently has held that such backup denials are impermissible, 'unless there is a showing of fraud, misrepresentation or other illegal activity.' *Bauman v. SAIF,* 295 Or 788, 794 (1983). We have interpreted *Bauman* to impose upon the insurer the burden of proving fraud, misrepresentation or other illegal activity when the insurer attempts to deny a previously accepted claim. * * *"

After reviewing *Bauman* and its progeny, the Board concluded:

> "[W]e understand the rule in burden of proof cases involving backup denials to be that the burden of going forward with some evidence of fraud, misrepresentation or other illegal activity lies with the insurer. Once this burden of going forward is met, it is the claimant's ultimate burden to prove the compensability of the claim. * * *
>
> "We find that the insurer sustained its burden of proving fraud, misrepresentation or other illegal activity. We further find that * * * this finding is dispositive of the substantive issue concerning the merits of this claim. Therefore, we affirm the Referee's order which upheld the insurer's denial."

In *Bauman v. SAIF, supra,* 295 Or at 794, the court, in interpreting ORS 656.262(6), held that, when an insurer has notified a claimant that his claim has been accepted, the insurer may not, in the absence of fraud, misrepresentation or other illegal activity, deny the compensability of the claim. We recently have applied *Bauman* in two cases involving "backup" denials. *Wilkins v. SAIF,* 66 Or App 420, 674 P2d 78 (1984), involved an alleged fraud. We stated:

> "SAIF alleges that claimant's entire claim was a fraud, because the accident did not happen. The referee, after evaluating all of the evidence, stated that 'it is impossible to believe that the accident occurred.' The Board agreed with

> that finding. Both the referee and the Board found claimant not credible. Although we are not bound to do so, we normally defer to a referee's findings of credibility, because he was actually able to observe the witnesses. *Miller v. Granite Construction Co.,* 28 Or App 473, 477, 559 P2d 944 (1977). After *de novo* review of the evidence, we agree with the referee and the Board that the preponderance of the evidence supports SAIF's contention that the accident alleged by claimant never actually occurred."

In *Skinner v. SAIF,* 66 Or App 467, 674 P2d 72 (1984), we concluded that, despite the fact that the employer had proved the claimant's misrepresentation, claimant had nevertheless established the compensability of her claim:

> "However, that there was a misrepresentation and that the employer could deny the claim does not necessarily resolve the case. Claimant may still prevail over the denial if she can establish by a preponderance of the evidence that, although she had a pre-existing condition, the injury which she sustained at work materially worsened her condition. *Larson v. Brooks-Scanlon,* 54 Or App 861, 636 P2d 984 (1981), *rev den* 292 Or 581 (1982). We conclude that under the facts of this case claimant has met her burden of proof."

The rule of *Bauman, Wilkins and Skinner* may be summarized as providing that a backup denial of an accepted claim must be supported by proof of fraud, misrepresentation or other illegal activity; it is then the employer's burden to prove, by a preponderance of the evidence,[1] those grounds for a denial. If the employer does so, the claimant may, nevertheless, proceed to prove, by a preponderance of the evidence, the compensability of the claim.

In the present case, the Board stated that "the rule in burden of proof cases involving backup denials [is] that the

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[1] Claimant invites us to review our holding in *Wilkins v. SAIF, supra,* that fraud, in a backup denial claim, must be shown by a preponderance of the evidence. Claimant cites the familiar rule that common law fraud must be proved by clear and convincing evidence. *See e.g., Webb v. Clark,* 274 Or 387, 391, 546 P2d 1078 (1976). The measure of proof under the Workers' Compensation Act is by a preponderance of the evidence. In *Hutcheson v. Weyerhaeuser,* 288 Or 51, 55, 602 P2d 268 (1979), the court stated:

> "We hold therefore, that in workers' compensation cases, whether at the administrative or the judicial level, the party having the affirmative of any given issue must prove it by a preponderance of the evidence unless the legislature fixes some different quantum of proof."

burden of going forward with some evidence of fraud, misrepresentation or other illegal activity lies with the insurer." It then stated that "the insurer sustained its burden of proving fraud, misrepresentation or other illegal activity." It is unclear whether, in the latter statement, the Board was applying—as it must—a preponderance standard. On *de novo* review ORS 656.298(6), we are not persuaded that employer proved, by a preponderance, any of the *Bauman* exceptions, *i.e.,* fraud, misrepresentation or other "illegal activity." It is therefore unnecessary for claimant to prove compensability of his accepted claim.[2]

Reversed and remanded.

[2] Claimant's final assignment of error is moot.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of James C. Welch, Claimant.

WELCH,
Petitioner,

v.

BANISTER PIPELINE,
Respondent.

(82-01160; CA A30608)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 17, 1984.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Brian L. Pocock, Eugene, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed; referee's order reinstated.

ROSSMAN, J.

Claimant appeals an order of the Workers' Compensation Board which reversed the referee and held that claimant was not permanently and totally disabled. We reverse.

In this case, in which the claimant does not exhibit total physical incapacity, we are involved with the so-called "odd-lot" doctrine, under which a disabled person may remain capable of performing work of some kind but still be permanently disabled due to a combination of medical and non-

medical disabilities which effectively foreclose him from gainful employment. Such nonmedical considerations include age, education, adaptability to nonphysical labor, mental capacity and emotional condition, as well as the conditions of the labor market. *Livesay v. SAIF,* 55 Or App 390, 394, 637 P2d 1370 (1981). Because such an injured worker has some capacity for employment, he is statutorily required to make reasonable efforts to find work, although he need not engage in job seeking activities that, in all practicality, would be futile. ORS 656.206; *Smith v. Brooks-Scanlon,* 54 Or App 730, 734, 636 P2d 433 (1981). The ultimate determination of disability must be based on the claimant's current condition, not on his potential for future employment after retraining. *Gettman v. SAIF,* 289 Or 609, 614, 616 P2d 473 (1980).

Claimant is a 40-year-old man. Although he has a ninth-grade education, he tests out equivalently between the third and the fourth grade level. He is of low average intelligence and very low manual dexterity. His employment history includes only very heavy labor. His most recent employment was a driller on jobs involving the use of explosives. On October 20, 1980, he was employed in that capacity when five cases of dynamite prematurely exploded and threw him 20 to 30 feet and he landed on his shoulder. In addition, a large rock struck him in the low back. As a result of the accident, he is no longer able to return to heavy labor. He has been released to do light work, with limitations that he is to do no repetitive bending, no lifting over 10 to 15 pounds and no twisting.

Claimant was referred to LaMotte, a counselor for Vocational Rehabilitation, who worked with him for several months and reported that he was motivated and would give his "best shot" to any job that was available. However, after a thorough evaluation, LaMotte reported: "I don't know of any jobs that this man can handle, nor do I know of any that I can train him for." Testifying at the hearing, LaMotte finally conceded that, perhaps with some kind of training, claimant could find work but stated that it would take a minimum of three years and that he was not sure what kind of training that would be. LaMotte further stated that claimant's unemployability is not the result of difficult economic times. Even if the economy were booming, claimant would be unemployable without retraining.

Employer had a Vocational Rehabilitation Specialist, Hauk, review the exhibits and testify as to claimant's employability. Hauk stated three times in his testimony that claimant was not currently employable. He believed, however, that claimant could be employed after three to nine months of basic education and then training in some specialty school.

Whether a claimant is permanently and totally disabled must be decided on the basis of conditions existing at the time of the decision, not on the basis of a speculative future change in employment status. *Gettman v. SAIF, supra,* 289 Or at 614. In this record, there is no evidence whatsoever that claimant is *currently* capable of gainful employment. Therefore, we have no choice but to reverse and find that claimant falls within the odd-lot category and is permanently and totally disabled as of May 12, 1982, the date of the hearing.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of LaJuan D. Allen, Claimant.

ALLEN,
Petitioner,

v.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

(82-02652; CA A29993)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 12, 1984.

Robert H. Grant, Medford, argued the cause for petitioner. With him on the brief was Grant, Ferguson, Carter, P. C., Medford.

H. Scott Plouse, Medford, argued the cause for respondent. With him on the brief was Cowling & Heysell, Medford.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Award of a penalty and attorney fees for suspension of payments on the 1977 award affirmed; permanent partial disability award reversed and remanded with instructions to award permanent total disability and to calculate penalties and attorney fees for suspension of payments on the 1975 award.

RICHARDSON, P. J.

In this workers' compensation case, petitioner[1] appeals an order of the Workers' Compensation Board awarding a total of 90 percent permanent partial disability, awarding a penalty and attorney fees because of the unpaid portion of a 1977 permanent partial disability award, but failing to award fees and a penalty with respect to the unpaid portion of a 1975 award. We reverse the disability award and the failure to award the penalty and fees related to the 1975 award and affirm the award of penalties and fees related to the 1977 award.

With respect to disability, the issue is extent only. Petitioner contends that the claimant should have been found permanently and totally disabled. He was a 51 year old man who had worked at various jobs, including pulling the green chain and as a mill worker, sewer contractor and rancher. He had a long history of low back and psychological problems. He first injured his back in 1968 in California, after which he had surgery. In March, 1974, after moving to Oregon, he compensably injured his back while doing steel fabrication work.

[1] The claimant's widow is now the petitioner in this appeal.

Shortly thereafter he had spinal fusion surgery. In June, 1975, a determination order awarded 25 percent unscheduled permanent partial disability. That August he was hospitalized for further surgery, a laminectomy. During the operation, he began hemorrhaging and the surgery could not be completed. While recuperating in the hospital, he had a psychotic episode in which he began hallucinating and having delusions and became very difficult to control. He was placed under the care of a psychiatrist Dr. Luther, and was transferred to a psychiatric unit. He improved under a course of medication.

Eventually Dr. Luther released him for surgery and in December, 1975, the surgical repair was accomplished. In December, 1976, the claim closure report of the surgeon, Dr. Weinman, noted that the claimant had a "moderately severe loss of function to the injured part and would be limited to sedentary work and to a job which would allow him to stand or sit at will." In February, 1977, he was awarded an additional 10 percent unscheduled permanent partial disability for his low back, for a total of 35 percent.

At that time Dr. Luther reported that he was seeing the claimant again and that he was not responding to treatment as well as he had previously. He described him as severely disturbed and said his condition included "some elements of what looks like organic loss, including memory deficit and confusion, and which also includes some paranoid and other ideation." He did not think claimant well enough to participate in vocational rehabilitation. In January, 1978, he reported that the claimant was having periods of improvement and some worsening and that he was on a course of stelazine and sinequan.

A psychiatrist, Dr. Quan, evaluated the claimant in June, 1978. He diagnosed "[d]epressive neurosis, chronic, mild to moderate." The doctor believed that the claimant could not benefit from a retraining program and that the duration of his condition did not indicate a good prognosis.

In 1979, Dr. Luther concluded that the claimant was ready to participate in a rehabilitation program at the Callahan Center, where he was enrolled in a four and one-half week program. He made progress and his outlook improved; however, it was noted at discharge that he was more depressed than usual. Later that year he enrolled in a vocational rehabilitation program, but it was terminated after his counselor noted his depression and Dr. Luther reported that the claimant would not be able to return to full time work. He was eventually referred to a private rehabilitation program, through which he and his wife completed motel management school, a plan Dr. Luther encouraged. The rehabilitation reports indicate that the claimant was motivated during training. He and his wife applied for jobs at various motel chains in the western United States, but were not successful in finding an appropriate position.

Dr. Luther stressed to the vocational rehabilitation counselor:

> "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 functioning 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.

"* * * At times Mr. Allen's ability to use good judgment in decisions is somewhat compromised by his depression."

Dr. Luther rated his 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 January, 1982, Southern Oregon Medical Consultants evaluated his physical status and reported:

"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. * * *"

A March 16, 1982, Determination Order granted an additional 20 percent unscheduled disability award, for a total award of 55 percent. He appealed, and the referee and the Board both awarded a total of 90 percent permanent partial disability. Petitioner appeals, contending that the claimant was permanently and totally disabled.

It is clear that, although the claimant's physical condition limited him to some extent, it permited him to do light work. At issue primarily is his mental disability. Dr. Luther's diagnosis was that the post-operative psychosis had developed into a psychotic depression. At the hearing, Dr. Luther stated that the claimant's psychotic depression was essentially permanent, his only hope for improvement being in the development of a new antidepressant or anti-psychotic drug. He explained that the reason he had not considered claimant 100 percent disabled was that he could drive a car and carry on some day to day activities. However, he said that the claimant's condition affected his judgment and energy and concentration levels so that he was capable only of intermittent work. He stated:

"* * * I have encouraged Mr. Allen with the cooperation of his wife to seek some type employment. The most reasonable thing that has been pursued and with some degree of success, although no ultimate success in terms of finding a job, has been something like motel management or something where Mrs. Allen can contribute a great deal to a joint endeavor. Mr Allen is capable in my judgment of intermittent work in the sense that some days he is reasonably good and some days he is—it would be virtually impossible for him to do other than very minimal simple tasks. And the problem of course, is that

> often this is unpredictable. My hope has been, and I think continues to be, that some kind of joint work would be possible. If Mr. Allen were, say to be divorced or would be—to be basically on his own, I am doubtful that there is any reasonably, to be reasonably expected type of job that he could hold down. In other words if he were in a sheltered situation, working for a close friend or something where he could work intermittently—do something, certainly there are some things he can do intermittently, if he were basically on his own I can't think of any 40 hour a week job that he could reasonably be expected to hold down."

The referee gave little weight to Dr. Luther's opinions, stressing that the claimant had been observed to tolerate four hours of sustained activity while at the Callahan Center and had successfully completed motel management training. The Board disagreed with the referee's assessment of Dr. Luther's testimony, but agreed with the award because it concluded that his conclusions did not support an award of permanent total disability. The Board stated that the claimant was not permanently and totally disabled, because Dr. Luther considered him able to work in a sheltered situation, such as motel management, in conjunction with his wife.

We agree with the Board's assessment of Dr. Luther's opinions. They are uncontroverted and consistent with the other reports, including those from the Callahan Center. The sustained activity noted while the claimant was at the Callahan Center does not contradict Dr. Luther's conclusion that his condition rendered him able to work only intermittently and unpredictably and prevents him from holding down a regular job.

We conclude that the record supports an award of permanent total disability. The question is whether his condition precluded him from "regularly performing work at a

gainful and suitable occupation." ORS 656.206(1)(a). The standard has been expressed as "whether the claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market." *See, e.g., Harris v. SAIF,* 292 Or 683, 695, 642 P2d 1147 (1982). We conclude that his condition prevented him from meeting that test. In *Harris,* the claimant was found permanently and totally disabled, although he was earning money through investment and real estate transactions. The Supreme Court stated, in part:

> "The fact that a claimant may have an income even a substantial one, or that he or she is able to perform a variety of activities does not mean *ipso facto* that he or she is no longer permanently totally disabled. * * *
>
> "* * * A severely disabled worker who through luck or pluck is able to generate an income cannot be denied permanent total disability status simply because he or she has demonstrated an ability to 'earn money.' * * *" 292 Or at 695-96. (Footnote omitted.)

The court quoted a discussion of the "odd-lot" doctrine from 2 Larson, Workmen's Compensation Law, 10-164.21 to 10-164.49, § 57.51:

> " 'Total disability' in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence

> that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disabilty nor require that it be reduced to partial. * * *
>
> "* * * * *
>
> "The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."

See also Hill v. U.S. Plywood-Champion, 12 Or App 1, 503 P2d 728 (1972), *rev den* (1973).

The claimant's potential for work in collaboration with his wife, who would fill in for him on bad days and make up for the shortcomings caused by his condition, falls into the category of "distortions" discussed above. The test is not

whether the claimant and his wife were employable, but whether the claimant was. He could not be considered employable just because his wife could do part of his job. Her capabilities were not an extension of his. If the claimant had been able to work for an employer who was willing to call another employe to fill in whenever the claimant was not functioning, we would not thereby be prevented from considering him permanently totally disabled. The situation is not different because the other employe was the claimant's wife.

Petitioner also contends that the claimant should have been awarded penalties and attorney fees for the carrier's failure to pay part of his 1975 permanent partial disability award. ORS 656.262 provides for assessment of attorney fees and penalties against a carrier for unreasonable refusal to pay compensation, and ORS 656.382 requires a carrier to pay attorney fees if it "unreasonably resists the payment of compensation." The claimant received a permanent partial disability award of 25 percent on June 17, 1975. Shortly thereafter, the claim was reopened and the claimant began receiving temporary total disability payments. During that time, the carrier followed what it contends was then standard practice, suspending payment on the permanent partial disability award pending closure of the reopened claim. Another determination order issued February 8, 1977, awarding an additional 10 percent permanent partial disability. The claim was again reopened shortly thereafter, and the carrier again paid time loss benefits but suspended payments on the permanent partial disability award pending closure. The carrier states that permanent partial disability award payments were resumed after the claim was closed in March, 1982. The referee ordered the carrier to pay a 10 percent penalty and attorney fees on the unpaid portion of the 1977 permanent partial disability award, and the Board affirmed. Petitioner asks that that part of the award be affirmed but contends that, in addition, there should be a penalty and attorney fees for failure to make payments on the 1975 award.

In *Taylor v. SAIF,* 40 Or App 437, 595 P2d 515, *rev den* 287 Or 477 (1979), we held that a carrier ordered to pay

compensation for temporary total disability following an aggravation claim may not redesignate paid permanent partial disability installments as temporary total disability. We

awarded penalties and attorney fees pursuant to ORS 656.262 and 656.382, stating:

> "Compensation for permanent partial disability and temporary total disablity serve different purposes. * * *
>
> "Because each form of compensation has a different statutory origin and a different purpose, we see no reason why the payment of one should excuse or defer the payment of the other. Payment of one is not a setoff for the other, ORS 656.216(2). No statute prohibits receipt of temporary total and permanent partial disability payments during the same period of time. No statute suggests that an aggravation claim automatically voids a previous determination order as premature. No statute authorizes a carrier to set off one type of compensation against the other, as SAIF did here. Because temporary total disability must be paid, because permanent disability must be paid sooner or later, and because the two types of compensation serve different purposes, there is nothing inequitable in requiring a carrier to make both types of payments concurrently." 40 Or App at 440-41. (Footnote omitted.)

The same logic applies here. The carrier contends that its failure to pay was not unreasonable, because such suspensions were standard practice until our 1979 decision in *Taylor v. SAIF, supra.* Such an argument was unsuccessful in *Taylor,* however, and must also be unsuccessful here. *But see Zwahlen v. Crown Zellerbach,* 67 Or App 3, 676 P2d 369, *rev den* 297 Or 228 (1984). The Board erred in failing to award a penalty and attorney fees for unreasonable refusal to continue payments on the 1975 permanent partial disability award.

We affirm the award of a penalty and attorney fees related to suspension of payments on the 1977 award, reverse the award of 90 percent permanent partial disability and remand with instructions to award permanent total disability and to calculate penalties and reasonable attorney fees for suspension of payments on the 1975 award.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Keith A. Shine, Claimant.

NEWPORT SEAFOOD et al,
Petitioners,

v.

SHINE et al,
Respondents.

(82-02910, 82-02911; CA A30794)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 24, 1984.

Kevin L. Mannix, Portland, argued the cause and filed the brief for petitioners. With him on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Edward J. Harri, Albany, argued the cause for respondent Keith A. Shine. On the brief were Richard T. Kropp, and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Thomas J. Mortland, Portland, argued the cause for respondents Intercontinental Motor Lines and Mission Insurance. With him on the brief was Breathouwer & Gilman, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

In this workers' compensation case, Newport Seafood Company (NSC), and its insurer appeal from an order of the Board that held that NSC was claimant's employer at the time of his low back injury. The Board reversed a referee's decision that Intercontinental Motor Lines (IML) was claimant's employer at the time of the injury. Responsibility is the sole issue. We affirm the Board.

NSC is a seafood processing company located in Newport. IML is a common carrier. In February, 1982, an IML truck bound for California stopped at NSC and loaded 2,000 pounds of seafood, which finished off the truck load. NSC's shipment was going to its customers in San Diego. About 25 miles south of Newport, the truck went off the road and upset. The driver telephoned Affleck, IML's Portland dispatcher, who called Sherman, IML's owner. Sherman authorized Affleck to do whatever was necessary to salvage the shipment. Affleck contacted Bittler and Manewal, part

[1] At the relevant time Bittler and Manewal each owned five percent of the NSC stock.

owners and managers of NSC,[1] at Manewal's wedding reception. Affleck knew Bittler and Manewal from previous business contacts. He solicited their help to put a crew together and assured them that IML would pay all the expenses.

Manewal and Bittler announced at the reception that an IML truck was off the road and that the freight would be unloaded the next day. Some of those present at the reception worked for NSC; everyone there was advised of the availability of the work. Claimant was employed by NSC as a crab and fish buyer. He was present at the reception and decided to work. On February 7, several persons, including claimant, assembled at NSC's offices and then proceeded to the truck. On arrival, the men met with other workers and began unloading the truck. Several of the workers were not NSC employes. Claimant injured his back while unloading the truck. He reported the injury that evening after returning to the NSC office.

The referee and the Board framed their analyses in terms of the loaned-servant doctrine. In concluding that, at

the time of his injury, claimant was IML's employe, the referee reasoned:

> "Whether the lent-servant *[sic]* doctrine applies in this case depends upon whether Manewal and/or Bittler were acting as officers on behalf of NSC (the alleged general employer) or instead, were acting in their individual capacities either as employees' agents for IML or as an independent contractor. If Manewal and/or Bittler acted as officers of NSC in obtaining claimant's services, the lent-servant *[sic]* doctrine would apply. If Manewal and Bittler were acting only as individuals authorized by IML to hire people for a salvage operation or were acting as an independent contractor the doctrine would not apply. There is evidence in this case weighing both ways.
>
> "It appears that IML's dispatcher intended for Manewal and Bittler to act in their individual capacities to obtain labor and equipment for an IML salvage operation. The dispatcher felt that he had authority to direct and control that salvage operation, even though he did not actually do so. Manewal understood that the operation was to be IML's, as did Bittler. Assistance with the project was solicited at a private wedding reception from both NSC employees and non-NSC employees. Normal NSC procedures were not followed in carrying out the project (*e.g.* the work was performed off of NSC premises, hourly employees did not punch a time clock, regular wage rates were not paid, taxes were not withheld from wages distributed, work on the project was voluntary and not mandatory even for NSC employees and the salvage operation was not a part of NSC's usual business). Furthermore, a number of individuals worked on the salvage operation who were not NSC employees, and the services of some of those individuals were solicited by someone other than Manewal or Bittler. Finally, IML had the primary interest in salvaging seafood from the overturned truck.
>
> "* * * * *
>
> "Although it is far from clear, I believe the greater weight of evidence indicates that Manewal and Bittler acted in their individual capacities and not as officers of NSC. * * *

"I conclude that Manewal and Bittler contracted, either on their own behalf or as agents for IML, to pay claimant for his services in salvaging the seafood on its overturned truck. I believe that it can be implied *[sic]* that claimant was generally aware that Manewal and Bittler were acting individually, notwithstanding the fact that he initially anticipated being

paid by NSC. Claimant recognized that his participation in the salvage operation was voluntary and that he did not follow normal NSC procedures including punching in and out and working on NSC's premises."

The Board disagreed with the referee's analysis.

"* * * We find that there is insufficient evidence to prove that Manewal and Bittler were acting independently and not as officers of NSC. It is true that Manewal and Bittler testified that they were paid as individuals for the work they did on the salvage operation and that they believed they were operating in their individual capacities. However, NSC's business good will was the motivating factor for their involvement. Further, they used NSC facilities as a meeting place and used NSC equipment in the salvage operation. NSC, not Manewal and Bittler, billed IML for all the time and equipment expended in the salvage operation. Accordingly, we find that Manewal and Bittler were acting in their capacity as officers of NSC. Therefore, the lent-servant *[sic]* doctrine should be applied.

"* * * * *

"We find that NSC * * * has failed to prove anything which would amount to an employment agreement between claimant and IML. '[T]he basic test for determining an employment relationship for workers' compensation consists of two elements: 1) the existence of a contract for hire; and (2) the employer's right to control...' There was no contract for hire between claimant and IML because claimant's subjective belief was that he was an employee of NSC when he was injured. As Larson states: 'An employee, for compensation purposes, cannot have an employer thrust upon him against his will or without his knowledge.' Accordingly, we find that claimant was an employee of NSC when he was injured, therefore NSC is responsible for claimant's compensable injury."

In resolving the issue, the Board correctly set forth a two-step analysis. The first inquiry is whether the loaned-servant doctrine applies between NSC and IML. If it does, then a determination must be made as to whether claimant, during the time at issue, was an employe of NSC or IML.

On *de novo* review, we agree with the Board that there is persuasive evidence that Manewal and Bittler were acting as officers of NSC. The facts recited by the Board include NSC's business goodwill, the use of NSC facilities as a

meeting place and the use of NSC equipment in the salvage operation. Moreover, NSC—not Manewal and Bittler—billed IML for both the time and the equipment used in the salvage operation. In the light of those facts, the fact that Manewal and Bittler were paid by IML's insurance carrier is not persuasive. Having determined from the evidence that the loaned-servant doctrine applies, we turn to its application.

In *Multnomah County v. Hunter,* 54 Or App 718, 721, 635 P2d 1371 (1981), we approved Larson's formulation of the loaned-servant doctrine:

> "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> "(a) the employee has made a contract of hire, express or implied, with the special employer;
>
> "(b) the work being done is essentially that of the special employer; and
>
> "(c) the special employer has the right to control the details of the work." 1C Larson, *Workmen's Compensation Law* 8-317, § 48.00.

The Board concluded, and we agree, that NSC failed to prove anything that would amount to a "contract of hire, express or implied" between claimant and IML. Unlike the common law rules developed primarily for the purpose of *respondeat superior,* a determination of an employment relationship in Workers' Compensation Law focuses first on the claimant's perspective:

> "In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: did he make a contract of hire with the special employer? If this question cannot be answered 'yes' the investigation is closed, and there is no need to go on into tests of relative control and the like.
>
> "This must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation." 1C Larson, *Workmen's Compensation Law,* 8-319, §48.10 (1982).

Claimant testified that he assumed he was being paid by NSC. It was only after he had reported his injury that he was made aware that he was to be paid by IML. There is no probative evidence that claimant expressly or impliedly entered into a contract of employment with IML.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHILDRESS,
Appellant,
v.
SHORT et al,
Respondents.
(83-371-J-3; CA A30557)

Appeal from Circuit Court, Jackson County.

Mitchell Karaman, Judge.

Argued and submitted July 13, 1984.

Jerry E. Gastineau, Medford, argued the cause and filed the brief for appellant.

Thomas M. Christ, Eugene, argued the cause for respondents. With him on the brief were Luvaas, Cobb, Richards & Fraser, P.C., Eugene.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed and remanded.

NEWMAN, J.

Plaintiff appeals a summary judgment for defendants Dean Wilson ("Wilson"), a contract logger and road builder, and Short, one of his employes. Plaintiff was injured when he was struck by a log loader that Short operated in Wilson's employ. Plaintiff sued defendants for negligence. *See* ORS 656.154.[1] Defendants assert that they are immune from suit under ORS 656.018.[2] We reverse.

Plaintiff was a log truck driver employed by Richard Wilson Logging, a log hauler, which paid him at an hourly rate. Wilson subcontracted with Richard Wilson Logging for it to haul logs from a site at which defendants were working. Richard Wilson Logging told plaintiff to drive a log truck to the site to pick up logs. All that the record discloses about the

[1] ORS 656.154 provides:

"If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker, or if death results from the injury, his widow, children or other dependents, as the case may be, may elect to seek a remedy against such third person."

[2] ORS 656.018 provides:

"(1)(a) The liability of every employer who satisfies the duty required by ORS 656.017(1) is exclusive and in place of all other liability arising out of compensable injuries to his subject workers, the workers' beneficiaries and anyone otherwise entitled to recover damages from the employer on account of such injuries or claims resulting therefrom, specifically including claims for contribution or indemnity asserted by third persons from whom damages are sought on account of such injuries, except as specifically provided otherwise in ORS 656.001 to 656.794.

subcontract between Wilson and Richard Wilson Logging is that the latter was a "subcontractor" of Wilson and that, when plaintiff was injured, he was hauling logs for Richard Wilson Logging "in conformity with the log hauling subcontract." The record does not disclose the extent to which Wilson actually exercised supervisory control over the log loading operation.

ORS 656.018(1) provides that worker's compensation shall be an employer's only liability for a compensable injury to a "subject worker." ORS 656.018(2) provides, generally, that workers' compensation is an injured subject worker's exclusive remedy against "the worker's employer" for a compensable injury. ORS 656.018(3) extends the immunity to other employes of the employer. Defendants assert that plaintiff was a "subject worker" of Wilson, that Short was, therefore, plaintiff's coemploye and that both defendants are immune from suit because of ORS 656.018.

The two elements required to establish that plaintiff was a "subject worker" of Wilson's for purposes of a defendant's immunity under ORS 656.018 are whether Wilson (1) had contracted to pay a "remuneration for * * * [plaintiff's] services" and (2) had the "right to direct and control the services." *See* ORS 656.005(14) and (28);[3] *see also Spore v. Carmac Veneer,* 62 Or App 495, 661 P2d 582 (1983); *Robinson v. Omark Industries,* 46 Or App 263, 611 P2d 665, *rev allowed* 289 Or 741 (1980), *rev dismissed* 291 Or 5 (1981). The issue, therefore, is whether defendants carried their burden to establish that there was no genuine issue of material fact on both these points. ORCP 47C; *Seeborg v. General Motors Corporation,* 284 Or 695, 699, 588 P2d 1100 (1978). They did not.

Defendants here assert:

> "[P]laintiff was compensated by defendant Dean Wilson through the conduit of a subcontractor, Richard Wilson, plaintiff's general employer. Dean Wilson paid Richard

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"* * * * *

"(2) The rights given to a subject worker and his beneficiaries for compensable injuries under ORS 656.001 to 656.794 are in lieu of any remedies they might otherwise have for such injuries against the worker's employer under ORS 654.305 to 654.335 or other laws, common law or statute, except to the extent the worker is expressly given the right under ORS 656.001 to 656.794 to bring suit against his employer for an injury.

"(3) The exemption from liability given an employer under this section is also extended to the employer's insurer, the department, and the employes, officers and directors of the employer, the employer's insurer and the department except that the exemption from liability shall not apply:

"(a) When the injury is proximately caused by wilful and unprovoked aggression by the person otherwise exempt under this subsection.

"(b) Where the worker and the person otherwise exempt under this subsection are not engaged in the furtherance of a common enterprise or the accomplishment of the same or related objectives * * *."

[3] ORS 656.005(28) provides:

" 'Worker' means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *."

ORS 656.005(14) provides:

" 'Employer' means any person * * * who contracts to pay a remuneration for and secures the right to direct and control the services of any person."

> Wilson for the hours worked by plaintiff, and Richard Wilson in turn paid plaintiff."

The record, however, does not show if "Dean Wilson paid Richard Wilson for the hours worked by plaintiff," or even if Wilson paid Richard Wilson Logging. The record also does not support the conclusion that Wilson paid plaintiff through the "conduit" of Richard Wilson Logging.[4] Simply because Richard Wilson Logging subcontracted with Wilson and paid plaintiff at an hourly wage to haul logs "in conformity with the log hauling subcontract" does not establish either that Wilson had "contract[ed] to pay a remuneration for * * * the services" of plaintiff or that defendants have carried their burden to establish that there is here no genuine issue of material fact. Accordingly, the court erred in granting summary judgment for defendants.[5]

Reversed and remanded.

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[4] Although none of these factors is individually decisive, the record also does not show if the subcontract price was expressly tied to the wages of Richard Wilson Logging's employes, if Wilson made provision for their workers' compensation, unemployment tax or withholding tax, if plaintiff's hourly wages varied depending on the contractor with whom Richard Wilson Logging subcontracted or whether Wilson specifically contracted with Richard Wilson Logging that plaintiff would haul.

[5] Because a genuine issue of material fact exists respecting remuneration, we do not reach the question whether there was a genuine issue of material fact that Wilson had secured the right to direct and control plaintiff's services.

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168 November 28, 1984 No. 692

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Mike A. Aldrich, Claimant.

ALDRICH,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 81-08607; CA A30179)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 6, 1984.

Marianne Bottini, Portland, argued the cause for petitioner. With her on the brief was Bottini & Bottini, Portland.

Linda DeVries, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, Joseph, Chief Judge, and Rossman, Judge.

JOSEPH, C. J.

Reversed and remanded for processing of claimant's aggravation claim and determination of penalties and attorney fees.

JOSEPH, C. J.

Claimant seeks review of the Workers' Compensation Board, claiming that it erred in affirming the referee. He argues that the determination order was issued prematurely, SAIF's denial was improper and he should be awarded penalties and attorney fees for SAIF's denial. We reverse.[1]

Claimant is a 24-year-old man who has a history of problems with his knee. When he was 15, he was diagnosed as having Osgood Schlatter's disease in both legs. Less than a month after the diagnosis, he was found to have no discomfort from the disease and was not limited in his activities. Although no details are in the record, he also apparently injured his knee while wrestling in high school. On approximately June 13, 1979, he twisted it in a waterskiing accident and required medical treatment. He missed no time from work, but was told to take it easy. On June 15, 1979, while finishing concrete on the job, he again twisted the knee; it permanently locked, requiring immediate surgery. Although he was candid with the doctor about his history, and SAIF was fully aware of the earlier skiing injury, SAIF accepted the claim on June 28, 1979. That condition became medically stationary, and claimant was awarded time loss and a five percent scheduled disability.

He returned to work approximately three months after surgery and had no major difficulties with his knee until February, 1981, when he again twisted it at work. On February 27, Dr. Corrigan filed a report in which he released him for work and indicated that claimant was medically stationary but gave no other information. Dr. Pettigrew released him for return to work on March 18, 1981, with a notation that he should be careful about quick moves on the left knee, and indicated that claimant was not medically stationary, the knee was unstable and he needed joint and muscle rehabilitation to keep the knee strong. A determination order was issued on the aggravation claim on April 21, 1981, awarding time loss only.

On May 26, 1981, claimant's left knee grew worse, and he was taken off work. He was released for work again on

June 5, 1981. Dr. Pettigrew's report stated that claimant had suffered a worsening of his condition on May 21, 1981, that he was not medically stationary, that his knee was unstable and that he would not have a full recovery. The doctor said that he could return to his regular work, so long as he was treated two to four times a month. Also in June, 1981, claimant was fitted by Dr. Jones for a derotational brace, which he wore for several months. Dr. Jones stated that, if the brace did not stabilize the knee, surgery would be necessary.

[1] Because we hold that claimant has a valid aggravation claim which should not have been closed before the surgery, ORS 656.245, for he is clearly entitled to those benefits on his aggravation claim.

SAIF requested Dr. Norton to review claimant's file. He reported that the necessity for the 1979 surgery did not stem from the on-the-job injury but from earlier preexisting conditions. He further stated that claimant's current knee problem did not result from anything that was missed by Dr. Corrigan at the time of the original surgery but was rather the natural course of ligament tears. Dr. Norton concluded that Osgood Schlatter's disease could be dismissed completely as having no significant effect on claimant's current knee instability.

On August 7, 1981, SAIF issued a denial, stating:

> "It is our opinion that your current knee problems are unrelated to your injury of June 15, 1979, and most probably related to conditions which preexisted your injury. Therefore, without waiving other questions of compensability this formal denial is made."

On January 27, 1982, Dr. Carlson surgically repaired a torn lateral meniscus and a ruptured right Achilles tendon. Further surgery may still be necessary. The doctor stated that he had not been aware that claimant had suffered an injury in June 15, 1979, but "in all probability, however, the subsequent knee surgery is in direct relationship to his previous knee injury in terms of injuring his meniscus and probably injuring his anterior cruciate ligament."

Claimant first asserts that he was not medically stationary when the determination order of April 21, 1981, was issued, so the order was improper. ORS 656.268. The test for determining whether a claimant is medically stationary is whether "further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17); *Harmon v. SAIF,* 54 Or App 121, 634 P2d 274, *rev den* 292 Or 232 (1981). Claimant's employment status

may be relevant, but it is not determinative of this issue. *Saxton v. Lamb-Weston,* 49 Or App 887, 621 P2d 619 (1980), *rev den* 290 Or 727 (1981).

The aggravation for which the determination order was issued occurred in February, 1981. The preponderance of the medical evidence establishes that claimant was not medically stationary at the time the order was issued. This conclusion is consistent with the fact that the doctors were trying through conservative treatment and then the leg brace to stabilize the knee but noted that, if such stability were not maintained, surgery would be necessary. The medical consensus was that stability of the knee, which would be a material improvement of claimant's condition, could eventually be obtained through whatever medical treatment might be necessary. Claimant was not medically stationary on April 21, 1981, and the determination order is therefore invalid. Claimant's aggravation claim is still open, unless it was validly closed by the August 7, 1981, denial.

In *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), the Supreme Court held that, once an employer has accepted a claim, it cannot later deny the claim in the absence of fraud, misrepresentation or other illegal activity, none of which is

alleged in this case. There is no question but that SAIF accepted the claim for the knee condition that resulted in the 1979 surgery. Regardless of causation evidence which may have become available since that time, SAIF is bound by that acceptance. It is also bound by its acceptance of the February, 1981, aggravation claim, which was never validly closed.

The only issue therefore is whether claimant's current condition is separate from that which has already been accepted by SAIF. SAIF argues that it is not denying the same condition, but is merely denying responsibility for the chronic underlying condition.[2] It may be possible for a claimant to have a chronic condition which is temporarily worsened by an on-the-job accident but which eventually returns to the pre-accident condition. Any subsequent worsening might in fact be attributable only to the underlying condition, and a denial

would then be proper. That is not the case here. Nothing in any of the medical evidence indicates that claimant's knee ever totally recovered (as distinct from becoming medically stationary) from the condition which required surgery in 1979. Although claimant apparently was basically asymptomatic for a period of time, even Dr. Norton, on whose opinion SAIF relies, states that claimant's current condition is merely the result of the natural post-surgery progression of a tear of the kind claimant suffered. Moreover, claimant had not become medically stationary on the accepted aggravation claim before the issuance of SAIF's denial. It is apparent from SAIF's argument and the medical evidence upon which it relies that, rather than trying to establish that claimant is currently suffering from a separate injury than that which it accepted, it is arguing that the 1979 claim was wrongly accepted in the first place and that the original surgery was actually the result of a chronic disease and not of an on-the-job accident. Under *Bauman*, an employer is barred from making that claim or issuing a denial.

This case is similar to *SAIF v. Forrest,* 68 Or App 312, 680 P2d 1031 (1984), in which the claimant had had an off-the-job accident which caused an injury to his left knee. Thereafter, he injured the same knee on the job. The claim was accepted and he was given a disability award, in part because of a seven degree loss of extension in his knee. A year later the claimant underwent surgery, during which it was determined that the loss of extension was due to the earlier injury and not to the on-the-job injury. SAIF denied liability for the surgery. We held that that was improper because, although SAIF had couched its denial as one for a preexisting condition and not as a denial of the on-the-job injury it had already accepted, the effect was to deny surgery for a condition (the loss of extension in the knee) which had already been accepted and for which permanent disability had been awarded. The denial issued by SAIF on August 7, 1981, in this case was also invalid.

[2] SAIF also argues that a June 11, 1981, off-the-job slip from a ladder was an intervening accident. However, no medical evidence supports this point, and we reject it.

SAIF presented no medical or other evidence of any kind indicating that claimant's current condition is not related to the condition for which he had surgery in 1979, which had already been accepted by SAIF. Therefore, it had no reasonable basis for the denial and no reasonable basis for refusing to pay claimant's medical bills for the second surgery. Penalties and attorney fees must therefore be awarded.

Reversed and remanded for processing of claimant's aggravation claim and a determination of the amount of penalties and attorney fees.

No. 693 November 28, 1984 175

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ruth B. Hayes-Godt, Claimant.

HAYES-GODT,
Petitioner,

v.

SCOTT WETZEL SERVICES et al,
Respondents.

(81-08445 82-11751; CA A30662)

Judicial Review from Workers' Compensation Board.

Submitted on record and briefs July 13, 1984.

David G. Cromwell, and Cromwell & Hess, Grants Pass, filed the brief for petitioner.

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., and Donna Parton Garaventa, Assistant Attorney General, Salem, filed the brief for respondent SAIF Corporation.

Jack R. Bird, and Frohnmayer, Deatherage, deSchweinitz, Pratt & Jamieson, Medford, filed the brief for respondent Scott Wetzel Services.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

JOSEPH, C. J.

Affirmed as to Scott Wetzel; reversed and remanded for acceptance of occupational disease claim as to SAIF.

JOSEPH, C. J.

Claimant appeals an order of the Workers' Compensation Board which affirmed the referee's order that claimant does not have a valid aggravation claim against Scott Wetzel Services and is barred from recovery against SAIF because she did not timely file her claim. We affirm as to Scott Wetzel and reverse as to SAIF.

Claimant was initially injured on March 15, 1980, while working in the bakery of Safeway Stores, Inc. (Scott Wetzel), when she fell and sustained a fractured left wrist.

The wrist did not heal properly and eventually required surgery. She returned to work on July 14, 1980, with no restrictions. Dr. Potter noted at that time that she had no residual problems except a minor limitation of motion which should resolve itself in a few weeks. A determination order was issued in August, 1980, awarding no permanent partial disability. She left her employment at Safeway for unspecified reasons in December, 1980.

On March 25, 1981, claimant began working for Dr. Graham, a chiropractor. Although still wearing a small bandage on her wrist, she was not then undergoing any treatment. Dr. Graham used the business name Gralo Management Corporation and was insured by SAIF. Claimant did physiotherapy work with a sound wave instrument, which she was required to hold in her left hand and move with a good deal of pressure in a circular motion for 20 to 25 minutes per patient. She treated approximately 17 patients a day.

In June, 1981, claimant took a two week vacation. While she was gone, her patients complained to Dr. Graham that she was not using enough pressure during the treatments. When claimant returned, she attempted to use more pressure and her hand began to bother her. On July 7 or 9, 1981, Dr. Graham attempted to train claimant to do x-ray work. She found that she was unable to squeeze her fingers together as required to pin x-rays to the frame. Thereafter she went back to Dr. Pons, who had first treated her in August, 1980. He noted a slight wrist swelling, but normal x-rays. Nerve conduction studies showed a carpal tunnel syndrome in the wrist. Dr. Pons stated in several reports that he believed that claimant's work for Dr. Graham materially contributed to her complaints. He noted that the earlier fracture had made her

more susceptible to carpal tunnel syndrome and stated that there was a possibility that her current condition was an aggravation of her earlier condition. Dr. Embick reviewed the file and stated that it was impossible to rule out the fracture entirely as a secondary cause of the syndrome. Claimant left her employment with Dr. Graham in mid-August, 1981.

She initially filed a claim against Scott Wetzel, which denied her claim on September 1, 1981. On April 30, 1982, she attempted to file a claim with Dr. Graham, but he refused to fill out his portion of the claim and refused to file it until July 9, 1982. SAIF denied the claim on August 10, 1982. At the time of the hearing claimant had not undergone surgery for the syndrome.

Claimant initially asserts that the Board was wrong in holding that SAIF and not Scott Wetzel is the responsible insurer. The issue is whether claimant has suffered an aggravation of her initial injury (for which Scott Wetzel is responsible) or a new occupational disease (for which SAIF is responsible). This is not a case in which either the last injurious exposure rule for an occupational disease or the successive injury rule applies. The medical evidence establishes that, although claimant's fracture may have made her susceptible to carpal tunnel syndrome, it did not cause that condition. The carpal tunnel syndrome occupational disease is

a separate condition. Dr. Pons, who initially saw claimant when the fracture was resolving, seven months before she went to work for Dr. Graham, and whom claimant later consulted for the syndrome, repeatedly concluded that the syndrome is causally related to her work for Dr. Graham. The other medical evidence suggests only a *possibility* that the original injury could have caused the syndrome, and that is insufficient to establish causation related to the fracture. SAIF is the responsible employer for claimant's compensable condition.

Claimant next assigns as error the determination that her claim against SAIF is barred by the fact that she did not file her claim until over nine months after she was first aware of the injury. Occupational disease claims must be made within 180 days from the date a claimant becomes disabled or is informed by a physician that she is suffering from an

occupational disease, whichever is later. ORS 656.807(1).[1] Failure to make a claim within the 180 days bars the claim unless one of the factors in ORS 656.265(4) exists.[2] The provisions applicable to this case are contained in ORS 656.265(4)(a):

> "The employer had knowledge of the injury or death, or the insurer or self-insured employer has not been prejudiced by failure to receive the notice."

Those requirements are stated disjunctively, and a claimant is only required to establish one in order to avoid having a claim barred. We conclude that the employer had knowledge of the injury and that the claim was not barred. *See Baldwin v. Thatcher Construction,* 49 Or App 421, 425, 619 P2d 682 (1980).

In order to establish employer knowledge a claimant need not establish that the employer knew of the *claim,* but only that the employer knew of the *injury,* even if the employer had good reason to believe that no claim would ever be filed. *Baldwin v. Thatcher Construction, supra,* 49 Or App at 425. If the employer has knowledge of the injury, a claim is not barred, even if the employer was prejudiced by late filing of the claim. *Baldwin v. Thatcher Construction, supra,* 49 Or App at 425-26.

In this case it is evident that claimant's employer, Dr. Graham, had as much knowledge as did claimant. He was

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[1] ORS 656.807(1) provides:

"(1) Except as otherwise limited for silicosis, asbestosis and asbestos-related diseases, all occupational disease claims shall be void unless a claim is filed with the insurer or self-insured employer within five years after the last exposure in employment subject to the Workers' Compensation Law and within 180 days from the date the claimant becomes disabled or is informed by a physician that the claimant is suffering from an occupational disease whichever is later."

[2] SAIF argues at some length that ORS 656.265(4) is not applicable to occupational disease claims, because the statute was amended in 1973 after this court's decision in *Gronquist v. SAIF,* 25 Or App 27, 547 P2d 1374, *rev den* (1976). We decline to accept the argument implied by SAIF that the Supreme Court blindly relied on our earlier decision in *Gronquist* and did not consider the changes in the statute when it held in *Inkley v. Forest Fiber Products Co.,* 288 Or 337, 347, 605 P2d 1175 (1980), that ORS 656.265(4) is applicable to occupational diseases. We concur in the Supreme Court's conclusion: "We can think of no reason to deny occupational disease claimants the same excuses for late or deficient filing as are available to injured workers under the Workers' Compensation law." 288 Or at 347. *See Robinson v. SAIF,* 69 Or App 535, 686 P2d 1053 (1984).

aware of claimant's preexisting injury. Indeed, when she first applied for work she still had a bandage from the earlier fracture on her wrist. He was certainly aware of the work which she was performing, for he was her only supervisor. He was aware almost immediately when claimant determined that her wrist condition would not permit her to put x-rays on a screen. Although Dr. Graham believed that no claim would be made against him and noted on the 801 form that he believed that her problems were all related to her earlier employment, he was aware of the work that claimant was doing and of the fact that she was hurting. Because of his professional training, he must have been aware that the kind of work that claimant was doing could have been a cause of her carpal tunnel syndrome. We therefore hold that the employer was aware of the injury in this case, and claimant is not barred by her failure to make her claim within 180 days.[3]

Affirmed as to Scott Wetzel; reversed and remanded for acceptance of the occupational disease claim as to SAIF.

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[3] Although not necessary for our decision, we note an alternative ground for finding that claimant is not time barred: lack of employer prejudice from the late filing. The burden of proving prejudice is on the employer. *Inkley v. Forest Fiber Products Co.*, 288 Or at 348. Prejudice can result from the passage of time, if the evidence shows that witnesses have become unavailable, that memories have dimmed, that prompt medical attention could have reduced the consequences of the injury or that the employer is otherwise seriously disadvantaged in some manner. *Vandre v. Weyerhaeuser Co.*, 42 Or App 705, 601 P2d 1265 (1979). The mere facts that some time has passed and that the employer claims that it has been prejudiced is not sufficient. *Raifsnider v. Cavemen Industries Inc.*, 55 Or App 780, 639 P2d 1298 (1982); *Higgins v. Med. Research Foundation*, 48 Or App 29, 615 P2d 1192 (1980). The only evidence of prejudice here, which is not specific, was insufficient.

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266 December 5, 1984 No. 711

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Tracey Wagoner, Claimant.

U. S. NATIONAL BANK,
Petitioner,

v.

WAGONER,
Respondent.

(82-05274; CA A30780)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1984.

R. Kenney Roberts, Portland, argued the cause for petitioner. On the brief were Jerald P. Keene, and Roberts, Reinisch Klor, P.C., Portland.

Elliott Lynn, Beaverton, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Warden and Warren, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Claimant suffered a back injury in 1980. Her employer[1] accepted her worker's compensation claim, and a determination order was issued on June 9, 1982. On November 8, 1982, employer issued a "backup denial," purporting to revoke the acceptance of the claim on the basis of employer's subsequent conclusion that the injury was not work-related. The referee affirmed the denial. The Workers' Compensation Board reversed, and employer appeals. We affirm.

In *Frasure v. Agripac,* 290 Or 99, 619 P2d 274 (1980), the Supreme Court held that, at least under some circumstances, the Oregon Workers' Compensation statutes permit employers and insurers to deny previously accepted claims. After the denial of the claim in this case, but before the Board's decision, the Supreme Court held in *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), that, except under circumstances not material here, post-acceptance denials are not permitted by the applicable statutes. Although *Bauman* did not overtly overrule *Frasure,* the court did say in *Bauman* that "[w]e must retreat slightly from what we said in *Frasure.*" 295 Or at 792. Whatever precise effect *Bauman* may have on the authoritative status of *Frasure,* it is clear that the denial of the claim here would be impermissible under *Bauman* and would be permissible under *Frasure.*[2] The issue in this appeal is whether *Bauman* applies retroactively.

On a number of occasions, the Oregon Supreme Court has given only prospective effect to decisions that changed procedural requirements or that overruled earlier decisions. *See Falk v. Amsberry,* 290 Or 839, 846-47, 626 P2d 362 (1981), and cases cited there; *Linn County v. Rozelle,* 177 Or 245, 283, 162 P2d 150 (1945). The refusal to apply a new procedural requirement retroactively can be announced in a decision other than the one that creates the new requirement. *See Holder v. Petty,* 267 Or 94, 514 P2d 1105 (1973).

There is some question about whether a decision that overrules a previous interpretation of a *statute can* be non-retroactive. Board member Barnes stated in his opinion concurring with the order below that, "[t]o the extent that the statutes have always said the same thing, application of the *Bauman* interpretation of those statutes in this case is hardly 'retroactive' in the same sense" as in other contexts where courts have declined to apply decisions retroactively. No Oregon appellate court opinion we have found or the parties

[1] Employer is the named petitioner in this court. Although employer's carrier has been involved in some of the relevant events, we use only the term "employer" for simplicity of reference.

[2] The word "permissible," as we use it here, relates to the legal authority to issue a denial and not to the correctness of employer's position on the compensability issue.

cite has decided whether courts *can* refuse to apply a decision retroactively that changes a previous construction of a statute.[3] For the purposes of this case, we assume that the answer is yes.

It appears to be clear that, unless constitutional or vested rights are involved, courts are seldom if ever *required* to give only prospective effect to their decisions. *See* Annot., 10 ALR3d 1371, § 6 (1966). Employer does not argue here that *Bauman cannot* lawfully be applied retroactively.

We find no express Oregon holding that a lower court or tribunal has or does not have authority to decide whether a higher court's opinions are to be applied retroactively or prospectively. However, the question has been implicitly answered by opinions of the Oregon Supreme Court in which it has decided whether United States Supreme Court decisions should apply retroactively. *See State v. Evans,* 258 Or 437, 483 P2d 1300 (1971). We see no reason why the question of retroactive operation should not come within the general principle that lower courts or tribunals have authority to decide all questions of law that higher courts have not decided.

The principal consideration that has motivated courts to make "overruling" decisions nonretroactive is the prevention of "detriment [to] litigants who have justifiably relied on the overruled precedent." *Falk v. Amsberry, supra,* 290 Or at 846; *see also* Annot., *supra,* 10 ALR 3d at 1371 (1966). Employer argues in this case that *Bauman* should not be given retroactive application because employers and insurers have relied on *Frasure.*[4] Employer states:

> "* * * [I]t is not the issuance of [backup] denials that have prejudiced the carriers, *it was the acceptance of claims and the initiation of benefits in reliance on the fact denials could issue if subsequent investigation suggested they were appropriate.*
>
> "* * * Board Member Barnes states in his concurring opinion that such acceptances number in the 'thousands.' To this must be added the cases awaiting hearing on back up denials issued before *Bauman* was decided. By any measure, those cases represent substantial objective evidence [of] justifiable reliance upon the pre-*Bauman* state of the law of claims processing.

[3] Authority from outside the state is divided. It is stated at 21 CJS 326-27, Courts, § 194 (1940):

> "* * * [I]n accordance with the rule * * * that a judicial construction of a statute relates back and constitutes a part of the statute, a decision reversing or overruling a prior decision as to the construction of a statute is generally retrospective in its operation and relates back to the enactment of the statute, or to the date of the overruled decision. * * *" (Footnotes omitted.)

However, 20 Am Jur 2d 562-63, Courts, § 234 (1965) says:

> "The overruling of a judicial construction of a statute will not be given retroactive effect. Such a decision will be limited to the effect ordinarily inherent in a legislative change of a statutory rule, that is, merely prospective effect. * * *" (Footnote omitted.)

[4] Although employer points to considerations in addition to reliance, *e.g.,* "hardship," "fairness and feasibility," we understand those other considerations to be synonymous with or consequences of the reliance employer argues was placed on *Frasure.* Courts have considered factors other than reliance, such as effects on the administration of justice, in making the choice between retroactive and prospective operation. *See, generally,* Annot., *supra,* 10 ALR 3d, § 5. Employer does not rely on factors of that kind here, nor would it be assisted by them.

"With regard to the cases upon which appeals are possible or pending, there is further prejudice. As stated above, had the employer/carriers known the standards to be applied to their denials, *i.e.* fraud, misrepresentation or other illegal activity, they might have garnered and presented evidence of those issues to the hearings Referees. * * *" (Emphasis employer's.)

Although employer makes no analytical distinction between them, there are two facets to its argument: First, that *Bauman* should not apply to *acceptances* of claims that were issued between the dates of the *Frasure* and *Bauman* decisions, because the acceptances were made when backup denials were regarded as permissible; and, second, that *Bauman* should not apply to *backup denials* that were in fact issued while *Frasure*, unmodified by *Bauman*, was the law.

Employer's argument as it relates to pre-*Bauman acceptances* is simply untenable. The effect of the argument would be to leave *all* acceptances of worker's compensation

claims made over a three-year period subject to revocation throughout the lives of the injured workers and, in some instances, the lives of their eligible survivors. The court said in *Bauman:*

"The insurer or self-insured employer is not at liberty to accept a claim, make payments over an extended period of time, place the compensability in a holding pattern and then, as an afterthought, decide to litigate the issue of compensability. We need not list all of the possible ramifications of such conduct but it is readily evident that problems involving lapsed memories, missing witnesses, missing medical reports, and a host of other difficulties would arise from the delayed litigation of the compensability of a claim." 295 Or at 794.

Bauman did not change the law pertaining to acceptances of claims. It changed the law pertaining to backup denials. It may be true, as employer postulates, that some claims were accepted in reliance on *Frasure's* holding that they could later be denied. However, there are many other reasons why an employer or insurer might have accepted an unmeritorious claim during the period between the *Frasure* and *Bauman* decisions *and why an employer or insurer might do so now.* For example, as Board member Barnes indicated in his concurring opinion, the cost of investigating some claims is less than the cost of the benefits they entail, although later events might cause the benefits to escalate. The relationship between *Frasure* and decisions to accept claims while *Frasure* was extant was far too uncertain in general and tenuous in particular instances to warrant the continued application of *Frasure* to all claims that were accepted between the time it was decided and the time of the decision in *Bauman.* Whatever justifiable reliance employers and insurers might have placed on *Frasure* in connection with their acceptance of claims is far outweighed by the rights of injured workers to, and the interest of the adjudicatory system in, the finality of acceptances that had not been subjected to backup denials before *Bauman* was decided.

Whether *Bauman* should apply retroactively to backup denials that *had* been issued before it was decided is a

closer question,[5] but the answer and the essential reasoning are the same. A retroactive application of *Bauman* to such backup denials can have the detrimental effects on employers and insurers that employer identifies in its argument; however, the converse is also true. If *Bauman* is not given retroactive effect, claimants would face obstacles to their ability to prove compensability that result from the passage of time between an acceptance and a backup denial. As noted above, the elimination of those obstacles was one of the express purposes of *Bauman.* The author states in the previously cited annotation that one consideration that bears on whether a decision should apply retroactively "is the purpose of the [new] rule, and if the purpose of the new rule can be adequately effectuated without applying it retroactively." *See* Annot., *supra,* 10 ALR 3d at 1390. The essential purpose of *Bauman* was to restore to claimants the statutory rights that *Frasure* mistakenly took away. That purpose is as applicable to persons whose claims were acepted between the dates of the two decisions as to those whose claims were accepted after *Bauman.* We conclude that the reliance employers and insurers may have placed on *Frasure* is an insufficient basis upon which to deprive claimants of the protection against backup denials that the court in *Bauman* held the workers' compensation statutes provide.

Affirmed.

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[5] There is some question in our minds about whether "retroactivity" is a helpful label or concept in connection with proceedings, like this one, which were in progress at the time *Bauman* was decided. There is no doubt that, if claimant had raised the issue in the proceedings below that the claimant in *Bauman* raised, she would have been entitled to prevail by virtue of the Supreme Court's disposition of the issue during the course of the proceedings. *See State ex rel Juv. Dept. v. Farrell,* 58 Or App 258, 261-62, 648 P2d 401, *rev den* 293 Or 521 (1982), *cert den* ____ US ____ (76 L Ed 2d 351) (1983). Whether or not claimant did raise the issue below, employer does not argue now that she cannot rely on *Bauman* because she did not raise the issue.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Vincent L. Meyer, Claimant.

MEYER,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(81-06150, 80-11612, 80-11611; CA A31130)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 15, 1984.

Peter W. Preston, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Warren, Judges.

RICHARDSON, P. J.

Reversed and remanded for acceptance of the claim.

RICHARDSON, P. J.

Claimant seeks review of an order of the Workers' Compensation Board upholding SAIF's denial of benefits for claimant's asbestosis. The issue is whether, under the last injurious exposure rule, SAIF is responsible for paying the claim. We hold that SAIF is responsible and therefore reverse.

Claimant, 64, has worked as a plumber and pipefitter since leaving school in the eighth grade. Throughout his career, and while working for different employers, he was exposed to asbestos. His last employment-related exposure was during June 21 to July 27, 1978, while employed by Contractors, Inc. That job required removal of insulation containing asbestos from pipes.

In July, 1979, claimant was diagnosed as suffering from asbestosis. He filed a claim with SAIF, the insurer for Contractors, Inc. SAIF denied responsibility on the ground that claimant's asbestosis was caused by his earlier extensive exposures to asbestos and that the brief exposure in 1978 did not contribute to the disease. Claimant requested a hearing. The referee upheld SAIF's denial. The referee found that the 1978 exposure was too brief and too recent to have caused climant's asbestosis. The Workers' Compensation Board affirmed.

In an occupational disease context, the last injurious exposure rule provides that, if a worker proves that the disease could have been caused by work conditions that existed at more than one place of employment, the last employment providing potentially causal conditions is deemed to have caused the disease.[1] *See Boise Cascade Corp. v. Starbuck*, 296 Or 238, 241, 675 P2d 1044 (1984). SAIF contends that it is not

liable under that rule, because the 1978 exposure was too brief and too recent to have caused claimant's present condition.

[1] SAIF contends that the last injurious exposure rule does not apply to this case. The rule, SAIF argues, applies only in cases where responsibility among several employers or insurers is at issue. SAIF reasons that, because it is the only potentially liable insurer that is a party to this case, the rule does not apply. We disagree. The rule applies when the occupational disease could have been caused by work conditions at any one of several employments, and the question is which employer is responsible. *See Fossum v. SAIF*, 293 Or 252, 646 P2d 1337 (1982); *Inkley v. Forest Fiber Products Co.*, 288 Or 337, 605 P2d 1175 (1980); *Mathis v. SAIF*, 10 Or App 139, 499 P2d 1331 (1972). This is such a case. Simply because SAIF is the only insurer that is a party to this case does not render the rule inapplicable. *See, e.g., Mathis v. SAIF, supra.* We note that originally two other employers were parties to this case but were dismissed by stipulation between claimant and SAIF.

Indeed, the medical evidence supports SAIF's contention that that exposure was not an actual cause of claimant's present condition. Dr. Patterson, board certified in pulmonary medicine, was the only doctor to testify about the effect of the 1978 exposure on claimant's asbestosis. He testified that claimant's x-rays showed signs of asbestosis as early as 1966 and that he had a "substantial amount" of asbestosis prior to 1978. In a report to SAIF concerning the 1978 exposure, he stated:

> "In my opinion, that particular exposure would have nothing to do with his current condition. The exposure was brief, a mask was worn, and the time course for the development of asbestosis is far too long to imagine that any exposure in 1978 would have significantly altered his current condition. * * *"

His testimony in a subsequent deposition was consistent with this opinion.

That the 1978 exposure was not the actual cause of claimant's present condition does not absolve SAIF from responsibility, for the appropriate inquiry under the last injurious exposure rule is not whether the conditions of the last employment actually caused the disease, but whether those conditions were of a kind which could have caused the disease over some indefinite period of time. *Mathis v. SAIF,* 10 Or App 139, 499 P2d 1331 (1972); *see Fossum v. SAIF,* 293 Or 252, 256, n 1, 646 P2d 1337 (1982). To that inquiry, Dr. Patterson testified as follows:

> "Q And would it be your opinion that the circumstances as described would constitute the type of exposure that, if continued over some period of time, could be significantly injurious to an individual's health?
>
> "A Yes, if these exposures were continued for a sufficient period of time, I would think they could be injurious.
>
> "* * * * *
>
> "Q So that the only real thing that you can say is, and correct me if I'm wrong, that the kind of exposure that he had while working for this employer, if continued for some indefinite period of time, would ultimately result in the kind of x-ray findings we see today on those x-rays that haven't been marked, but you have referred to earlier, right?

> "A Yes."

Because the conditions in claimant's 1978 employment at Contractors, Inc., were of a kind which could have caused asbestosis over some indefinite period of time, that employment is deemed to have caused the disease. *FMC Corp. v. Liberty Mutual Ins. Co.,* 70 Or App 370, ___ P2d ___ (1984). SAIF is the responsible insurer.

Reversed and remanded for acceptance of the claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Zona F. Malinen, Claimant.

MONTGOMERY WARD & COMPANY,
Petitioner,

v.

MALINEN,
Respondent.

(82-03216, 82-02253; CA A30679)

Judicial review from the Workers' Compensation Board.

Argued and submitted July 18, 1984.

J. P. Graff, Portland, argued the cause for petitioner. With him on the brief were Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

D. Richard Fischer, Astoria, argued the cause for respondent. With him on the brief were Larson & Fischer, Astoria, Hayes Patrick Lavis, Astoria, and Roll, Westmoreland & Lavis, P. C., Astoria.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Employer appeals from an order of the Workers' Compensation Board affirming the referee's decision that claimant's injury is compensable. We affirm.

Claimant is a 57-year-old woman. On January 6, 1982, she slipped on an ice-covered sidewalk which ran in front of employer's Astoria catalog store and its adjacent parking lot. The fall seriously injured her right leg. At the time of the accident, she was a freight clerk in the store and had been so employed since 1969. Her duties included work at the counter.

Claimant had learned on the evening of January 5, after leaving work, that she was to report for jury duty the next morning. She reported to work at 7:30 a.m. and, when the manager arrived, told her that she would have to leave later that morning for jury duty. Two others of the store's five employes were off work, and the manager said, "Well, that's going to leave us shorthanded." Claimant left the store at about 9:15 and walked to the courthouse three blocks away. The court recessed at noon, and claimant was instructed to return at 1:30 p.m.

Claimant testified that she left the courthouse and started to walk back to employer's store to "relieve one of the girls at the store." The referee concluded, on the basis of claimant's testimony, her work history and his own assessment of her credibility, that her primary reason for returning to the store was to work. Snow had fallen the day before, and the sidewalks were slick and icy. Claimant fell on the public sidewalk next to employer's parking lot, about 50 feet short of the store's front entrance.

Access to employer's store was from the public sidewalk. Although the store had a rear entrance that claimant could have reached by crossing the parking lot, the parking lot was even more hazardous than the sidewalk at the time. The Astoria City Code required that employer keep the sidewalk where claimant fell clear of snow and ice, and it was employer's policy to do so. Indeed, on the day before the accident, another employe had cleared the sidewalk of snow and ice without being told to do so by the manager.

The referee based his conclusion that claimant's injury was compensable primarily on the fact that she was returning from jury duty:

> "Considering the importance of citizen's serving on jury duty and the protection provided for the service, it follows that workers, such as claimant, might very well travel from work to jury service and back to work, in order to maintain both the performance of industrial enterprises and the jury system, rather than traveling to and from jury duty directly from home, thereby being exposed to a risk attendant to employment and one to which they would not ordinarily be exposed. Claimant was not just going or coming to work or going or coming to lunch as she might regularly do, but in a very real sense this particular mission was dictated by unique work concerns."

We do not need to consider whether, as a general proposition, persons injured while traveling between work and jury duty should be deemed to have "sustained an accidental injury arising out of and in the course of employment." ORS 656.005(8)(a). It makes no difference that claimant had been performing a civic duty or that she was coming to work instead of leaving from it. What is controlling is that she was coming to work by the only practicable route across an area that was subject to her employer's control. This case falls within the rules laid down in *Montgomery v. State Ind. Acc. Com.*, 224 Or 380, 356 P2d 524 (1960); *Montgomery Ward v. Cutter*, 64 Or App 759, 669 P2d 1181 (1983); and *Willis v. State Acc. Ins. Fund*, 3 Or App 565, 475 P2d 986 (1970).

In *Montgomery*, the Supreme Court held that an employe was entitled to compensation when he was struck by a car while crossing a public street on his way from work. The employer provided parking lots for employes so they would not have to cross the street, but the lots were full on the day in question. The court found that the heavily traveled street which claimant was forced to cross was the only way to and from the plant and that employes were exposed more than the general public to its hazards. The employer exercised a certain

amount of control over traffic and pedestrians using or crossing the street, because it had influenced the city to install a traffic signal in front of its gate, which it could set in operation by use of a key.

In *Willis*, a university professor slipped and fell as he crossed a city-owned park on his way to his office from his car. Students and staff of the university used the park to such an extent that the university had assumed substantial responsibility for its upkeep. We held the injury compensable because of the extent and nature of the control which the employer exercised over the park and because employes of the university were more exposed to the risk of injury while crossing the park than were members of the general public.

The claimant in *Cutter* worked for a store located in a shopping mall. She fell while returning to work after doing a personal errand during her lunch hour. She had parked her car in a portion of the mall parking lot where the mall operator required the store's employes to park. She was walking directly to the store when she stepped in a hole in the parking lot. The employer could have required the mall operator to repair the hole under the terms of its lease with the mall owners. We held the injury compensable, because the portion of the parking lot where the injury occurred was sufficiently within the employer's control to be treated as a part of its premises.

Employer's attempts to distinguish these cases are unpersuasive. It exercised as much control over the area where claimant fell as the employers exercised in *Montgomery, Willis* and *Cutter*. Indeed, employer had a legal duty to control the buildup of ice and snow on the sidewalk, whereas the employers in the cases mentioned above merely assumed partial control or were entitled to it.

Employer argues that it did not "regularly [exercise] such control of the sidewalk where claimant fell as to make it an adjunct of the store or a part of its premises" in part because, if the injury had taken place during the summer, no court "would conclude that the injury had arisen out of claimant's employment or was otherwise work related just from the fact that [employer] regularly removed snow and ice from the sidewalk during winter." In *Montgomery, Willis* and *Cutter*, however, each employer had the right to exercise partial control over the premises at the time the accidents took place. Year-round control was not material in those cases. Its absence is not material here.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Cletis H. Belcher, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,
v.
BELCHER,
Respondent.

(82-10033; CA A31076)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 10, 1984.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for petitioner. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Michael N. Gutzler, Salem, argued the cause for respondent. With him on the brief was Allen & Vick, Salem.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

In this workers' compensation case, SAIF petitions for review of an order of the Board which found that the hearings division had jurisdiction under ORS 656.283(1) and ORS 656.704(3) to resolve a dispute concerning the frequency of claimant's chiropractic treatments. We affirm.

The parties stipulated:

> "Since the October 2, 1980, injury claimant has received conservative treatment for his low back, including chiropractic treatment from Dr. J. Kent Llewellyn. His low back condition continues to be compensably related to the October, 1980, injury and he continues to be entitled to post-claim closure medical services pursuant to ORS 656.245."

SAIF paid Dr. Llewellyn on the basis of four visits per month but refused to pay for more frequent visits which occurred between October, 1982, and March, 1983.[1] Claimant requested

[1] OAR 436-69-201(2)(a) provides:

> "Frequency and extent of treatment shall not be more than the nature of the injury and the process of a recovery requires * * *. The usual range of the utilization of medical services does not exceed 24 office visits by any and all attending physicians in the first 60 days from the first day of treatment, and 4 visits a month thereafter. * * *"

The record establishes that claimant had 8 office visits between August 13 and 30, 1982; 13 office visits in September, 13 visits in October; 11 visits in November; 10 visits in December; 8 visits in January; 8 visits in February; and 8 visits in March.

a hearing pursuant to ORS 656.283(1). The referee determined that the hearings division had jurisdiction to consider the issue and held that the treatments were reasonable and necessary. The Board affirmed.

SAIF argues that jurisdiction to resolve disputes concerning frequency of medical treatment rests exclusively in the medical director of the Workers' Compensation Department under OAR 436-69-201, pursuant to the authority granted by ORS 656.252. In addition, SAIF contends that claimant is not a party to such a dispute, because claimant is not personally liable for treatment which is determined to be unnecessary or inappropriate. OAR 436-69-701(3).

ORS 656.245 requires an insurer to provide "medical services for conditions resulting from the injury for such

period as the nature of the injury or the process of the recovery requires." OAR 436-69-201(1)(a) provides in part:

> "The insurer will not pay for care unrelated to the compensable injury. Services which are unnecessary or inappropriate according to accepted professional standards are not reimburseable."

The administrative rules provide for the resolution of disputes between the insurer and the medical service provider concerning the necessity and appropriateness of medical services. OAR 436-69-201, OAR 436-69-901.

The Board relied on *Lloyd C. Dykstra,* 36 Van Natta 26 (1984), in determining that the hearings division had jurisdiction to determine the dispute concerning frequency of medical treatment. In *Dykstra,* the Board reasoned that jurisdiction is independent of the procedures provided by the administrative rules. Subject to timeliness requirements, any party or the director of the Workers' Compensation Department may request a hearing "on any question concerning a claim." ORS 656.283(1). Matters concerning a claim are "those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.704(3). The Board reasoned that chiropractic treatments are a form of compensation to which claimant is entitled if he establishes that the treatments are related to his injury and that they are reasonable and necessary for treatment of the condition resulting therefrom. ORS 656.005(9); 656.245(1); *Milbradt v. SAIF,* 62 Or App 530, 661 P2d 584 (1983); *Wetzell v. Goodwin Brothers,* 50 Or App 101, 622 P2d 750 (1981). The issue is whether the treatment being provided is reasonable and necessary. That is a question concerning a claim, because it concerns the amount of compensation that a claimant is entitled to receive as a result of the compensable injury.

We agree with the Board's reasoning in *Dykstra.* The administrative procedures outlined in OAR ch 436 are permissive, not mandatory. Claimant has a right to request a hearing pursuant to ORS 656.283(1), independently of the insurer's right or the medical service provider's right to invoke the applicable administrative procedures.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of John D. Freschette, Claimant.

EBI COMPANIES,
Petitioner,

v.

FRESCHETTE,
Respondent.

(82-05760; CA A30682)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 24, 1984.

Jerald P. Keene, Portland, argued the cause and filed the brief for petitioner. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

No appearance for respondent.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

Van Hoomissen, J., dissenting.

YOUNG, J.

Employer appeals[1] from a Board order that affirmed a referee's order that disapproved a disputed claim settlement governed by ORS 656.289(4). The issue is whether the settlement violates a statutory prohibition against releases. ORS 656.236(1). We agree that the settlement is an unlawful release and affirm.

On June 6, 1979, claimant sustained a compensable injury to his right knee. On November 30, 1979, a Determination Order awarded temporary total disability. On January 22, 1982, claimant sustained further injury to his right knee. Essentially, the parties disagree as to whether claimant's 1982 injury caused a substantial worsening of his knee condition to the extent that the 1979 compensable injury can no longer be considered a material contributing cause of claimant's ongoing disability. *See Grable v. Weyerhaeuser*, 291 Or 387, 631 P2d 768 (1981). Contending that that question presents "a bona fide dispute over compensability" under ORS 656.289(4), the parties entered into a stipulation.

"IT IS HEREBY STIPULATED AND AGREED that both parties have evidence to support their contentions, that

[1] Employer states in its brief that claimant concurs with employer's position on the issues, which accounts for there being no appearance by claimant.

a bona fide dispute exists over the compensability of this claim after January 22, 1982, and that is an appropriate claim for settlement on a disputed claims basis pursuant to ORS 656.289(4).

"IT IS FURTHER STIPULATED AND AGREED that this matter shall be compromised and settled subject to the approval of the Workers' Compensation Board by employer/carrier paying and claimant accepting the sum of $1,000 in full and final settlement of this claim. In consideration for this payment, claimant agrees that his claim shall remain in its denied status and waives any right he has to appeal the denial as amended herein.

"IT IS FURTHER STIPULATED AND AGREED that employer/carrier remains liable for medical expenses relating to the right knee condition up to January 22, 1982, and that claimant will hold employer/carrier harmless from any and all medical expenses incurred after that date.

"IT IS FURTHER STIPULATED AND AGREED that this settlement resolves all issues of temporary total disability, permanent partial disability, further medical care and treatment, aggravation rights, and all other workers' compensation benefits on a disputed claims basis after the date of January 22, 1982.

"IT IS FURTHER STIPULATED AND AGREED that acceptance of this settlement means that no present or future compensation or medical benefits will be allowed under the Workers' Compensation Act after the date of January 22, 1982. Claimant agrees that this settlement is entered into freely and voluntarily and that he has read the stipulation in its entirety and discussed its meaning with his attorney prior to signing.

"IT IS FURTHER STIPULATED AND AGREED that there are no group medical insurance carriers which require notice of this settlement pursuant to ORS 656.313(3). Claimant agrees to hold this carrier harmless if such a group carrier exists which requires notice.

"IT IS FURTHER STIPULATED AND AGREED that claimant's claim after the date of January 22, 1982, shall be settled and disposed of as a doubtful and disputed claim pursuant to ORS 656.289(4).

"IT IS FURTHER STIPULATED AND AGREED that all issues any party could raise are conclusively deemed settled by this settlement."

The referee did not find that there was no bona fide dispute. He decided, however, that the settlement unlawfully barred claimant from asserting any rights relating to the original compensable claim:

"While I believe that parties can dispute out (sic) the claim for present benefits, I do not believe they can insert an intervening injury in the chain of causation so as to bar claimant from ever again attempting to obtain compensation by showing that his condition at some future point might be injury related.

"If this case went to hearing, the referee would determine if claimant's present condition was injury-related. If the referee found it was not, claimant would not receive compensation. However, by that decision the referee would not find the original accepted injury non-compensable, and the referee would not be foreclosing the claimant from ever again attempting to assert his right to compensation from that

> accepted injury. The parties are attempting to do that, which I find is a release prohibited by ORS 656.236."

The Board affirmed, stating "that because the effect of such agreements is to extinguish any and all rights that a claimant has or may have under the Workers' Compensation Act in relation to an original, accepted industrial injury, they are in violation of the statutory prohibition against releases. ORS 656.236[1]."

ORS 656.236(1) provides:

> "No release by a worker or his beneficiary of any rights under ORS 656.001 to 656.794 is valid."

In the event that there is a dispute as to compensability, however, the statute is qualified by ORS 656.289(4).

> "Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the Board or the court, by agreement make such disposition of the claim as is considered reasonable. * * *"

In the present case, the original injury was accepted as being compensable. There can be no "bona fide dispute" as to that.

In a similar case, *Arnold Androes*, 35 Van Natta 1619 (October 27, 1983), the Board reasoned:

> "By the terms of this agreement, claimant is foreclosed from ever again making a claim for any workers' compensation benefits for conditions that may be related to his original industrial injury, including any claim for future medical services. Claimant presently has the right to claim compensation for reasonable and necessary medical services causally related to his injury. This is a lifetime right. ORS 656.245(1). We have held that, generally speaking, there cannot be a denial of future medical services on a previously accepted claim. *David A. Smith*, 35 Van Natta 1400 (1983); *Gary E. Freshner*, 35 Van Natta 528 (1983); *Anita Gilliam*, 35 Van Natta 377 (1983); *Patricia M. Dees*, 35 Van Natta 120 (1983). Because there cannot be a denial of future medical services, it would seem to follow that presently there can be no bona fide dispute concerning claimant's entitlement to medical services in the future.
>
> "Furthermore, this is not a situation in which the subject of dispute is whether claimant sustained compensable injuries at all. Claimant's original injury claims were accepted and, so

> far as we are now aware, there is no question that they should have been accepted. Yet the effect of this settlement agreement is to extinguish any and all rights that claimant has or may have under the Workers' Compensation Act in relation to his original, accepted industrial injuries. Aside from the question of whether there presently can be a bona fide dispute concerning claimant's entitlement to future benefits under the Act, we find that this settlement agreement, which by its express terms states that claimant 'will be forever barred from receiving additional workers' compensation benefits,' is in clear violation of the statutory prohibition against releases."

Employer urges that *Seeber v. Marlette Homes, Inc.*, 30 Or App 233, 566 P2d 926 (1977), controls the present case. It does not. In *Seeber*, the claimant attempted, eight years

after he had entered into a disputed claim settlement, collaterally to attack the settlement. The issue was whether the claimant, who had entered into an approved disputed claim settlement while the compensability of his original claim was in litigation, could later file an aggravation claim pursuant to ORS 656.273. The court held:

> "We are persuaded that a settlement under ORS 656.289(4) may release and bar a later aggravation claim because a claim for aggravation under ORS 656.273 depends on the compensability of the underlying injury and where, as here, there is no finding in the original settlement order as to the extent of claimant's original disability, there is no way to measure the extent to which that injury was aggravated. Claimant's position, were it sustained, would require a relitigation of the settled issue of the compensability of the original claim and a determination of the extent of the original disability eight years after the injury." 30 Or App at 237.

This disputed claim settlement would extinguish claimant's rights under the Workers' Compensation Act in relation to his original, accepted industrial injury. That is a release in violation of ORS 656.236(1).

Affirmed.

VAN HOOMISSEN, J., dissenting.

I respectfully dissent.

ORS 656.236(1) invalidates any "release" by a worker of any rights under ORS 656.001 to 656.794. ORS 656.289(4) provides in relevant part:

> "Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable."

The Board has taken the position that the statute does not mean what it says and that a dispute as to whether a worsened condition is compensable is not a "bona fide dispute over compensability." What else is it? The Board's conclusion that a present settlement of a claim with future effects is a prohibited release is not warranted in fact or in law.

This case is controlled by *Seeber v. Marlette Homes, Inc.*, 30 Or App 233, 566 P2d 926 (1977). There, claimant filed a claim in 1975 alleging that his 1969 injury had been aggravated. The 1969 claim had been resolved through settlement. We held that a bona fide dispute over the compensability of the 1969 injury existed and that the agreement settling that claim barred claimant's 1975 aggravation claim based on the 1969 injury. Our rationale was that, because the extent of disability resulting from the 1969 injury had not been established, there was no way to determine the extent of the 1975 aggravation without litigating the extent of the 1969 injury. That *rationale* is equally applicable here.

Claimant has agreed to settle his present aggravation claim and to forego any future claims based on the underlying injury. His agreement goes no further than the agreement in *Seeber*. Without such an agreement, claimant could file an aggravation claim in the future. The extent of his 1982

worsening would be in issue. ORS 656.273(1). Necessarily, inquiry then would be made into the extent of the 1982 worsening. Allowing such an inquiry would frustrate the purpose of disputed claim settlements. ORS 656.289(4).

The Board's paternalistic approach makes no economic sense. This is an arm's-length settlement. Claimant is represented by a lawyer. The 1982 worsening claim is disputed. Claimant has read the settlement agreement, and he has discussed it with his lawyer. He and his lawyer want the settlement approved. That ought to be enough! This is not a release, it is a settlement. In the absence of fraud, overreaching or other unconscionable conduct, neither the Board nor

this court should set aside a negotiated settlement. We should read the statute to mean what it says.

As the referee noted, if claimant's 1982 claim goes to hearing, he may receive no compensation. The carrier is willing to pay something now to avoid the possibility of future litigation and, perhaps, liability, and to close its file. That is what negotiated settlements are all about. The Board's rule is detrimental to the goal of negotiated settlements and it should be rejected.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jerry W. Kessen, Claimant.

KESSEN,
Petitioner,

v.

BOISE CASCADE CORPORATION,
Respondent.

(82-01160; CA A30610)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1984.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Paul De Muniz, Salem, argued the cause for respondent. With him on the brief were Robert R. Trethewy and Garrett, Seideman, Hemann, Robertson & De Muniz, P.C., Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed.

ROSSMAN, J.

In this workers' compensation case involving an altercation at work, claimant appeals from the Board's order on review, which affirmed and adopted the referee's opinion and order denying compensation because of the so-called "aggressor defense." We affirm.

Claimant is a 35-year old truck driver. Although employer's drivers are not always assigned particular shifts, claimant generally worked nights during the period of this incident. At 5 p.m. on the evening in question, claimant reported to work at employer's Independence truck terminal. After signing in and receiving his dispatch instructions, he asked Martin, his supervisor, for the night off on the coming Monday. On the afternoon of that day, claimant intended to attend a funeral for a friend and co-worker. Martin indicated that all the drivers could attend the funeral but that claimant would not be excused from work that evening.

Upset by the refusal of his request, claimant immediately left the terminal office, slamming the door behind him. Martin called to him to come back, directing him to "close the door right." Now even more upset, claimant came back into the office. He began telling Martin off, saying that the job assignments were not being made fairly and that certain day shift drivers were being shown favoritism.

Suddenly, claimant turned his anger directly at Huff, another truck driver, who had just completed a 12-hour shift and was seated in a swivel chair with one foot propped up on the driver's desk where claimant had signed in. In anger, claimant began pointing and shaking his finger at Huff. Speaking in a loud voice, he moved toward Huff, accusing him of being one of those "favored few." He then grabbed Huff's wrapped and bandaged left arm, which had only recently been removed from a cast. (Huff had broken the arm two and a half weeks before.) Huff rose from his chair and nailed claimant with a right to the jaw, causing the injuries resulting in this proceeding.

The sole issue for us to decide is whether, under these facts, claimant's admitted injuries are compensable. Agreeing with the determinations of both the referee and the Board, we hold that they are not compensable.

The applicable statute is ORS 656.005(8)(a), which defines a "compensable injury." In 1981, the legislature amended this section to exclude from compensable injuries injuries received in certain activities. The amendment provides:

> "* * * However, 'compensable injury' does not include injury to any active participant in assaults or combats which are not connected to the *job assignment* and which *amount to a deviation from customary duties.*" (Emphasis supplied.)

We do not see any ambiguities or uncertainties in the statute, as applied to this situation. Therefore, we construe it according to its plain meaning. *See Perez v. State Farm Mutual Ins. Co.*, 289 Or 295, 299, 613 P2d 32 (1980).

The statutory provision—often referred to as the "aggressor defense"—clearly contemplates a four-part test. In order to be barred from receiving compensation, (1) the claimant must be an active participant, (2) in assaults or combats, (3) which must not be connected to the job assignment and (4) which must amount to a deviation from customary duties. We find that all four of the requirements have been established by the facts in this case.

Claimant was an active participant in the altercation. Although he was the recipient of the only blow struck, he was the one who, because of his anger, vocal tirade and threatening gestures, actually initiated the fight. We agree with the referee in his characterization of claimant as being the aggressor.

The statutory exclusion refers either to assaults *or* combats. It is somewhat doubtful that the incident rose to the level of a "combat." However, the participant's conduct clearly constituted an "assault."

The assault was not *connected* to claimant's job assignment; it was clearly a deviation from his *customary* duties. Unlike a boxing instructor or a bouncer, whose job may entail assaultive conduct, claimant's job was to drive a truck, along with the incidental duties of loading and unloading and checking in and out of the office. His confrontation with Huff was a deviation from those duties. We conclude that claimant did not sustain a compensable injury.

Affirmed.

No. 757 December 19, 1984 567

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Bobbie L. Macki, Claimant.

MACKI,
Petitioner,

v.

EBI COMPANIES,
Respondent.

(82-10850; CA A31103)

Judicial review from Workers' Compensation Board.

Argued and submitted September 18, 1984.

Kenneth D. Peterson, Jr., Hermiston, argued the cause and filed the brief for petitioner.

LaVonne Reimer, Portland, argued the cause for respondent. With her on the brief were Catherine Riffe and Lindsay, Hart, Neil & Weigler, Portland.

Before Joseph, Chief Judge, and Warden and Newman, Judges.

NEWMAN, J.

Affirmed on denial of compensability; reversed and remanded for determination of interim compensation, penalty and attorney fees.

NEWMAN, J.

Claimant appeals an order of the Workers' Compensation Board that affirmed the referee's order that her claim is not compensable and that she is not entitled to interim compensation, a penalty or attorney fees. We affirm in part and reverse in part.

Claimant asserts that she suffered a compensable right shoulder injury on September 6, 1982. On *de novo* review, we find claimant not credible and that she has not sustained her burden of proof that her right shoulder condition is work-related. The denial is upheld.

Claimant, however, also assigns as error that the Board affirmed the denial of interim compensation, ORS 656.262(4), and a penalty and attorney fees for failure to pay it. ORS 656.262(10). The employer was notified of the claim not later than September 7, 1982. Insurer denied the claim on November 5, 1982, but did not pay interim compensation. The employer, with claimant's acquiescence, had previously arranged for her to take a leave of absence without pay from September 7 to October 1, 1982, to obtain treatment for a pre-existing right shoulder condition. She did not return to work when her leave expired. The employer terminated her employment on or about November 8, 1982.

The Board erred in denying interim compensation. *Bono v. SAIF,* 66 Or App 138, 673 P2d 558 (1983), *rev allowed* 296 Or 829, 679 P2d 1366 (1984). *See also SAIF v. Norbeck,* 70 Or App 270, 689 P2d 339 (1984). Even if a claim is ultimately held noncompensable, *see Jones v. Emanuel Hospital,* 280 Or 147, 570 P2d 70 (1977), the employer does not know the claim is for a disabling injury, or the claimant is on a leave of absence following the injury, a claimant is entitled to interim compensation if the insurer does not deny the claim within 14 days of the time the employer received notice or knowledge of the claim. ORS 656.262(4). Insurer was obligated to pay interim compensation without offset until November 5, 1982.

Because insurer failed to advance a valid excuse for its failure to comply with the statutory time limits, claimant is

also entitled to a penalty and reasonable attorney fees. *See Bono v. SAIF, supra,* 66 Or App at 143.

Affirmed on denial of compensability; reversed and remanded for determination of interim compensation, penalty and attorney fees.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Anthony A. Bono, Claimant.

BONO,
Respondent on Review,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner on Review.

(WCB 80-11418; CA A27151; SC S30478)

In Banc

On review from the Court of Appeals.*

Argued and submitted June 6, 1984.

Guy B. Greco, Newport, filed the response and argued the cause for respondent on review. With him on the brief was Greco & Escobar, Newport.

James E. Mountain, Jr., Solicitor General, Salem, argued the cause for petitioner on review. With him on the petition for review was Dave Frohnmayer, Attorney General, William F. Gary, Deputy Attorney General and Darrell E. Bewley, Assistant Attorney General, Salem. Darrell E. Bewley argued the cause and filed the brief in the Court of Appeals.

David W. Hittle, Salem, filed an amicus curiae brief in behalf of the Oregon Trial Lawyers Association. With him on the brief was Callahan, Hittle & Gardner, Salem.

Jerald P. Keene, Portland, filed an amicus curiae brief in behalf of Associated Oregon Industries and Association of Workers' Compensation Defense Attorneys. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

CARSON, J.

The decision of the Court of Appeals is reversed and the case is remanded to the Workers' Compensation Board.

* Judicial Review from the Workers' Compensation Board. 66 Or App 138, 673 P2d 558 (1983).

CARSON, J.

In this workers' compensation case, "interim compensation"[1] under ORS 656.262(4) is at issue. The question is whether a worker who has not demonstrated absence from work is entitled to receive interim compensation during the time between the claim and acceptance or denial of the claim. We hold that interim compensation need not be paid to such a worker.

[1] The term "interim compensation" does not appear in ORS 656.262. In discussing this statute, *Jones v. Emanuel Hospital,* 280 Or 147, 151, 570 P2d 70 (1977), stated:

> "Subsection (2), construed together with subsections (4) and (5), requires the employer to pay what may for convenience be called interim compensation payments until the employer denies the claim."

The reader should note that the material that was in subsection (5) in 1977, is now in subsection (6).

Claimant was injured on October 9, 1978, in an automobile accident within the course and scope of his employment. Neither claimant nor employer, who had immediate notice of the accident, considered the accident to be the basis for a workers' compensation claim. The claim was not filed until 22 months later, after claimant had retained a new attorney. The claim was filed on August 20, 1980, and employer received written notice of the claim on August 26, 1980. Employer was insured by the State Accident Insurance Fund Corporation (SAIF). SAIF accepted the claim for medical services only on November 1, 1980, and provided claimant written notice of this determination on November 14, 1980, without contesting its lack of timeliness. SAIF did not pay interim compensation.

The referee determined that claimant was not entitled to compensation because he did not establish the "time loss" element of a compensable injury resulting in temporary disability. The Workers' Compensation Board (Board) affirmed, finding that interim compensation for a non-disabling injury is not payable where a claimant continues to perform his or her regular work. The Court of Appeals reversed. 66 Or App 138, 673 P2d 558 (1983). The court determined that a strict reading of the statute involved, as interpreted in *Jones v. Emanuel Hospital,* 280 Or 147, 570

P2d 70 (1977), required that interim compensation be paid to claimant.

ORS 656.262 provides, in pertinent part:

"* * * * *

"(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

"* * * * *

"(4) The first instalment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim. Thereafter, compensation shall be paid at least once each two weeks, except where the director determines that payment in instalments should be made at some other interval. * * *

"* * * * *

"(6) Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim. Pending acceptance or denial of a claim, compensation payable to a claimant does not include the costs of medical benefits or burial expenses. * * *

"* * * * *

"(10) If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

In *Jones v. Emanuel Hospital, supra,* we interpreted

ORS 656.262(2) to include interim compensation within the scope of "compensation due" to an injured worker. We held that under ORS 656.262(4) interim compensation must be paid whether or not the injured worker suffered a compensable injury. We also held that the penalties prescribed in ORS 656.262(10) could be added to such an award of interim compensation.[2]

Jones equated interim compensation with total disability benefits.[3] The opinion stated that Ms. Jones had "requested interim compensation payments (called temporary total disability) * * *." We did not express that interim compensation payments were to be made pursuant to the benefits calculation of ORS 656.210, but this follows from the quoted statement. There is no independent interim compensation benefits calculation in ORS 656.262(4). The amount of interim compensation payments is determined in the same manner as the amount of temporary total disability benefits.

Interim compensation and temporary total disability are also linked in another way. Although *Jones* is not explicit about the requirement of being absent from work or suffering a "time loss," it is stated in the facts that Ms. Jones was " 'unable to work.' " 280 Or at 149 (quoting *Jones v. Emanuel Hospital,* 29 Or App 265, 267, 562 P2d 1247 (1977)). For that reason, there was no need to relate the availability of interim compensation to ORS 656.210(3). The payment of temporary total disability benefits is based in part upon whether the injured worker "leaves work." ORS 656.210(3). Interim compensation is based on temporary total disability benefits. Thus, we hold that in order to receive interim compensation, a subject worker must have left work as that phrase is used in ORS 656.210(3). Claimant did not establish that he had been

[2] In 1977, subsection (10) was subsection (8).

[3] ORS 656.210 provides:

"(1) When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 100 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is lesser. Notwithstanding the limitation imposed by this subsection, an injured worker who is not otherwise eligible to receive an increase in benefits for the fiscal year in which compensation is paid shall have his benefits increased each fiscal year by the percentage which the applicable average weekly wage has increased since the previous fiscal year.

"(2) For the purpose of this section, the weekly wage of workers shall be ascertained by multiplying the daily wage the worker was receiving at the time of his injury:

"(a) By 3, if the worker was regularly employed not more than three days a week.

"(b) By 4, if the worker was regularly employed four days a week.

"(c) By 5, if the worker was regularly employed five days a week.

"(d) By 6, if the worker was regularly employed six days a week.

"(e) By 7, if the worker was regularly employed seven days a week.

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

"(3) No disability payment is recoverable for temporary total disability suffered during the first three calendar days after the worker leaves work as a result of his compensable injury unless the total disability continues for a period of 14 days or the worker is an inpatient in a hospital. If the worker leaves work the day of the injury, that day shall be considered the first day of the three-day period."

absent from work nor that his earning power was diminished. He is not entitled to interim compensation on this record.

It is not necessary for a worker to be totally disabled in order to receive interim compensation. Any claim for a disabling compensable injury will trigger the ORS 656.262(4) payments. However, to the extent that the amount of such payments cannot be calculated, the worker should receive as interim compensation the temporary total disability benefits specified in ORS 656.210.

ORS 656.262(4) is not a penalty for an employer who takes longer than 14 days to accept or deny a claim. Any unreasonable delays are penalized by ORS 656.262(10). Because a penalty is statutorily provided, it would be incorrect to interpret the requirement of interim compensation as a penalty. The purpose of interim compensation is to compensate the injured worker for leaving work. This is true even where this results from a non-compensable injury, as in *Jones*. However, if the worker does not demonstrate that he or she left work, interim compensation is not required.

The referee specifically found that claimant did not have a time loss just subsequent to the injury. However, there was no finding concerning whether claimant had left work during the period immediately subsequent to the date the claim was filed. That is the period during which interim compensation may be due in this case. Prior Oregon caselaw could be read to mean that interim compensation was required in this case whether or not claimant left work. *Jones v. Emanuel Hospital, supra.* We disagree with that reading, but find it reasonable for claimant to have relied on it in failing to demonstrate that he had left work. For the above reasons, we remand to the Board for a determination whether claimant left work during the period from the date the claim was filed until the date he was notified of its acceptance by employer.

If interim compensation is required in this case, the Board shall determine whether statutory penalties for delaying or refusing payment of compensation are appropriate and, if penalties are due, the amount thereof. If interim compensation is not required, then no compensation, other than for medical services, was due claimant and therefore no statutory penalties for delaying or refusing payment of compensation would be payable. ORS 656.262(4), (6) and (10). However, the Court of Appeals made a factual determination that a penalty is due for the late acceptance because of SAIF's failure to comply with the statutory 60-day limit for denying or accepting a claim. *Bono v. SAIF, supra,* 66 Or App at 143; ORS 656.262(6) and (10). We will not disturb this finding, and therefore hold that claimant is entitled to a penalty for the late acceptance, in an amount to be determined by the Board.

The decision of the Court of Appeals is reversed and the case is remanded to the Workers' Compensation Board.

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Franks, Rose E., 82-10263 (3/84)
Freeman, Donald L., 82-08306 (11/84)
Freund, Gregory N., 82-01172 (12/84)
Frey, Shirley M., 83-08956 (10/84)
Frost, Robert A., 82-11682 (12/84)
Fueston, Gerald R., 82-00187 (1/84)
Fuller, Becky A., 83-05421 (7/84)
Gabaldon, John, 81-05059 (5/84)
Gammon, John K., 83-10440 (12/84)
Gange, Larry W., 84-01462 (12/84)
Garcia, Connie A., 83-07303 etc. (8/84)
Gardner, Walton A., 83-02658 (3/84)
Garoutte, Harold H., 82-08746 (3/84)
Gehrke, Jack, 83-08980 etc. (10/84)
George, David L., 82-01117 (11/84)
Gilbert, Patricia A., 83-01917 (1/84)
Gilkey, Shell H., 81-00679 (2/84)
Gill, Charles R., 83-01281 (6/84)
Gilliam, Anita L., 83-04441 (9/84)
Giumelli, Louis W., 83-02307 (3/84)
Glass, William E., 83-09351 (12/84)
Goddard, Connie, 82-11769 (3/84)
Golding, Lawrence E., 82-11598 (8/84)
Goldman, Leslie J., 83-09179 (11/84)
Gonzales, Frank R., 83-10282 (10/84)
Gonzales, Jose B., 82-07601 etc. (3/84)
Gonzalez, Manuel, 82-03176 (1/84)
Goodell, Elsa E., 82-11084 (12/84)

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Gorans, Susan, 82-03116 (12/84)
Gore, Beverly A., 83-02540 (5/84)
Gore, Marshall S., 83-06506 (7/84)
Gorst, Shawn W., 83-05186 (10/84)
Gottfried, Laronna R., 82-08262 (1/84)
Graham, John, 82-05166 (2/84)
Graham, Mary M., 83-02432 (2/84)
Graham, Wilma R., 83-04586 (9/84)
Grandin, Jacqueline, 83-04709 (9/84)
Graves, Daniel D., 83-00487 (1/84)
Graves, John F., 83-02086 (5/84)
Graves, Raymond A., 83-05211 (8/84)
Gray, Arcola D., 82-05062 (1/84)
Gray, Linda J., 84-01257 (11/84)
Green, Becky E., 82-11482 (4/84)
Griffin, Mary R., 83-05452 (7/84)
Grigsby, Beverly, 83-03285 etc. (7/84)
Grigsby, Donald D., 83-04995 (9/84)
Gunter, LaVerna J., 82-08923 (2/84)
Guthrie, Matthew S., 83-11580 (10/84)
Guttery, Alice M., 83-00357 (1/84)
Guzman, Gilbert G., 83-06155 (10/84)
Guzman, Jesus, 83-08145 (12/84)
Guzman, Jose E., 83-08060 (11/84)
Hacker, Ronnie L., 84-00450 (8/84)
Hager, Philip E., 83-06039 (12/84)
Haigler, Eugene V., 83-02615 (3/84)
Hall, Arthur B., 83-05576 (7/84)
Hall, Marvin D., 83-09150 etc. (10/84)
Hamblett, Robert A., 83-00712 (12/84)
Hamilton, Lloyd L., 82-11377 (1/84)
Hamlet, Kathryn J., 82-07654 (2/84)
Hamner, Ronald C., 83-05949 (12/84)
Hampton, Jerry D., 83-05252 (7/84)
Hamrick, Kenneth R., 83-08356 (11/84)
Handy, Beverly A., 83-00847 (3/84)
Hannah, Melody L., 83-03264 (5/84)
Hanson, Helyn S., 83-08204 (10/84)
Hanson, John M., 83-03969 (4/84)
Haret, Geraldine A., 82-05250 (1/84)
Harrel, Gene R., 82-07331 (8/84)
Harrington, Rickey L., 83-01997 (7/84)
Harshe, Ronald L., 83-01165 (3/84)
Hart, John R., 83-05006 (5/84)
Hart, Richard D., 82-08013 (2/84)
Hartill, Gene A., 82-11213 (7/84)
Hartman, Ruby L., 82-05295 (1/84)
Hatch, Lloyd W., 83-05013 (11/84)
Hatzel, Hugo, 83-05695 (12/84)
Hayden, Jackie A., 83-07817 (10/84)
Hayes, Patricia L., 82-09824 (6/84)
Haynes, Charles S., 81-09765 (8/84)
Heamish, Abraham, 82-06973 (3/84)
Heard, Patricia A., 83-04830 (7/84)
Heckard, Paul, 82-02237 (10/84)
Heinisch, Deborah J., 83-06278 (9/84)
Helsberg, Bonnie J., 83-02126 (9/84)

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Henderson, Janelle G., 83-10432 (11/84)
Hendry, Mary L., 83-02095 (10/84)
Henry, William, 82-02531 etc. (10/84)
Hergert, Edward E., 83-07428 (5/84)
Herron, Delmar L., 82-10903 (1/84)
Hess, Michael D., 80-09629 (4/84)
Hetz, Mark R., 82-09610 etc. (12/84)
Hibbard, Lawrence L., 83-09443 (11/84)
Hicks, April D., 84-01394 (12/84)
Hicks, DeWaine J., 83-10215 (10/84)
Hildahl, Lyle R., 83-03189 (8/84)
Hill, Tari L., 83-01745 (5/84)
Hindman, David P., 83-05744 etc. (8/84)
Hinshaw, Darrell L., 83-05758 (10/84)
Hitchcock, Charles W., 82-10513 (6/84)
Hitner, William H., 83-03162 (5/84)
Hobbs, Raymond E., 81-03081 etc. (2/84)
Hodnett, Irene, 83-07344 etc. (11/84)
Hoffee, Richard L., 82-03847 (12/84)
Hoffman, Alice C., 83-03220 (5/84)
Hogan, Lester, 82-04892 (4/84)
Holgate, Norman G., 81-11051 (3/84)
Holliday, Deborah J., 83-02649 (9/84)
Holmes, Steven H., 82-06253 (1/84)
Homsley, Wilma J., 83-08002 (10/84)
Hoover, Griffith G., 82-03843 (2/84)
Howard, Chris, 83-03770 (4/84)
Howard, Mabel J., 82-10405 (1/84)
Huffman, Patricia L., 83-03702 (5/84)
Humphrey, Wendall, 82-00885 (10/84)
Hunnicutt, Joe O., 82-11498 (3/84)
Hutcheson, Robert C., 82-08551 (1/84)
Hutchison, Brenda D., 84-02932 (12/84)
Iman, Duane E., 83-07064 (10/84)
Irvin, Robert G., 82-08894 (10/84)
Jackson, Donald W., 82-09061 (3/84)
Jackson, Ivery T., 82-09174 (1/84)
Jacobs, Patricia F., 81-02486 (12/84)
Jacques, Morris, 83-06067 (3,4,7/84)
Jadin, Duane R., 83-08128 (10/84)
James, Jerry E., 83-04579 (4/84)
Jeffery, Pamela D., 83-01043 (1/84)
Jenks, Timothy, 83-10924 etc.(11,12/84)
Jennings, Carl E., 84-01307 (12/84)
Jennings, Ross C., 83-05454 (11/84)
Jennings, Steven J., 83-01622 (10/84)
Johnson, Charlotte, 83-02119 (10/84)
Johnson, Denton R., 83-01518 (7/84)
Johnson, Everett, 81-07556 (1/84)
Johnson, George, 82-11704 etc. (4/84)
Johnson, Grover T., 83-03059 (11/84)
Johnson, Lisa M., 83-08901 (9/84)
Johnson, Martin D., 81-06666 (2/84)
Johnson, Martin, 82-02207 etc. (1/84)
Johnson, Maxine J., 83-03222 (5/84)
Johnson, Robert L., 83-09779 (11/84)
Johnston, Lorrainna, 84-00388 (11/84)
Johnston, Robert V., 82-08024 (7/84)
Jolly, Thomas S., 82-11269 (7/84)
Jones, Boneta M., 83-01879 (1/84)
Jones, George E., 81-02669 (3/84)
Jones, Murl E., 82-10423 (4/84)
Jones, Robert B., 82-11270 (2/84)
Kafanias, Aleka, 81-10259 (8/84)
Kalkhoven, Janet H., 82-11281 (7/84)
Kaps, Lyle M., 83-01967 (5/84)
Karam, John S., 82-10092 (1/84)
Karr, William E., 83-07316 (6/84)
Kassahn, Jerry E., 82-11458 (1/84)
Kazim, Mir S., 82-08825 (3/84)
Keeney, Betty B., 84-00982 (11/84)
Kelley, Dennis W., 82-09641 (3/84)
Kelly, Billie L., 82-10780 (2/84)
Kelm, Larry L., 83-01836 (9/84)
Kemp, Roger J., 83-07900 (8/84)
Kennedy, Earl, 82-03031 (4/84)
Kennel-Ishie, S., 83-08257 (11/84)
Kenner, Golden, 82-07964 (5/84)
Kepford, Charles M., 82-10296 (9/84)
Kessinger, Barbara A., 83-08845 (11/84)
Key, Jim G., 81-10357 (3/84)
Khep, Darcy L., 83-03193 (7/84)
King, Bob D., 83-05858 (8/84)
King, Clay B., 83-00994 (7/84)
King, Danny C., 83-07284 (8/84)
King, James D., 83-06960 (6/84)
Kinman, Viola, 82-09270 etc. (4/84)
Kitchel, Kim B., 83-01162 (10/84)
Klym, Emil R., 83-02651 etc. (5/84)
Knapp, Carol J., 82-08271 (3/84)
Knibbe, Sherman J., 84-00675 (11/84)
Kock, Daniel G., 84-01941 (12/84)
Koenig, Leroy, 83-10630 etc. (10/84)
Korte, Roger V., 82-08517 (8/84)
Krogstad, Donald, 82-09572 (3/84)
Kubly, Robert P., 82-07818 (1/84)
Labahn, Dorothea M., 83-01760 (5/84)
Lacey, Janet A., 83-02734 (4/84)
Landaker, Donald R., 83-12129 (12/84)
Lane, Roy J., 83-03570 (11/84)
Laront, Gloria J., 83-03333 (4/84)
Laufle, Marilyn P., 83-05790 (6/84)
Lawrence, Mary L., 83-00027 (5/84)
Layton, Jimmy K., 83-03487 (2/84)
Lebatique, Fred (Gomez),78-4014 (3/84)
Lee, Bruce W., 83-04005 (3/84)
Leighton, Garth O., 83-08071 (11/84)
Lemke, Kenneth J., 83-07411 (5/84)
Lemons, Dennis F., 82-05015 (8/84)
Lentz, Donald L., 83-08008 (10/84)
Lessick, Joyce I., 82-00690 etc. (1/84)
Lindeman (Bales),Julie,83-11870 (11/84)
Littell, Mary L., 82-09013 (2/84)
Livingston, Gerald D., 83-07869 (11/84)

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Locklear, Charles E., 82-01351 (12/84)
Logan, Homer H., 83-04873 (5/84)
Logan, Homer H., 83-12026 (12/84)
Logan, Joyce D., 83-04053 (3/84)
Loop, Robert L., 83-01093 (1/84 & 2/84)
Lopez Briceno, Jose, 83-01697 (10/84)
Lucento, Robert, 83-01962 etc. (8/84)
Lundsford, James V., 83-08176 (10/84)
Lunsford, Teddie D., 82-11127 (3/84)
Lunsford, Teresa L., 83-09399 (8/84)
Lussier, Robert M., 83-07541 (10/84)
Lynch, Carlyne R., 83-06418 etc. (7/84)
Mack, Norman A., 83-04016 (3/84)
Madsen, Melvin K., 83-00070 (7/84)
Maeyaert, John S., 83-00363 (8/84)
Maichen, Marvel J., 83-03185 (6/84)
Mandera, Joseph O., 83-07920 (9/84)
Marcotte, Frances G., 82-04467 (11/84)
Marks, Beverly A., 83-06329 (5/84)
Marlin, Barry G., 83-02421 (11/84)
Marshall, Danny L., 83-01662 (5/84)
Marshall, Harry J., 83-09850 (12/84)
Martin, Richard C., 83-02325 (7/84)
Massengill, Martha C., 83-10715 (11/84)
Mathews, Duane E., 83-04600 (12/84)
Mathis, Glenn H., 83-10490 (12/84)
Matteucci, Suzanne M., 83-01656 (6/84)
May, Alfred A., 83-06836 (10/84)
May, Thomas C., 83-09741 (8/84)
McAninch, Marlene C., 83-02672 (8/84)
McBride, Anna, 83-05641 etc. (6/84)
McCall, Cathy J., 81-08883 (2/84)
McCollam, Raymond E., 83-06993 (12/84)
McCreery, Leslie A., 83-09794 (12/84)
McDermott, Edward G., 83-02603 (6/84)
McDonald, Mary J., 82-07460 etc. (3/84)
McEldowney, Colleen, 82-05027 (4/84)
McEntire, Wayne, 83-03833 (6/84)
McIlvain, Gilson, 83-03625 (1/84)
McJunkin, Eldon J., 82-00815 (2/84)
McKay, Allan, 83-04452 (8/84)
McLarin, Dennis O., 82-11505 (4/84)
McMahan, Betty R., 83-00674 (6/84)
McMellon, Harold R., 82-04722 (10/84)
McNabb, Connie J., 82-05104 (2/84)
McRae, Billie L., 82-08840 (6/84)
Medeiros, Dennis E., 82-03747 (4/84)
Meissner, Phyllis N., 83-09720 (9/84)
Mengucci, Gene L., 83-11451 (12/84)
Meola, Mitchell M., 83-03957 (12/84)
Metler, Harold S., 82-08308 (7/84)
Meyer, Vincent L., 81-06150 etc. (2/84)
Michael, Naomi J., 83-04624 (4/84)
Michaelis, Kitty A., 83-02243 (4/84)
Miles, Eugene A., 83-05082 (12/84)
Millard, Victor R., 82-09585 (6/84)
Miller, Robert C., 82-07083 (8/84)

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Milligan, Clell, 80-05901 (3/84)
Mills, Nona R., 83-04094 etc. (5/84)
Mills, Ronald, 81-01675 (3/84)
Mills, Vess M., 82-10001 (9/84)
Minor, Ted, 81-11768 (3/84)
Miranda, Adolph, 82-07066 (4/84)
Mitchell, Eugene R., 81-11820 (4/84)
Mitchell, Jack O., 82-05931 (6/84)
Mix, Anthony C., 83-09533 (11/84)
Monta, Carlos A., 82-10243 (9/84)
Montgomery, Cheryl L., 83-10913 (9/84)
Montgomery, Donald T., 82-11652 (8/84)
Morgan, Stephen, 83-05943 etc. (7/84)
Morgan, Vivian S., 81-07211 (6/84)
Morkert, Kenneth C., 83-06091 (9/84)
Morrell, Leroy, 83-06911 (4/84)
Morris, Arthur R., 83-05996 (7/84)
Morris, Carl M., 82-10007 (9/84)
Morris, Roy G., 83-10399 (9/84)
Mortier, June R., 82-09128 (5/84)
Morton, Norman R., 83-05541 (11/84)
Mosch, Joachim, 83-01538 (4/84)
Moss, Donald J., 82-08699 etc. (1/84)
Mount, Jesse, 83-07104 (9/84)
Mourlas, Jeff M., 83-11418 (11/84)
Mowry, Robert L., 83-03529 (4/84)
Muilenburg, Thomas J., 82-10403 (9/84)
Munhall, Robert L., 83-05167 (9/84)
Myers, Karen A., 82-10676 (1/84)
Nacoste, T.S., 82-05465 etc. (12/84)
Neal, William, 82-07810 (12/84)
Needham, Jerry R., 83-08427 (3/84)
Nelson, Joyce A., 82-05790 etc. (5/84)
Nelson, Patricia A., 82-10181 (2/84)
Nelson, Ronald E., 83-02406 (2/84)
Newsome, Donald R., 83-09146 (5/84)
Nicholson, Karen O., 82-09467 (5/84)
Nielsen, Eva J., 82-11476 (3/84)
Nienow, David W., 81-01018 (8/84)
Nikula, Mary G., 83-07959 (12/84)
Norcott, Nelda E., 83-10967 (8/84)
Normile, Norman R., 82-04850 (7/84)
Norton, Duane E., 83-04764 etc. (9/84)
Nuttall, Ruby L., 82-01439 (3/84)
O'Boyle, Walter A., 82-03172 (3/84)
O'Bryan, William, 83-08567 etc. (8/84)
O'Dell, Evelyn M., 82-11009 (1/84)
O'Keefe, Brian K., 83-03916 (2/84)
Oberfell, Muriel J., 83-09054 (12/84)
Officer, Jeanne, 83-08284 (7/84)
Olds, Henry E., 83-10795 etc. (12/84)
Olin, Daniel E., 82-11437 (2/84)
Olinger, Joann F., 83-00091 (1/84)
Olsen, Bert J., 82-02831 etc. (3/84)
Olsen, Bert J., 83-05671 (6/84)
Olson, Christy R., 83-06326 (12/84)
Olson, Debra L., 81-11076 (1/84)

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Organ, Samuella, 82-01805 (1/84)
Orozco, Francisco, 83-04638 (4/84)
Orriggio, Jephtha, 83-04706 (10/84)
Orton, Gary H., 83-01618 (11/84)
Otu, Samuel F., 83-03943 (3/84)
Owenby, Tom P., 83-06976 (9/84)
Owens, Kenneth R., 83-02142 (1/84)
Pacheco, Kimberly A., 83-03563 (12/84)
Page, Lita C., 83-06214 (8/84)
Paige, Marcile L., 82-01727 (4/84)
Palanuk, Stephen J., 83-11539 (11/84)
Palmer, Brian K., 83-06780 (11/84)
Parker, Cynthia L., 84-01317 (11/84)
Parsons, Thomas M., 82-04183 (1/84)
Parten, Wanda L., 82-04678 etc. (5/84)
Pasquier, Cheryl (Falcone), 83-01719
Patterson, Willie,83-00997 etc., (3/84)
Payne, Virgil D., 84-04191 (11/84)
Peacock, James P., 82-10741 (1/84)
Pegg, Jack W., 82-10432 (6/84)
Pendergast, Richard, 83-08096 (10/84)
Pepperling, Delmar, 82-11015 (2/84)
Pepperling, Gary W., 82-11015 (2/84)
Perdue, Anna M., 84-00682 (11/84)
Perdue, Mickey O., 83-01817 (3/84)
Perez, Eduardo, 83-07456 (11/84)
Perkins, Ruth E., 82-09997 (4/84)
Petersen, Clara J., 83-05423 (9/84)
Peterson, Grant, 82-03285 etc. (2/84)
Phearson, Patrick C., 83-09398 (12/84)
Phillips, James T., 84-00874 (12/84)
Phillips, Johnny C., 81-05597 (9/84)
Phipps, Stanley C., 83-04648 (7/84)
Picker, Deborah L., 82-01790 (3/84)
Pinkley, Mary H., 83-03423 (3/84)
Podrabsky, Lori A., 83-11114 (12/84)
Pope, Joyce M., 82-05662 (1/84)
Posey, James H., 81-10153 (6/84)
Powers, Phillip, 82-01936 etc. (9/84)
Prasad, John, 82-10477 (12/84)
Prater, James, 81-04573 etc. (1/84)
Preshong, Margaret S., 83-05526 (5/84)
Presley, John, 83-05835 etc. (6,7/84)
Pruitt, Wanda M., 84-01958 (12/84)
Pulos, Gregory, 83-08675 (8/84)
Purdue, Timothy J., 82-10737 (3/84)
Pursley, Eva M., 82-02303 (5/84)
Puttie, Steven, 82-11739 (1/84)
Rabis, Paul, 83-10596 (12/84)
Radke, William J., 83-01257 (6/84)
Ragan, Susie R., 82-00988 (5/84)
Ranieri, Larry V., 83-01660 etc. (5/84)
Rasmussen, James D., 83-07090 (8/84)
Ravenwood, Minx E., 80-07679 (3/84)
Ray, Douglas N., 83-04428 (9/84)
Reck, George S., 82-09903 (1/84)
Reed, Martha L., 83-06518 etc. (6/84)

Name, WCB Number (Month/Year)
Reedy, Ronald, 83-07575 etc. (11/84)
Reese, Deborah A., 83-09205 (9/84)
Remington, Sandra K., 83-05398 (5/84)
Renouf, James W., 83-02021 (5/84)
Retzman, Elmer E., 81-03525 etc. (5/84)
Reynolds, Lettie, 82-02757 (8/84)
Reynolds, Sylvia J., 83-04140 (3/84)
Reznicsek, Walter J., 83-02148 (5/84)
Richison, Tida D., 83-05855 (9/84)
Ridenour, Lyle D., 82-11385 (4/84)
Ries, Joan M., 83-03176 (4/84)
Riggan, James E., 83-08370 (9/84)
Riley, Inez M., 83-12182 (11/84)
Robb, Jerry E., 83-09436 (6/84)
Robbins, Charles E., 82-09366 (1/84)
Roberts, Harry, 82-11315 (4/84)
Roberts, Marquita L., 83-01543 (6/84)
Robertson, Marion E., 83-07052 (7/84)
Robinson, Thomas, 83-01467 etc. (3/84)
Rocheleau, Wesley L., 83-07982 (10/84)
Rodriguez, Lupe, 83-08481 (7/84)
Rogers, Alfonso, 83-07484 (12/84)
Rogers, Floyd E., 82-07063 (5/84)
Rogers, Paul, 83-00521 et seq. (5/84)
Rogers, Thelma E., 83-04043 (4/84)
Roldan, Eusebio, 83-01265 (9/84)
Rolph, Robert, 83-03889 (9/84)
Rondeau, Alden J., 82-08120 (1/84)
Rose, Alvin H., 83-02171 etc. (7/84)
Rose, Robert M., 83-12041 (12/84)
Rosling, Jeannie L., 83-04259 (5/84)
Ross, Charles E., 83-09929 (12/84)
Ross, Teddie, 82-06599 (10/84)
Roth, William P., 82-08214 (4/84)
Rothenfluch, Darrell, 82-11154 (2/84)
Rounsaville, Charlene, 83-02476 (7/84)
Rouse, Ron D., 83-06777 (12/84)
Rudder, Alta E., 82-09066 (4/84)
Rush, Alice V., 82-01314 (2/84)
Rutherford, Larry W., 83-02662 (4/84)
Salloum, Mouin I., 83-03568 etc. (7/84)
Sampson, Steven A., 82-06860 (1/84)
Samson, Ray D., 83-03859 (6/84)
Sanchez, Joyce D., 83-06232 (12/84)
Sargent, Eleanor R., 83-06429 (4/84)
Sattler, Wendlin J., 82-09146 (3/84)
Sawyer, Betsy, 82-10744 (4/84)
Sayre, Alvena L., 83-00212 (3/84)
Schaefer, Coralee A., 82-08778 (2/84)
Scheible, Robert E., 83-03020 (5/84)
Schilling, Paula J., 83-04757 (10/84)
Schnepp, Ramona, 82-07992 (1/84)
Schuchardt, Ronald K., 82-04706 (3/84)
Schulke, Suzanne M., 83-04507 (4/84)
Schultze, Ruby J., 82-11238 (2/84)
Scofield, Robert D., 82-07787 (5/84)
Scott, Charneall S., 83-08726 (11/84)

Name, WCB Number (Month/Year)
Scott, Larry H., 83-00087 (6/84)
Scott, Ronald A., 82-09540 (1/84)
Severson, Orris L., 83-05922 (9/84)
Sharp, Aubrey L., 82-08343 (1/84)
Sharpe, Larry B., 82-09472 (5/84)
Shaver, Robert A., 82-09848 (2/84)
Shelgren, David M., 82-07225 (6/84)
Shepard, Thomas M., 83-02117 (1/84)
Sherier, Thomas L., 83-12060 (11/84)
Sherman, Diane M., 82-07581 (9/84)
Sherman, Patsy D., 82-11449 (3/84)
Shipman, Lyla M., 83-01968 (3/84)
Short, Earlene, 82-03842 (5/84)
Shriver, Judy L., 83-06348 (12/84)
Shroy, Charles F., 82-07332 (1/84)
Shrum, James P., 84-01683 (10/84)
Shrum, Jimmy D., 81-09771 (11/84)
Silva, Jeffrey A., 82-05276 (2/84)
Simons, Carl R., 82-11515 (11/84)
Simpson, Bonnie V., 83-06366 (10/84)
Simpson, Mary J., 83-05896 (5/84)
Sisk, Mary J., 83-04373 (10/84)
Slay, Charles B., 83-08452 (12/84)
Sloane, Roy A., 83-07618 (9/84)
Smart, Everett D., 83-03828 (4/84)
Smith, Bettie M., 83-01809 (1/84)
Smith, Betty A., 83-08301 (7/84)
Smith, Clayton R., 83-01509 (8/84)
Smith, George R., 81-10870 (11/84)
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