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

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37 Van Natta ___ (1985)

MARIE H. BRADSHAW, Claimant
Jolles, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-00795
January 4, 1985
Order on Remand

This case is before the Board on remand from the Court of Appeals with instructions to rate the extent of claimant's permanent disability considering claimant's headache condition which the court held to be compensable. Claimant argues that she is permanently and totally disabled.

Claimant was 53 years old at the time of hearing. She has a tenth grade education. She has worked as a waitress. For many years prior to her injury claimant worked as a newspaper carrier. Claimant's injury was to her left foot. In our earlier Order on Review we granted claimant an award of 70% for 94.5° scheduled left foot disability. The court has found that claimant's headache condition is a compensable sequela of her left foot injury. On this record, the only condition for which claimant is entitled to an unscheduled disability award is her headache condition. She has preexisting diabetes. However, as we noted in our earlier order, her diabetes flared up at the time of her injury but has returned to its preinjury state. There is no indication that claimant's diabetes was disabling prior to her injury; therefore it need not be considered in deciding whether claimant is permanently and totally disabled.

Claimant's foot injury precludes her from doing work which requires her to be on her feet. Claimant testified that she has a headache all the time. She also testified that sometimes it gets very bad so that she "can't move." When asked whether she can work, claimant testified:

> "That again is debatable because they come on. I never know. It's always there. I always have a headache but sometimes it's just progressively worse, and when I have the headaches I can't get out of my chair. And I have sat there two or three days trying to get rid of a headache, so that is debatable."

Claimant's treating physician, Dr. Machlan, was asked whether claimant's headaches are debilitating. He responded:

> "Do you mean does she have to stay in bed? No, she doesn't. She gets up and goes around and goes about her normal activities, whatever that is, in spite of the headaches, but she takes pain medications to help her relieve it periodically.
>
> "Q. What effect would these headaches have on work activities on a 40-hour-per-week job?
>
> "A. That depends on the individual tremendously?

"Q. How about in her case?

"A. Well, with her she says it interfered with her ability to do it and I have no reason to question this."

Thus, claimant herself is unsure whether her headaches would prevent her from working. Her treating doctor notes that she is able to carry on her daily activities despite the headaches and defers to claimant's own judgment whether they prevent her from working. Based on these facts, we are unable to conclude that claimant is medically prevented from regular gainful employment by her headache condition. Thus, claimant is not permanently and totally disabled based on her physical condition alone.

As we noted in our previous order:

"The only job search she has done is to attempt to return to her previous occupation. She has not participated in vocational rehabilitation."

We conclude that claimant has failed to satisfy the work search requirements of ORS 656.206(3). We, therefore conclude that claimant has failed to prove that she is entitled to an award of permanent total disability.

Considering the impairment caused by claimant's persistent headaches as well as the relevant social and vocational factors such as claimant's age and work experience, we conclude that claimant would be appropriately compensated for her compensable headaches by an award of 80° for 25% unscheduled disability.

ORDER

Claimant is awarded 80° for 25% unscheduled disability for her headache condition. Claimant's attorney is allowed 25% of the increased compensation not to exceed $3,000 as a reasonable attorney's fee.

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
January 4, 1985
Order of Abatement

The Board has received claimant's motion to abate and reconsider our Order on Review dated December 7, 1984.

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

IT IS SO ORDERED.

NANCY J. RENSING, Claimant
Dwight Ronald Gerber, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-09149
January 4, 1985
Order Denying Motion to Dismiss and Motion to Strike

The SAIF Corporation has moved for an order dismissing claimant's request for review or alternatively striking claimant's brief on the ground that claimant's brief was not timely filed.

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 or the late filing of a brief are not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

SAIF's motion to strike claimant's brief raises the recurring problem of briefs which are not timely filed. As SAIF points out, the filing of briefs, unlike the availability of evidence for hearings, is a matter which is solely in the control of the attorneys. The Board is of the opinion that in order to keep the appellate process operating in an efficient and orderly manner it is important that briefs be filed in a timely manner or that some reason be given and permission be obtained from the Board for late filing. The rules so provide. OAR 438-11-010(3). Attorneys are admonished to follow the Board's rules concerning the timeliness of filing briefs.

However, as a matter of practice the Board allowed late submissions of briefs when the briefs are only a few days late. In this instance claimant's brief was mailed two days late. Based on our general practice, we decline to strike claimant's brief.

We note, however, that our practice of tolerating such late submissions is actively under reconsideration by the Board. We intend to closely monitor the filing of briefs to determine how big a problem late filing is. After study and reflection the Board may change its present policy to a policy of strict enforcement of our present rule. In the meanwhile, SAIF's motion to strike is denied.

ORDER

The SAIF Corporation's motion to dismiss and motion to strike are denied. SAIF has twenty days from the date of this order in which to file its Respondent's brief. Claimant has ten days from the date of the filing of SAIF's respondent's brief to file a reply brief.

ROGER RIEPE, Claimant
Kenneth A. Morrow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Third Party TP-84005
January 8, 1985
Third Party Distribution Order

The SAIF Corporation has petitioned the Board for resolution of a dispute concerning the proper distribution of the proceeds of a third party recovery obtained by claimant. ORS 656.593(1)(d); 656.593(3).

The facts are not in dispute. Claimant sustained serious injuries as a result of a helicopter crash which occurred in the course of his employment in March of 1979. Claimant filed a workers' compensation claim with his employer's industrial insurer, the SAIF Corporation, and elected to pursue a civil

action for damages alleging, among other things, defects in the manufacture of the helicopter and breach of warranty. See ORS 656.154; 656.578. Claimant's workers' compensation claim was accepted by SAIF and benefits were paid. As of February 1983 SAIF had incurred in excess of $68,000 in claim costs, including close to $38,000 for payment of claimant's medical expenses.

In the spring or summer of 1983, claimant and the various third parties arrived at a proposed settlement of claimant's third party action. This proposed settlement agreement was communicated to SAIF in order to obtain SAIF's approval. ORS 656.587. To effectuate settlement of claimant's third party action, SAIF agreed to reduce its lien and accept $45,000 in full and final satisfaction. See ORS 656.580(2); 656.593(3). In consideration for the compromise of SAIF's lien, claimant agreed to request that his workers' compensation claim be denied. In fact, on or about September 23, 1983, claimant signed a statement formally requesting a denial of his claim. No denial was issued, however, and by letter dated January 4, 1984, SAIF advised claimant that it would be unable to comply with the terms of its agreement with claimant in view of the Supreme Court's then-recent decision in Bauman v. SAIF, 295 Or 788 (1983). Bauman was decided on October 25, 1983, and held that a claim, once accepted, may not be denied unless there is a showing of "fraud, misrepresentation or other illegal activity." SAIF stated its belief that Bauman precluded retroactive denial of claimant's accepted claim. Under these circumstances, SAIF advised claimant that it was requesting a distribution of the proceeds of claimant's third party settlement in accordance with the distribution formula contained in ORS 656.593(1).

Claimant's attorney responded to SAIF, stating his belief that there was no legal basis upon which SAIF could withdraw its approval of claimant's third party settlement or demand any funds in addition to $45,000 as agreed. Claimant's attorney stated, "That is particularly true in light of the fact that the settlement agreement with the defendants would never have been reached had not SAIF made the agreement it did." Claimant's attorney also indicated claimant's willingness to abide by the terms of his agreement that his workers' compensation claim would be denied. Claimant's attorney tendered a trust account check in the amount of $45,000 in full and final satisfaction of SAIF's lien. SAIF refused claimant's tender, and its application to the Board followed.

In its submission to the Board, SAIF states that it has no authority to issue a denial of claimant's accepted claim since it has no basis for alleging any misrepresentation or concealment by claimant in connection with his workers' compensation claim. In support of its refusal to comply with its agreement, SAIF relies upon "a material change in the circumstances of the parties since SAIF gave its consent to the settlement" in September of 1983. That "material change" is the court's Bauman decision prohibiting retroactive denials. SAIF states that it would be unjust to require it to comply with the agreement in light of Bauman, since it would result in only partial reimbursement of its statutory lien, while claimant would retain all of his workers' compensation rights and benefits in addition to the proceeds of his third party recovery. SAIF also states its willingness to accept $45,000 in full and final satisfaction of its statutory lien if, "Through the

mechanism of a withdrawal by claimant of his workers' compensation claim it would be deemed binding upon the claimant now and in the future."

Claimant maintains that his agreement with SAIF is binding. Claimant seeks nothing more than an order directing that SAIF accept $45,000 in full and final satisfaction of its lien, and that claimant's request for a denial of his workers' compensation claim be honored in order to allow the denial to become final by operation of law.

Claimant's third party action was settled on a structured settlement basis, according to the terms of which claimant received a cash payment of $100,000 upon settlement and will receive $700 per month during the remainder of his life, a $25,000 lump sum payment in 1988, a $50,000 lump sum payment in 1993 and a $100,000 lump sum payment in 1998. When SAIF initially advised claimant that it would be unable to comply with its agreement and issue a denial, it was requested that the $700 monthly payment be made directly to SAIF until such time as its entire lien was satisfied. In its application to the Board, SAIF states that as of March 22, 1982 approximately $68,310 in workers' compensation benefits had been paid. Presumably SAIF is seeking an order directing reimbursement in this amount with no claim for anticipated future expenditures. See ORS 656.593(1)(c).

The parties' focus is on Bauman and whether it precludes consummation of their agreement. Both parties want to execute their agreement; however, SAIF believes there is a legal impediment to doing so. We agree with claimant that Bauman v. SAIF, supra, does not prevent implementation of the parties' agreement. The concern which gave rise to the Bauman decision was the practice of employers and insurers, which had been fostered by the court's earlier decision in Frasure v. Agripac, 290 Or 99 (1980), of accepting a claim initially, paying compensation and later denying the claim ab initio. In support of its conclusion in Bauman, the court reasoned:

> "To allow the employer or the employer's insurer to engage in such vacillating activity would encourage degrees of instability in the workers' compensation system that we do not believe the statute contemplates. * * * 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 793-94.

None of those concerns are present in this case, or others like it, where the claimant and industrial insurer are dealing at arms' length in an effort to effectuate the best possible resolution of claimant's third party action and make a just and proper distribution of the proceeds. See also Kenneth N. Crocker, 36 Van Natta 1505 (1984). Although Bauman does not prohibit the parties' agreement, a potential stumbling block mentioned by neither party is ORS 656.236(1), the statutory prohibition against releases.

That statute provides, "No release by a worker or his beneficiary of any rights under ORS 656.001 to 656.794 is valid." In several cases we have refused to approve a proffered stipulation on the basis that the stipulation constitutes a release in violation of ORS 656.236(1). William J. Hamilton, 36 Van Natta 576 (1984); Walter E. Ginn, 36 Van Natta 1 (1984); Warren C. Bacon, 35 Van Natta 1694 (1983); Duane E. Maddy, 35 Van Natta 1629 (1983); Donald T. Campbell, 35 Van Natta 1622 (1983); Arnold Androes, 35 Van Natta 1619 (1983). Of these cases, Hamilton was the only one involving distribution of the proceeds of a third party recovery. In that case, claimant and the industrial insurer entered into a stipulated settlement according to the terms of which the insurer waived the right to recover its claim costs, thereby allowing claimant to receive a greater portion of his third party recovery, which was obtained by judgment. In exchange for this waiver by the insurer, claimant agreed that the insurer would receive a credit in the amount of its claim costs against any future workers' compensation benefits to which the claimant might otherwise become entitled, up until a date certain. We refused to approve the parties' proposed settlement agreement on the basis of our conclusion that it violated the statutory prohibition against releases. We also found some support for our conclusion in SAIF v. Parker, 61 Or App 47 (1982), in which the court affirmed our decision that an industrial insurer is required to determine its anticipated future claim costs pursuant to ORS 656.593(1)(c), and that in the absence of such a determination, the insurer is responsible for future costs just as if there had been no third party recovery.

Most recently in William M. Bird, 36 Van Natta 1571 (1984), we refused to approve a stipulated order submitted by claimant and the SAIF Corporation on the grounds that the parties' stipulation violated ORS 656.236(1). The purpose and intent of the parties' agreement was to provide for a withdrawal of claimant's workers' compensation claim in exchange for SAIF's agreement to waive its potential statutory lien. In that case, claimant had filed a workers' compensation claim, but no benefits had been paid by SAIF.

In neither Hamilton nor Bird did we consider the provisions of ORS 656.587, which provides:

> "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. ORS 656.236 does not apply to compromises and settlements under ORS 656.578 to 656.597." (Emphasis supplied.)

In Hamilton we stated, "* * * [C]onsiderations involving the release of rights under the Workers' Compensation Act can and do arise in the context of settlement of disputes arising under ORS 656.593." 36 Van Natta at 581. See also Lonnie G. Miller, 31 Van Natta 103 (1981). The underscored portion of ORS 656.587 suggests that this conclusion may have been in error, at least with respect to distribution of a third party recovery obtained by settlement.

The policy underlying the statutes governing recovery against third parties is that the ultimate loss for wrongdoing should fall upon the wrongdoer, with a corollary being not allowing a claimant to obtain a double recovery. Ollie Rater, 34 Van Natta 739, 740 (1982); 2A Larson, Workmen's Compensation Law, §§ 71.10, 71.20 (1983). The third party recovery statutes are intended to provide for an employer's or insurer's recovery, from responsible third persons, of benefits paid to injured workers and their dependents. Ore Ida Foods v. Indian Head, 290 Or 909, 912 (1981). If ORS 656.587 was ambiguous, we would consider these policies in construing the statute to allow a release of an injured worker's rights under the Workers' Compensation Law in the present context. The statute is not ambiguous, however, and by its terms excepts the application of ORS 656.236 to settlements negotiated in the context of a third party action. Further examination of our prior decisions in Hamilton, Bird and Lonnie G. Miller, supra, will serve to identify the scope of this exception..

In Hamilton the claimant's third party recovery had been obtained by a judgment. The agreement entered into by the claimant and the industrial insurer was negotiated after completion of the third party action. Distribution of the third party proceeds would have been made in accordance with the formula contained in ORS 656.593(1). There was no need for the industrial insurer to approve a proposed settlement of claimant's third party action. There was no call for the parties to reach an agreement concerning what portion of the proceeds it might be "just and proper" for the industrial insurer to accept in satisfaction of its lien. ORS 656.593(3). ORS 656.587, and the exception to ORS 656.236 contained therein, was not applicable in that case.

Miller was discussed in Hamilton and involved distribution of a third party settlement. The Board approved an agreement between the claimant and the industrial insurer, whereby the insurer waived its lien for future claim costs. In consideration for this waiver, the claimant was to receive the balance remaining after payment of the insurer's accepted claim costs, ORS 656.593(1)(d), and the claimant agreed that the insurer would be granted a credit in the amount of the remaining balance against any benefits to which he might otherwise become entitled in the twelve months following execution of the agreement. In Hamilton we stated, "To the extent that our decision today is inconsistent with our prior decision in [Miller], Miller is overruled."

On further reflection, it appears that Hamilton and Miller were not inconsistent. Miller involved a distribution of settlement proceeds. By virtue of ORS 656.587, the parties were free to enter into their agreement, even if it had some elements of a release which would otherwise be prohibited by ORS 656.236(1). As discussed above, Hamilton involved distribution of a third party recovery obtained by judgment, and ORS 656.587 had no application. Hamilton, therefore, is distinguishable from Miller, and the former did not serve to overrule the latter.

In William M. Bird, supra, the claimant agreed to withdraw his workers' compensation claim in order to "fully pursue his legal remedies against the third party . . ." The SAIF Corporation agreed to waive its potential lien against the proceeds of any recovery that claimant might obtain through his

civil action. It was unclear from the proposed agreement submitted by the parties whether claimant had initiated a civil action and, if so, what the status was. Our refusal to approve the agreement was not inconsistent with ORS 656.587 because there was no indication that a settlement of a third party action was being negotiated. It is only in the context of a settlement under the statutes governing third party recovery that the prohibition against releases does not apply.

In sum we believe that ORS 656.587 means what it says. It is a narrow exception to the statutory prohibition against releases. Although ORS 656.593(2) provides that the portion of a third party recovery retained by the claimant "shall be in addition to the compensation" to which the claimant is entitled under the Act, ORS 656.587 nevertheless allows the claimant to release that right in certain circumstances.

In conclusion, we hold that Bauman v. SAIF, supra, does not prevent implementation of the parties' agreement with regard to a just and proper distribution of the proceeds of claimant's third party recovery. Nor does ORS 656.236(1), the statutory prohibition against releases, since that statute does not apply to compromises and settlements under the third party recovery provisions. ORS 656.587. Accordingly, the parties may execute their agreement, and SAIF shall be paid and retain out of the proceeds of claimant's third party recovery $45,000 in full and final satisfaction of its statutory lien.

IT IS SO ORDERED.

LANCE V. BENTZ, Claimant
Allen & Vick, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 83-10205 & 83-11280
January 9, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order which upheld the SAIF Corporation's denials of both his aggravation claim and occupational disease claim for a low back condition.

The Board affirms the order with the following comment. In Garbutt v. SAIF, 297 Or 148, 151 (1984), the Supreme Court stated that a physician's report is not indispensable in a workers' compensation claim. The worker's or other lay testimony may or may not carry the burden of proving the claim. After conducting our de novo review of the record, including claimant's testimony, we find that the preponderance of the persuasive evidence fails to establish either a compensable aggravation or occupational disease claim.

ORDER

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

JOHN E. CAIN, Claimant
Evohl F. Malagon, Claimant's Attorney
John L. Svoboda, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-10108
January 9, 1985
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of those portions of Referee McCullough's order which set aside its denial of claimant's aggravation claim. Claimant cross-requests review seeking additional temporary disability benefits plus a penalty and associated attorney fee.

Claimant compensably injured his low back in November 1977. Three myelograms have been performed on claimant and he has undergone one discectomy. The last arrangement of compensation was when a stipulation was approved in May 1982. Claimant has received awards totaling 192° for 60% unscheduled disability by Determination Orders and stipulation. At the time of the last arrangement of compensation, claimant testified that he could stand five minutes, walk one block, had pain in his back and down to his toes, was in pain 90% to 95% of the time, could lift four to five pounds and slept only two hours per night.

Claimant's testimony at the hearing in this case was remarkably similar to his prior testimony regarding the nature, extent and location of his symptoms and resulting limited activities. However, without any supporting elaboration or detail, claimant says his pain is now worse.

The medical evidence offers claimant little support. Shortly before the last award of compensation in May 1982, Orthopaedic Consultants performed a comprehensive examination in November 1981. Shortly after the last award in May 1982, claimant first consulted Dr. Smith on referral from his attorney in October 1982. A comparison of Orthopaedic Consultant's 1981 report with Dr. Smith's 1982 report reveals that the only real difference is in the straight leg raising test. However, in view of the imprecise and subjective nature of this test, i.e., that different examiners can get different results on different days, the fact that there is only a 15° difference between the two tests, and the absence of any other findings which would indicate a worsening, we find the medical evidence is not persuasive in establishing an aggravation.

Nor do we find claimant's testimony sufficiently persuasive in the circumstances of this case. As far as detail is concerned, claimant's testimony in this proceeding is about 99% the same as his testimony in May 1982 at the time of the last award of compensation. Although claimant nevertheless concludes that he is now worse, like the Referee, we are not willing to accept claimant's view as conclusive when we consider the record as a whole.

Turning to claimant's cross-request for review, claimant is entitled to no additional time loss because we uphold the aggravation denial and because there is no evidence of any medically verified inability to work which would have triggered the duty to pay interim compensation pending acceptance or denial of an aggravation claim. We also find that no penalty or attorney fee is warranted.

We take no position on whether claimant should have surgery because the record does not reveal that authorization has been requested for surgery. Dr. Smith merely states that claimant "should be offered surgical exploration." If surgery is requested and the surgery is found reasonable and necessary, then claimant may be entitled to have his claim reopened at the time he actually submits to surgery.

ORDER

The Referee's order dated March 29, 1983 is reversed.

Board Member Lewis Dissenting:

I respectfully dissent to that portion of the majority's order which finds that claimant has not established a compensable aggravation claim.

To establish an aggravation claim, claimant must prove that his original compensable condition has worsened since the last award or arrangement of compensation. ORS 656.273(1). He is not required to show a substantial worsening. Mosqueda v. ESCO Corporation, 54 Or App 736 (1981).

I agree with the Referee that claimant has established that his condition has slightly worsened since the last arrangement of compensation. In reaching my conclusion, I am particularly persuaded by Dr. Smith's findings. Dr. Smith noted a degree of sciatic tenderness, which was suggestive of a continuing nerve root compression or irritation syndrome. Sciatic tenderness is not mentioned in Orthopaedic Consultant's report which was released prior to the last arrangement of compensation. Furthermore, Dr. Smith reported a "strongly positive" straight right leg raising test. Claimant's reaction was positive at 30°, whereas during the Consultant's examination the right leg was positive at 45°. Based on these findings, Dr. Smith opined that claimant's condition strongly suggested that he was having sufficient difficulty and was in fact worsening.

I take no position on the other issues addressed in the majority's order.

VICTORIA W. FOX, Claimant
Emmons, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 81-09173
January 9, 1985
Order on Review

Reviewed by Board Members Barnes and Ferris.

Claimant requests review of Referee Seifert's order which affirmed a Determination Order which had awarded claimant 64° for 20% unscheduled disability. Claimant contends that she is entitled to a greater unscheduled award for her shoulder disability and to an additional scheduled award for her arm disability.

In July 1976 claimant filed a claim alleging her work activities as a veneer grader had affected her right shoulder and arm. Claimant was diagnosed as having sustained traumatic arthritis of the acromioclavicular joint and a subluxation of the

sternoclavicular joint, both involving the right clavicle. Claimant's claim was accepted, apparently on the basis of an occupational disease.

In October 1976 claimant underwent surgery, which involved excision of the distal and proximal ends of her right clavicle. In April 1977 a second surgery was performed to excise another portion of the distal end of the clavicle.

After maximum recovery, the residual effects in the shoulder include a loss of 40° abduction and some disabling pain. The residual effects in claimant's right arm include inability to lift objects in excess of five pounds, reduced grip strength and occasional pain and numbness in the index finger and thumb. Because of the finger/thumb problems, claimant is unable to write legibly for more than about half a page or to operate a typewriter for more than about five minutes.

After her surgeries, claimant's attempts to return to a variety of progressively-less-strenuous positions in the mill proved unsuccessful. Claimant then completed a vocational rehabilitation program to become a registered nurse. At the time of hearing, claimant was employed as a "light duty" nurse in a nursing home. Claimant is not required to -- and probably could not --lift patients; her duties are limited to such functions as administering medications, dressing wounds and scheduling other staff members.

We agree with claimant's contention that she has established entitlement to a scheduled award for loss of use of her right arm. A separate and additional award should be made for loss of function of a scheduled body part regardless whether the scheduled impairment is traceable to an injury to an unscheduled portion of the body. Walker v. Compensation Dept., 248 Or 195 (1967); Jean F. Nylin, 34 Van Natta 1193 (1982). Claimant experiences occasional shooting pain and numbness in a portion of her hand. These symptoms have resulted in decreased ability to do such things as drive a car, write and type. We conclude that claimant has demonstrated a loss of function in her right forearm arising from her shoulder condition.

We believe that an award for 10% loss of the forearm will adequately compensate claimant for her impairment in that part of her body.

We affirm and adopt the relevant portions of the Referee's order on the issue of unscheduled disability.

ORDER

The Referee's order dated October 26, 1982 is modified in part and affirmed in part. Claimant is awarded 15° for 10% loss of the right forearm. This award is in addition to all prior awards. Claimant's attorney is allowed 25% of the increased disability granted by this order, as and for a reasonable attorney fee. The remainder of the Referee's order is affirmed.

CANDY J. HESS, Claimant
Gatti & Gatti, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-08812
January 9, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review and claimant cross-requests review of Referee T. Lavere Johnson's order that: (1) granted claimant an award of 64° for 20% unscheduled disability to her low back in lieu of 16° for 5% granted by Determination Order; (2) awarded claimant's attorney a penalty of 25% of an attorney fee awarded by a previous litigation order; and (3) awarded claimant's attorney an insurer paid fee for prevailing on the penalty issue. The issues on review are: (1) the extent of claimant's disability; and (2) the propriety of the penalty awarded to claimant's attorney. The Board modifies the Referee's order.

On de novo review we agree with the Referee that claimant is entitled to an award of 20% unscheduled permanent disability to her low back.

The penalty issue arises out of a complicated set of procedural facts. Claimant suffered a compensable injury on May 22, 1981. Her claim was accepted on July 2, 1981 and closed by a Determination Order dated March 1, 1982 which was affirmed by a second Determination Order dated March 10, 1982. Neither Determination Order granted claimant any permanent disability award.

Claimant requested a hearing on the issue of the timeliness of the closure of her claim. On August 31, 1982 Referee Peterson entered an order that set aside the March 1982 Determination Orders and remanded the claim to SAIF for further processing. The order also awarded claimant's attorney a fee to be paid out of claimant's additional compensation, both temporary and permanent, if any. SAIF requested Board review.

On December 1, 1982, while SAIF's request for review was still pending, claimant's claim was again closed by a Determination Order that granted claimant an award of 16° for 5% permanent disability to her low back.

On June 13, 1983 the Board affirmed Referee Peterson's August 31, 1982 order. No further appeal was taken. It was not until June 24, 1983 that SAIF paid claimant's attorney the fees awarded by Referee Peterson's August 1982 order. It is SAIF's position that the portion of the compensation due and payable to claimant that represented her attorney's fee was not "compensation," and was, therefore, not subject to ORS 656.313(1), which provides that, "Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant."

SAIF states in its brief that, "Attorney fees are not compensation...." (Emphasis in original.) While there is authority that employer/insurer paid attorney fees in addition to compensation, e.g., in a penalty situation under ORS 656.382(1), are not "compensation," Mobley v. SAIF, 58 Or App 394 (1982), the Board has consistently ruled to the contrary where the fees are payable from compensation under ORS 656.386(2). In this case,

claimant's attorney's fee was to be paid from compensation awarded by Referee Peterson's August 31, 1983 order. SAIF Corporation intentionally withheld payment of the fee pending Board review.

The Board most recently discussed this issue in Robert G. Perkins, 36 Van Natta 1050, 1051 (1984), where we stated:

> "Our prior decisions holding that the insurer is required to pay claimant's attorney's fee pending Board review when the fee is payable out of claimant's compensation, are all based upon a single rationale:
>
> "'The Board concludes that when compensation is ordered paid to a claimant, the sums due do not lose their character and identification as compensation simply because the claimant is obligated to pay a portion of that compensation to an attorney as a fee. Ivan W. Davidson, [2 Van Natta 106 (1969)].
>
> "'The fact that an attorney has a lien upon a percentage of the compensation payable does not destroy the status of that portion of an award as "compensation." Jose Mendoza, [8 Van Natta 97, 98 (1972)].
>
> "'The Board concludes and finds that ORS 656.313 compels an employer or the State Accident Insurance Fund to pay the compensation ordered paid by a hearing officer, the board or court, and that the portion of the compensation payable over to the attorney does not lose [its] identity as compensation. Carlos V. Rios, [8 Van Natta 85, 86 (1972)].'
>
> "We adhere to the rationale expressed in our earlier decisions. Fees payable out of compensation pursuant to ORS 656.386(2) retain their identity as 'compensation.'"

We continue to adhere to the above-quoted rationale. SAIF's failure to pay claimant's attorney that portion of claimant's compensation authorized as an attorney fee was improper. We agree that a 25% penalty is appropriate. However, we find no statutory basis to award the penalty to claimant's attorney, particularly where, as here, claimant's attorney was also awarded an insurer paid attorney fee for prevailing on the penalty issue. Accordingly, that portion of the Referee's order that awards claimant's attorney a penalty will be modified to award the penalty to claimant.

ORDER

The Referee's order dated February 21, 1984 as amended by the order dated April 13, 1984 is modified. Claimant is awarded a penalty of 25% of $1,090 to be paid by the SAIF Corporation. That portion of the Referee's order that awarded a penalty to

claimant's attorney is set aside. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded an attorney fee of $650 for services on Board review, to be paid by the SAIF Corporation.

RONALD G. HILL, Claimant
Steven C. Yates, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 83-00528
January 9, 1985
Order on Review

Reviewed by Board Members Barnes and Lewis.

Claimant requests review of those portions of Referee Mongrain's order that declined to assess a penalty and attorney fee against the insurer because it unilaterally offset a previous overpayment against current temporary disability benefits. Claimant contends that a penalty and attorney fee is appropriate and that the insurer waived its right to recover its overpayment by failing to seek authorization for the offset at the time of a prior stipulated order that awarded benefits to claimant.

Claimant was compensably injured in December 1974. A Determination Order issued in January 1979; among other things, it created an overpayment of temporary disability benefits. Approximately half of the overpayment was recovered by the insurer's offset against the permanent disability benefits awarded by the Determination Order. Claimant appealed the Determination Order. On May 7, 1979 a Referee approved a stipulation which granted claimant additional permanent disability benefits. That stipulation did not mention any prior overpayment or current setoff.

In October 1982 the claim was reopened because of an aggravation. At that time the insurer began to offset its prior overpayment pursuant to former OAR 436-54-320. Claimant requested a hearing alleging that the insurer was improperly recovering the overpayment. The Referee found that, although OAR 436-54-320 was invalidated by Forney v. Western States Plywood, 66 Or App 155 (1983), the insurer's action in taking the offset was not unreasonable. We agree and affirm that portion of the Referee's order concerning a penalty and associated attorney fee.

On the waiver issue, we agree with claimant that the insurer has waived its right to recover the overpayment by failing to raise the issue at the time of the 1979 stipulation. In Forney, the court held that an insurer may not unilaterally recover an alleged overpayment. It specifically reserved the question of whether the right to recover an overpayment may be waived by delay in raising the issue. 66 Or App at 160. Although the Forney court did not decide this issue, we believe that it is controlled by the principle of res judicata as described by the court in Million v. SAIF, 45 Or App 1097 (1980).

In Million the court held that res judicata applies

> ". . . not only to every claim included in the pleadings but also to every claim which could have been alleged under the same 'aggregate of operative facts which compose a single occasion for judicial relief' Taylor v. Baker, 279 Or 139, 144, 566 P2d 884 (1977) . . ." 45 Or App at 1102.

In this case, under the same set of operative facts which gave rise to the stipulation, the insurer could have asserted its claim to an offset. The overpayment was in existence at that time and was known to the insurer. The stipulation allowed claimant additional permanent disability benefits against which an offset could have been taken. Although the stipulation obviated the need for a formal hearing, it was not valid until it was approved by a Referee. Thus, it functions as the equivalent of an "occasion for judicial relief" as the court used the phrase in Million.

ORDER

The Referee's orders dated November 29, 1983 and February 24, 1984 are affirmed in part and reversed in part. That portion of the Referee's orders authorizing the insurer to offset an alleged overpayment are reversed. The remainder of the Referee's orders are affirmed. Claimant's attorney is awarded $350 for services on Board review to be paid by the insurer.

ALLAN KYTOLA, Claimant
David C. Force, Claimant's Attorney
Brian L. Pocock, Defense Attorney

WCB 82-06536
January 9, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Brown's order that set aside a Determination Order that had redetermined the extent of claimant's disability and reduced a permanent total disability award to an award of 128° for 40% unscheduled disability. The employer contends that it has proven that claimant is no longer permanently and totally disabled. Claimant argues that the Referee and the Board lack jurisdiction over this case. Accordingly, he moves to dismiss. Claimant also moves to strike the employer's reply brief on the ground that it relies on evidence not contained in the record.

The Board finds that it has jurisdiction and, therefore, denies claimant's motion to dismiss. The Board also denies claimant's motion to strike. However, the Board will not consider any "evidence" contained in the employer's reply brief which is not contained in the record.

Claimant is a 63-year-old former logger who compensably injured his left shoulder and neck on May 16, 1974 when a chain saw kicked back and knocked him to the ground. Prior to that injury claimant had compensably injured his low back and had undergone two laminectomies. Claimant was granted an award for 15% unscheduled disability for the earlier injury by a Referee's order dated October 8, 1974.

In February 1975 Dr. Halferty of the Disability Determination Division examined claimant. He opined:

> "1. Degenerative intervertebral disk disease and degenerative arthritis of the lumbar spine as well as degenerative changes in the cervical spine with radiculitis and chronic strain.

"2. It would appear that this patient would not be able to continue his usual logging occupation. He stated that he already has an alternative vocation started as he is learning a dealership in chain saws."

Dr. Hickman performed a psychological examination in February 1975. He opined that claimant was experiencing an anxiety reaction attributable to his on-the-job injuries. Dr. Hickman did not believe that further psychological assistance was needed. In April 1975 Dr. Corrigan, the treating orthopedic surgeon at that time, opined that claimant was medically stationary. In May 1975 Dr. Mathews examined claimant and noted that claimant was then working in a saw shop and that claimant's hands showed evidence that he was doing moderate to heavy manual labor. Dr. Mathews did not believe claimant would be able to return to logging partly because of medical factors and partly because of other unnamed factors. On July 7, 1975 a Determination Order issued awarding claimant 35% unscheduled disability due to the 1974 injury.

In August 1975 Dr. Luce, a neurologist, reported that claimant had marked cervical and lumbar pathology, but that surgery would only be indicated if the spinal cord was impaired. In September 1975 Dr. Moers, a family practitioner, reported that claimant was "completely and permanently disabled from returning to heavy labor." In November 1975 Dr. Mathews reported:

"There are some reports from Doctor Moers, the most recent being September, 1975 indicating his feeling that the patient is in a state of bad chronic disability. I think that there is evidence to indicate the patient is not as badly disabled as Doctor Moers would imply in his report. I am referring particularly to the appearance of his hands and to his rather gross tendency to exaggerate disability on physical testing."

In May 1976 Dr. Dunn, a neurologist, performed a myelogram on claimant and noted worsening of the root sleeve defects at C4-5. Claimant developed meningitis as a result of the myelogram. He eventually sought treatment at the Mayo clinic. By September 1976 the meningitis was under control.

In November 1976 Dr. Luther, a psychiatrist, examined claimant and noted that claimant at that time had a franchise selling logging equipment. He opined that claimant tended toward a paranoid personality. He concluded:

"I do not see his psychiatric problem as overwhelming in the psychotic sense although I am sure it is a significant factor in his overall medical situation."

In January 1977 Dr. Gilsdorf examined claimant and opined:

"I feel that this man definitely must be considered, in view of his history and current status, a permanent total disability. He has multiple complicating

> factors in this disability but his main origin of disability is his truncal skeleton, that is, cervical, dorsal and lumbar spine. . . . His disability is obviously complicated by his psychiatric condition, precluding any significant chance of vocational rehabilitation.

On February 25, 1977 a Determination Order issued granting claimant an award for permanent total disability.

In September 1977 claimant attempted to have Dr. O'Toole, another of claimant's treating doctors, state that there was a causal relationship between claimant's meningitis and some dental problems. Dr. O'Toole reported:

> "I really feel that I have reached the limit of my patience with [claimant]. He has been frequently abusive during our contacts in the past and inasmuch as he has no significant ongoing medical problem that requires my close care in the immediate foreseeable future, I will ask him to seek medical help elsewhere."

In March 1980 Dr. Weinman performed an examination on claimant and opined:

> "[T]he fact that he walks very rapidly when I see him go by the window and doesn't walk very rapidly when he's in the room, has a great deal of pain and grimacing and the fact that his functional overlay clouds the examination, is very interesting.
>
> "I, too, feel his impairment is not total and that it would most accurately fall in the range of 20% of whole body permanent physical impairment and loss of physical function in the cervical spine area, and 25% whole body permanent physical impairment and loss of physical function of the whole body for his lumbar spine area."

Chart notes from Dr. Dunn from mid 1980 to early 1981 indicate that claimant's condition was improving with vitamin injections, physical therapy and reduction of pain medication. In August 1981 Dr. Dunn reported:

> "[Claimant] has undergone utilization of vitamin B-12 as well as some intermittent physical therapy and a drug reduction program. . . . I feel he has been able to be maintained in a much better status as a result of this and has been able to increase his activities also. I do not feel that he is sufficiently improved to be able to return to work and, in fact, it would probably be a mistake to do so as virtually any type of job that he would have to be employed with would involve the

use of his hands, arms, or legs and would potentially aggravate his situation."

On November 24, 1981 Dr. Gilsdorf reported that in his opinion claimant continued to be essentially unemployable. In December 1981 the Southern Oregon Medical Consultants examined claimant and opined:

> "There is marked functional overlay and it does interfere with the examination. It is felt by all three examiners that his subjective complaints far outweigh the findings. It is also recommended that an MMPI be obtained for a data base. It is felt that his work limitation would be that of light."

Doctors Bolton and McIntosh of the consulting panel approved claimant for release to do several light jobs in millwork.

For some reason, the employer "reopened" the claim in February 1981. On June 23, 1982 the Board issued an Own Motion Determination. 34 Van Natta 738 (1982). In that order the Board rejected the employer's suggestion that it reevaluate claimant's permanent disability. The order referred the request for redetermination of the permanent disability award to the Evaluation Division. On July 1, 1982 a Determination Order issued terminating claimant's award for permanent total disability and granting an award for 40% unscheduled disability. Claimant requested a hearing.

On October 18, 1982 Dr. Gilsdorf reported:

> "I feel he is restricted to the activity tolerances more probably of a light work status rather than light to medium, but by past description of physical activities, he is not capable of carrying on these activities for an eight-hour day."

At deposition Dr. Gilsdorf testified that claimant had consistently magnified his problems. Dr. Gilsdorf maintained, however, that in his opinion claimant could not sustain the physical activities required to work.

The employer had claimant under surveillance beginning in September 1979. The surveillance notes together with five reels of surveillance film indicate that claimant is capable of engaging in significant physical activity. Claimant was observed unloading and stacking firewood, working the better part of a day on his vehicles, chopping firewood, kneeling, bending, twisting, shoveling snow, and jacking up his vehicle. Records document that claimant sold 118 cords of firewood to a California company in 1980. Although the testimony is in conflict, because the Referee found claimant not credible, we accept the contrary testimony and find that claimant performed much of the work required to cut and prepare the firewood.

At hearing Dr. Dunn testified that in his opinion gainful employment for claimant would be fraught with difficulty both because of pain and the potential for worsening. Dr. Dunn conceded that claimant shows exaggerated responses to pain. Dr.

Dunn also noted that claimant's treatment had been successful in that medication has been reduced. As a result of the reduction in medication, claimant's ability to engage in physical activity has increased:

> "Q. We can infer that he is better able to handle what pain he has now--
>
> "A. I think that is true.
>
> "Q. -- than he was back in 1979?
>
> "A. I think that is true, yes.
>
> "Q. And with that given we could infer that he would--Assuming that pain is a factor in a person's functioning, we could assume that he is better able to function now than he was in 1980, is that right?
>
> "A. It should contribute to better functioning, certainly."

The Referee reviewed the case law and concluded that the employer has the burden of proving both that claimant is employable and that there had been a material change in circumstances. He held that while the employer had proven that claimant is employable, it had failed to prove that circumstances had changed since the time claimant was granted the award for permanent total disability. In other words, the Referee found that claimant was never permanently and totally disabled, but because he found that the employer had failed to prove that claimant's condition had changed since the award for permanent total disability, he was powerless to uphold a Determination Order reducing the permanent total disability award.

We disagree with the Referee's analysis. In Frank Ramsey, 36 Van Natta 877 (1984), we discussed both Harris v. SAIF, 292 Or 683 (1982), and Bentley v. SAIF, 38 Or App 473 (1979). We concluded:

> "[T]he quantum of proof that an employer/insurer is required to produce in this context [redetermination of a permanent total disability award] comes down to something like: What job is the claimant presently capable of performing, with such capacity being indicated either by evidence of improvement in the claimant's medical condition or by circumstantial evidence of the claimant's employability." 36 Van Natta at 881.

In this case, there is evidence that claimant's condition has improved. Dr. Dunn testified that claimant had reduced his drug intake and consequently was better able to handle his pain. He also testified that claimant should therefore be able to function better. In addition to the medical evidence that claimant's condition has improved, there is significant evidence that claimant is employable and has, in fact, been employed. The surveillance films and the surveillance notes convince us that claimant is capable of sustained physical activity. The fact that claimant was able to cut and sell large quantities of firewood indicates that he is employable.

Taking the medical evidence that claimant's physical condition has improved together with the evidence that claimant is capable of working, we conclude that the employer has sustained its burden of proving that claimant is no longer permanently and totally disabled.

ORDER

The Referee's order dated October 19, 1983 is reversed. The Determination Order dated July 1, 1982 is reinstated.

CURTIS M. LYON, Claimant
Myrick, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-04398
January 9, 1985
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Mongrain's order which set aside its denial of claimant's aggravation claim.

In summary, we find the facts to be:

(1) At the time of his July 1981 industrial injury, claimant did not have a rotator cuff tear. This was the opinion of his treating physician, was confirmed by an arthrogram and was a specific finding in a prior litigation order.

(2) It was discovered in February 1983 that claimant did have a left rotator cuff tear following a fishing trip.

(3) Claimant wants his 1981 industrial injury claim reopened for treatment, etc., of his 1983 rotator cuff tear.

The question, of course, is whether claimant has established a causal link between the former and the latter. The Referee found such a link established by Dr. Jacobsen's opinion and claimant's testimony.

We disagree. Dr. Jacobsen merely indicates that claimant may have aggravated a torn rotator cuff suffered in the industrial accident. He does not state that opinion to a reasonable certainty. Moreover, the basis for his opinion may be flawed because he seems to assume that there was a previous rotator cuff tear. However, as previously stated, the medical reports in the record indicate that a rotator cuff tear was ruled out following the 1981 industrial injury.

Claimant's testimony, though credible, is insufficient in our minds to establish the causal link between his 1981 injury, which did not result in a rotator cuff tear at that time, and his rotator cuff tear discovered in 1983.

ORDER

The Referee's order dated August 9, 1983 is reversed. The SAIF Corporation's denial dated April 7, 1983 is reinstated and affirmed.

Board Member Lewis Dissenting:

I respectfully dissent. The result reached by the majority is based solely upon the finding that, "At the time of his July 1981 industrial injury, claimant did not have a rotator cuff tear." (Emphasis in original.) I believe that finding is contrary to the evidence.

Dr. Jacobsen's arthrogram findings in 1983 were "compatible with a partial tear of the undersurface of the rotator cuff at the point of attachment on the greater tuberosity," and showed "irregularity of the greater tuberosity, compatible with previous rotator cuff injury and/or calcific tendonitis." (Emphasis added.) This medical evidence together with claimant's credible testimony that his shoulder injury never resolved make it more probable than not that claimant did have a rotator cuff tear in 1981. See Garbutt v. SAIF, 297 Or 148, 151-52 (1984). There is no contrary evidence, lay or medical, to refute claimant's evidence. I would affirm the Referee's order.

LEOKADIA W. PIWOWAR, Claimant
Francesconi & Cash, Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 82-09391
January 9, 1985
Order on Review

Reviewed by the Board en banc.

Claimant requests review of those portions of Referee Mulder's order that upheld the self-insured employer's August 31, 1982 and February 7, 1983 partial denials and concluded that claimant had not established entitlement to additional permanent disability, including permanent total disability. The self-insured employer cross-requests review of those portions of the Referee's order that required it to pay claimant permanent disability benefits awarded by a Determination Order up to the date of the Referee's order and awarded claimant a penalty of 25% of the amount due pending review of the Determination Order, but not paid. The issues are: (1) compensability; (2) extent of disability; (3) whether permanent disability awards granted by a Determination Order must be paid after a partial denial; and (4) penalties.

In August of 1980 and again in August of 1981 claimant sustained low back injuries at work. Claimant's claims were accepted for each of these incidents. During 1980, 1981 and 1982 claimant was examined by numerous physicians, none of whom were in complete agreement as to the etiology of claimant's back problems. Various suggested diagnoses included a herniated lumbar disc, generalized osteoarthritis of the spine, rheumatoid spondylitis, discogenic spondyloarthrosis, osteoparosis and chronic lumbar/dorsal strain. Notwithstanding the diverse opinions as to the nature of and reason for claimant's back problems, the treating and examining doctors generally agreed in late 1982 that claimant's condition was stationary.

On August 31, 1982 the employer sent the first of two partial denials at issue in this case. This first partial denial denied continued palliative chiropractic care.

Claimant's claim was closed by a Determination Order dated December 13, 1982 that granted claimant an award of 128° for 40% unscheduled permanent partial disability. Claimant requested a hearing on this Determination Order on December 27, 1982.

On January 20, 1983 Dr. Edward E. Rosenbaum, internist and rheumatologist, examined claimant and reported as follows: All of claimant's back impairment was due to the natural progression of her ankylosing spondylitis which existed before her 1980 and 1981 industrial injuries; the ankylosing spondylitis was not caused or worsened (except possibly in a temporary symptomatic sense) or accelerated by the minor industrial back strains in 1980 and 1981; and, instead, those back strains had fully resolved without any resulting permanent impairment "due to," ORS 656.214(5), those injuries. Subsequently, most of the doctors who had previously treated or examined claimant indicated agreement with Dr. Rosenbaum's findings and conclusions.

Upon receipt of Dr. Rosenbaum's report, the employer first suggested the possibility of getting the Evaluation Division to reconsider its December 13, 1982 Determination Order. That suggestion required claimant's cooperation because claimant had previously filed a hearing request and because ORS 656.268(4) provides that the Evaluation Division lacks authority to reconsider a Determination Order after a hearing request has been filed. Claimant's cooperation was not forthcoming.

Consequently, the employer then issued the second partial denial in issue in this case on February 7, 1983:

> ". . .Georgia Pacific is denying that your injury of August 31, 1981 resulted in anything other than a temporary symptom flareup. Specifically, Georgia Pacific denies you experienced any permanent impairment as a result of the August 1981 incident."

The Referee found, and we find, that the preponderance of the persuasive evidence is in accord with Dr. Rosenbaum's opinion that claimant's back impairment is due to an underlying noncompensable condition that was neither caused nor aggravated by her employment or the soft tissue injury in 1981. This finding is, of course, completely inconsistent with the Determination Order that awarded claimant 40% permanent disablity.

The problem is that, when it issued its February 7, 1982 denial, the employer then stopped making monthly payments to claimant on the Determination Order's award of permanent disability. The Referee apparently reasoned that a denial cannot terminate the duty to pay compensation awarded by Determination Order because he ordered the employer to comply with the Determination Order and penalized the employer for not having done so. The employer argues that something is obviously wrong with saying, on the one hand, that it has been established that claimant suffered no permanent impairment as a result of her compensable injuries, while saying, on the other hand, that the employer must comply with an erroneous Determination Order to pay claimant $10,880.

We conclude that the law does not require such an absurd result for at least three reasons. First, no statute requires that an award made by the Evaluation Division in a Determination Order be paid pending a requested hearing on that Determination Order. ORS 656.313(1) and (2) require only that awards made by a Referee or by the Board be paid pending further appeal. There is

certainly a reasonable basis upon which the legislature could have distinguished between a Determination Order and a litigation order as far as the duty to pay pending further review; specifically, the relatively ex parte nature of the Evaluation Division process that produces a Determination Order, see Carr v. SAIF, 65 Or App 110 (1983), versus the confrontation rights involved in the litigation process, see Edwin R. Cantrell, 36 Van Natta 312 (1984). The statutory duty to pay pending appeal of only certain types of orders reflects a legislative choice "to provide for judicial review of only certain aspects of a [litigation] decision of [a Referee] and the Board." Wisherd v. Paul Koch Volkswagen, 28 Or App 513, 516 (1977). We think it is reasonable to assume that, if the legislature had also intended to deprive employers and insurers of meaningful review of an ex parte decision of the Evaluation Division, i.e., a Determination Order, such a provision would have been expressly included in the statute.

Even if the law provided that Determination Orders should generally be paid pending hearing, there is a second reason why that generalization is inapplicable in this case. 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 a claim, except where the right to compensation is denied by the insurer or self-insured employer."

Paraphrasing the statute, compensation due or allegedly due under ORS chapter 656 need not be paid if the right to the compensation in question has been denied. That this statute authorizes employers and insurers to terminate temporary disability benefits upon denying a claim is beyond cavil. Claimant has advanced no authority, and we have found none, that would compel a different result, under the facts of this case, for termination of permanent disability benefits. It follows that the employer's February 7, 1983 denial terminated its duty to continue paying claimant the permanent partial disability benefits awarded by the December 13, 1982 Determination Order.

The third line of authority for the proposition that the employer in this case was not required to continue paying permanent partial disability benefits after it issued its post-closure partial denial of those benefits comes from three recent decisions of the Court of Appeals: Maddocks v. Hyster Corp., 68 Or App 372 (1984); Roller v. Weyerhaeuser Co., 67 Or App 583 (1984); and Safstrom v. Reidel International, Inc., 65 Or App 728 (1983). These cases hold that an employer/insurer is not permitted to issue a partial denial before claim closure when the denial would circumvent the Evlauation Division's statutory claim closure duties. However, an employer/insurer is permitted to issue a partial denial after claim closure. That is exactly what the exployer in this case did.

The matter is then ripe for litigation. Safstrom, 65 Or App at 731-32; Roller, 67 Or App at 587. But it is not completely clear exactly what form of litigation the court has in mind. "To hold, as we do, that employer's [pre-closure] partial denial was improper here does not preclude it from litigating the issue at the time of closure. . ." Roller, 67 Or App at 587. Since an employer/insurer is required to submit a claim for closure by the

Evaluation Division, and since the ORS 656.268 claim closure process at the Evaluation Division does not involve any form of litigation, we interpret the court's reference to "litigating . . . at the time of closure" to authorize an employer/insurer to do just what the employer did in this case once it became apparent that reconsideration by the Evaluation Division was not possible: To issue a post-closure partial denial, to cease paying the benefits it had denied and thus to set the stage for a litigation decision based on the rights to be heard and to confront, etc.

The alternative possible interpretation of the Safstrom line of cases -- that an employer/insurer is free to issue a post-closure partial denial of benefits awarded by Determination Order, but must nevertheless continue to pay the benefits in dispute pending a hearing -- simply makes no sense. There is no statute that so provides. There is a statute, ORS 656.262(2), that provides to the contrary. Moreover, such an interpretation of the Safstrom cases attributes to the Court of Appeals the intent of insulating a Determination Order that is erroneously adverse to an employer/insurer from meaningful review.

Claimant here argues that the Determination Order, which we now know is erroneous, should be surrounded by just that kind of insulation. Claimant argues that the employer's only remedy after it received information that indicated that the Determination Order was erroneous was to cross-request a hearing on the Determination Order and continue paying compensation pursuant to that order pending hearing. If that position is correct, we should be willing to candidly admit just how illusory and ineffectual that "only remedy" will be.

First, that "remedy" would not even be theoretically available in some situations. Suppose a claim were accepted, processed and closed by Determination Order that awarded compensation for permanent total disability. Suppose no party requested a hearing on that Determination Order within the statutory one-year period. Suppose the employer/insurer later received reliable information to the effect that the industrial injury claim was totally fraudulent. A backup denial could be issued. Bauman v. SAIF, 295 Or 788 (1983); Wilkins v. SAIF, 66 Or App 415 (1984). But if such a denial would not suspend the duty to pay benenfits awarded by the Determination Order, all that the allegedly fraudulent claimant would have to do to guarantee lifetime receipt of possibly underserved benefits would be to not request a hearing on the denial.

Second, even if the timing made it theoretically possible for the employer to request a hearing on the Determination Order, it is not realistic to expect a hearing decision before the Determination Order's award has been paid in full. Under the best of circumstances, the average delay from hearing request to hearing decision is about seven to nine months. Board rules provide for the possibility of an expedited hearing at the request of a claimant, OAR 438-06-110, 438-06-075, but there is no provision for an expedited hearing at the request of an employer/insurer. Under the payment formula in ORS 656.216(1), this claimant's $10,880 award would likely have been paid in full while this employer waited for any hearing request it filed to be heard and decided. We cannot believe that is what the Court of Appeals intended in Safstrom, Roller and Maddocks.

Because we conclude that the employer was within its rights to cease paying permanent partial disability benefits when it issued its partial denial, it follows that the penalty assessed by the Referee was improper.

ORDER

The Referee's order dated July 7, 1983 is affirmed in part and reversed in part. That portion of the Referee's order that affirmed the self-insured employer's partial denials of August 31, 1982 and February 7, 1983 and denied claimant's request for permanent disability is affirmed. That portion of the Referee's order that ordered the self-insured employer to pay permanent partial disability benefits to claimant between February 7, 1983 and the date of the hearing and that awarded a penalty and attorney fee is reversed.

Board Member Lewis Dissenting:

I respectfully dissent.

I believe that the majority order errs in several important respects. In general, the majority order ignores the purpose of the Workers' Compensation law. More particularly, the so-called partial denial is in reality a backup denial and is precluded by Bauman v. SAIF, 295 Or 788 (1983). Even if this is a permissible denial, the statutes do not permit the employer to unilaterally terminate payment of benefits ordered paid by a Determination Order. The employers' proper remedy was to challenge the Determination Order at hearing and litigate what portions of claimant's permanent disability are attributable to her compensable injury. Roller v. Weyerhaueser Co., 67 Or App 583 (1984).

The purpose of ORS 656.012 is to provide sure, prompt and adequate benefits to injured workers and to provide a fair and just administrative system for delivering those benefits. To allow an employer or insurer to do as this employer has done thwarts the essential purpose of the system. In this case, the employer has accepted claimant's injury. The Workers' Compensation Department has issued a Determination Order that grants claimant an award for permanent disability. Claimant requested a hearing to protest the extent of disability awarded. The employer had the same opportunity to request a hearing to challenge the Determination Order. ORS 656.283(1). However, rather than following the proper procedure for challenging the award, the employer chose to unilaterally terminate payment on the Determination Order by issuing a "partial denial". Approving such unilateral actions allows an employer to cutoff awards to claimants simply because of allegedly newly developed evidence which purports to show that the claimant was not entitled to the award. Thus, the employer's whim is allowed to replace the orderly system provided for in the statute.

As I have previously stated, I believe the legislature only intended to allow employers/insurers to deny and thereby terminate benefits on claims before they are accepted. Patrick Hannum, 36 Van Natta 1680 (1984) (Lewis, Dissenting); see ORS 656.262(6). Of course if a claimant makes a new claim, whether for an aggravation, a different condition or additional medical bills, the insurer is free to deny and not pay for that claim.

Nevertheless, I believe, that once an insurer has accepted a claim, it must continue to pay on that claim as required by law or as ordered by the Department, a Referee, the Board or the courts, until some authority has excused it from paying.

Even if the majority is correct that an employer/insurer may, by issuing a denial, unilaterally terminate benefits ordered paid under a Determination Order, this denial cannot have that effect because it is a backup denial which is precluded by Bauman, supra.

> "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." 295 Or at 794.

Claimant injured her back at work and the back injuries were accepted by the employer. Following the Determination Order which granted claimant a 40% unscheduled disability award, the insurer issued what the majority terms a partial denial. However, despite the fact that the denial is written in terms which suggest a partial denial, it is apparent that the employer is at this late date attempting to deny compensability of the very back condition which it accepted at the outset. Bauman is clear. The employer's denial is improper and should be set aside.

Finally, as noted, the law provides a remedy for the employer. It should have requested a hearing to challenge the Department's finding on extent of disability. The Court of Appeals has suggested that a hearing on extent, rather than a partial denial, is the appropriate vehicle for determining what portions of a claimant's permanent disability are attributable to the compensable injury and therefore compensable and which portions are not. Roller v. Weyerhaueser, supra at 587 ; see Barrett v. D & H Drywall, 70 Or App 123, 125 (1984). The majority's fear that if employers/insurers were not allowed to unilaterally terminate ordered awards by denial, a claimant could preclude an employer from challenging a permanent total disability award by refusing to request a hearing to challenge the denial is groundless. ORS 656.283(1) specifically allows any party to request a hearing on any question concerning a claim. Unquestionably, in the hypothetical, the insurer could request a hearing whether or not the claimant challenged the denial.

For all the reasons stated in this dissent I would affirm the Referee's order.

ROLAND R. SKOGLIE, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-12239
January 9, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Podnar's order which awarded as a penalty a sum equal to 10% of temporary total disability compensation ordered paid for the period from December 20, 1983 through January 22, 1984, plus $100 as an attorney's fee in obtaining the penalty. The sole issue on review is whether the Referee erred in assessing a penalty and associated attorney's fee.

Claimant was compensably injured on December 30, 1981. A spinal fusion was performed on June 9, 1982. Unscheduled awards total 50% permanent partial disability.

Claimant attempted to return to work as a flagger and dump truck driver in late October 1983. Dr. Samuel, the treating chiropractor, wrote to SAIF on December 22, 1983 that the work trial, which entailed flagging, had been unsuccessful and that the hours of standing had increased stiffness in the back and tightened the hamstrings, proving that a job of that nature would not suffice for claimant.

Dr. Samuel next reported to SAIF on January 13, 1984. He stated that claimant notified him on December 20, 1983 that the work trial had been unsuccessful. Dr. Samuel noted that claimant was objectively worse and asked that the claim be reopened. The Referee found that this report triggered SAIF's duty to pay benefits. He ordered SAIF to pay temporary disability benefits for the period between December 20, 1983 and January 22, 1984. He also assessed the penalty and associated attorney's fee for SAIF's failure to pay temporary disability benefits during that period.

SAIF paid interim compensation for the period from January 23, 1983 through March 6, 1983. SAIF denied compensability of the aggravation claim on March 9, 1983. The denial was upheld by the Referee.

The only question before us is the reasonableness of SAIF's failure to pay interim compensation for the period December 20, 1983 through January 22, 1984, and hence, whether the Referee's award of a penalty and associated attorney's fee were appropriate. The only evidence relevant to that question is that pertaining to SAIF's conduct and its knowledge and motivation at the time of that conduct. We find nothing in the relevant evidence before us to suggest that SAIF acted unreasonably. Accordingly, that portion of the Referee's order awarding a penalty and attorney's fee for failure to timely pay temporary total disability compensation is reversed.

ORDER

The Referee's order dated May 30, 1984 is affirmed in part and reversed in part. Those portions of the Referee's order which directed the SAIF Corporation to pay claimant a 10% penalty on temporary total disability compensation for the period from December 20, 1983 through January 22, 1984 and claimant's attorney $100 as a fee in obtaining the penalty are reversed. The remainder of the Referee's order is affirmed.

CURTIS WARRICK (Deceased), Beneficiaries of
Pozzi, et al., Attorneys
Roberts, et al., Defense Attorneys

WCB 81-09236
January 9, 1985
Order on Review (Remanding)

Reviewed by Board Members Barnes and Ferris.

The self-insured employer requests review of Referee Knapp's order which awarded claimant's attorney a fee of $1500, payable by the employer. The issues are whether the Board has authority to review the Referee's award and, if so, the reasonableness of that award.

Claimant filed a claim for death benefits on September 8, 1981 following the death of her husband from cardiac arrest on August 21, 1981. The employer denied the claim on September 22, 1981. Claimant signed a fee agreement with her attorney on October 5, 1981. On October 8, 1981 a request for hearing was filed. On February 26, 1982 the employer withdrew its denial and accepted the claim.

The parties appeared before the Referee on August 10, 1982 for the sole purpose of determining the amount of attorney's fees to be awarded to claimant's attorney. Claimant's attorney submitted an affidavit detailing 23.5 hours of work on the case and requested a fee of $2500. The employer submitted a packet of documents as exhibits on the issue of attorney fees. At the "hearing" there was a great deal of argument about whether claimant's attorney had been instrumental in producing the delayed acceptance of the claim for death benefits. However, no sworn testimony was taken from any witness.

The Referee issued an order awarding a $1500 fee pursuant to OAR 438-47-015, which provides:

> "If an attorney is instrumental in obtaining compensation for a claimant without a hearing before a referee, a reasonable attorney fee may be allowed or approved. The amount of the fee shall be determined in a summary proceeding by a referee."

Claimant argues that the Board should not review the Referee's order in this case because OAR 438-47-015 provides only for a "summary proceeding by a referee." Claimant contends that the apparent intent of the rule is for a Referee's decision in this context to be final and nonreviewable, except possibly by a circuit court pursuant to ORS 656.388(2).

We disagree. If there is a "question concerning a claim" within the meaning of ORS 656.283(1) and ORS 656.704(2), any party may request a hearing which results in a decision of a Referee. See Schlecht v. SAIF, 60 Or App 449 (1982); Reynolds-Croft v. Bill Morrison Co., 55 Or App 487 (1982). If dissatisfied with the Referee's decision, any party may request Board review pursuant to ORS 656.295. Thus, except as otherwise expressly provided by statute, it would appear that the legislature generally intended that any decision by a Referee would be reviewable by the Board. It is, therefore, doubtful that it would be consistent with ORS chapter 656 for the Board to adopt a rule which purports to provide for a Referee making a final, nonreviewable decision.

Against the backdrop of this apparent legislative intent, we believe that the better interpretation of the last sentence of OAR 438-47-015 -- "The amount of the fee shall be determined in a summary proceeding by a referee" -- is that it is advice to litigants and Referees that hearings solely on attorney fees should be kept as brief and simple as possible.

One limit on simplicity, however, is that there must be a record sufficient for review. In this case, for example, the employer argues that it voluntarily accepted the claim for death benefits without any contact with claimant's attorney, but there is no evidence (as distinguished from unsworn representations) on this point, one way or the other, in the record. It is thus

necessary to remand to the Referee so that the parties can offer evidence in support of their representations on the role of claimant's attorney in obtaining acceptance of this claim versus whether the employer acted voluntarily and independently.

ORDER

The Referee's order dated September 15, 1982 is vacated and this matter is remanded to the Referee for further proceedings consistent with this order.

BERNICE V. ANDES, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05381
January 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Michael Johnson's order which upheld the SAIF Corporation's denial of her low back injury claim. On review, claimant contends her claim is compensable.

The Board affirms the order of the Referee with the following comment. After conducting our de novo review of the record, we conclude that claimant has failed to prove the compensability of her low back injury claim. We do not interpret the Referee's order as a conclusion that the work incident did not take place. Rather, we interpret his analysis to be that the "most neutral" witness did not corroborate an important fact which was in dispute. Since the Referee found nothing about any of the witnesses' demeanor or presentation to indicate dishonesty, this "most neutral" witness' failure to corroborate claimant on this fact cast doubt on claimant's entire version of the incident. Moreover, this doubt would extend to the history she gave to her treating physician, which formed the basis of his opinion.

ORDER

The Referee's order dated August 10, 1984 is affirmed.

ELSIE L. BURR, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-03864
January 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Danner's order which declined to set aside an April 2, 1984 Determination Order as prematurely issued, and declined to impose penalties/attorney fees for the SAIF Corporation's alleged unreasonable delay in payment of chiropractic billings from Dr. Schmidt. The issues on review are premature claim closure and the alleged unreasonableness of SAIF's delayed payment of compensation.

The Board affirms and adopts the Referee's well-reasoned order, with the following additional comments concerning the penalty/attorney fee issue.

SAIF's conduct in this case was not unreasonable. SAIF had reasonable grounds to question the frequency of claimant's chiropractic treatment. It paid the undisputed portions and

requested justification from Dr. Schmidt for the remainder of claimant's monthly treatments. Upon receipt of Dr. Schmidt's justification, SAIF continued its inquiry by requesting an opinion from its chiropractic consultant and by promptly scheduling an examination with the Orthopaedic Consultants and Dr. Hughes, a psychiatrist. After receiving Orthopaedic Consultants' report and Dr. Hughes' separate report on or about February 23, 1984, SAIF apparently decided that all of claimant's chiropractic treatment was justifiable, as evidenced by its payment of all outstanding billings on April 16, 1984 (with the exception of one billing which had been received immediately prior to the hearing, which is not material to the issues presented herein). During all of this time, claimant was receiving regular chiropractic care with Dr. Schmidt, all of which was paid for by the time the hearing convened.

Under these circumstances, we conclude that SAIF acted reasonably and complied with its claims processing obligations. Ronald R. Brenneman, 36 Van Natta 1184 (1984); Kevin Bethel, 36 Van Natta 1060 (1984).

ORDER

The Referee's order dated July 24, 1984 is affirmed.

ORVILLE L. CARLSON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-07256
January 15, 1985
Order Dismissing Request for Review

The SAIF Corporation has requested review of Referee Baker's order upholding its denial of claimant's aggravation claim. The sole issue in this case is the compensability of claimant's aggravation claim. The SAIF Corporation prevailed on this issue at hearing and, therefore, is not an aggrieved party. We previously have held that a party who is not aggrieved by a Referee's order has no standing to appeal therefrom. Elmer W. Baird, 34 Van Natta 965 (1982). Therefore, we dismiss the appeal with the following comments.

This case arose from an incident occurring on or about May 27, 1981 while claimant was engaged in lifting and stacking cans for the employer, Agripac. Claimant alleges that his work activities that day caused back pain, rendered him disabled and required medical services. Previously, in 1979, claimant had sustained upper and mid back injuries arising from a fall from the loading dock while employed by the same employer. A claim arising from that fall was accepted and processed to closure with an award of 32° for 10% unscheduled permanent disability. Prior to the 1979 industrial injury, claimant had received treatment for back pain and had been diagnosed as having osteoarthritis and scoliosis.

The lifting and stacking incident of May 1981 gave rise to a hearing in which the issue was whether claimant's disability and need for medical services (if any) were due to an aggravation of his 1979 injury, a new injury, or his preexisting, noncompensable conditions. Although these issues arose from the same set of operative facts, there were multiple requests for hearing and different WCB (Workers' Compensation Board) case numbers assigned to the requests. The appeal from the aggravation claim denial was assigned the number 81-07256 and the new injury claim was assigned the number 81-07257.

The claims were heard in tandem by Referee Baker. The Referee found that claimant was at least temporarily disabled and required medical services as a result of the May 1981 work activities and concluded that claimant had sustained a new injury. Accordingly, in an order dated April 9, 1982, bearing WCB Case No. 81-07256, the Referee affirmed SAIF's denial of the aggravation claim, and in a separate order of the same date, bearing WCB Case No. 81-07257, he set aside SAIF's denial of the new injury claim.

In a document dated May 7, 1982, but received by the Board on May 11, 1982, SAIF requested review of WCB Case No. 81-07256, the aggravation claim. Claimant initially moved the Board to dismiss the appeal because it was not timely filed. We denied that motion because the documents in this case reveal that although SAIF's request for review was received by the Board after expiration of the 30 days from the date of the Referee's order, the request was mailed before the expiration date. We have previously held that the date of mailing controls, not the date of receipt. Michael J. King, 33 Van Natta 636 (1981); Barbara Rupp, 30 Van Natta 556 (1981), and, therefore, denied the motion to dismiss the appeal for lack of timeliness.

Claimant requested the Board to reconsider its order denying claimant's motion to dismiss and more fully briefed the timeliness issue, however, we issued an Order on Reconsideration reaffirming our denial of the motion to dismiss.

Having reviewed the record in its entirety we reach the conclusion that claimant's motion to dismiss should have been granted. SAIF responded to claimant's request for reconsideration of his motion to dismiss and alleged that the SAIF Corporation "had notified the Workers' Compensation Board that review was being sought on Workers' Compensation Board Case No. 81-07257 and not Workers' Compensation Board Case No. 81-07256." It now appears that after expiration of the 30 day appeal period and without notice to claimant or claimant's counsel, someone on behalf of the SAIF Corporation telephoned a clerical person at the Board and prevailed upon that person to add to SAIF's request for review in case number 81-07256 the numbers "81-07257."

ORS 656.289(3) in relevant part provides:

> "(3) The order [of the Referee] 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...." (Emphasis added.)

ORS 656.295(1) provides:

> "(1) The request for review by the board of an order of a referee need only state that the party requests a review of the order." (Emphasis added.)

Neither ORS 656.295(1) nor the Board's administrative rules prescribe with much specificity what a party must state in order to make out a request for review. In keeping with the policy declared in ORS 656.012(2)(b), the Board's practice has been to tolerate reasonable informality. However, the reference in ORS

656.289 and 656.295 to "the order" or "an order" requires that the party requesting review designate the order it wishes to have reviewed. If it does not, any order not designated in the request for review becomes final by operation of law.

Here, the aggravation and new injury claims were assigned different case numbers and the Referee issued separate orders disposing of those separate claims. SAIF submitted only one request for review and that request for review designated only WCB Case No. 81-07256, the aggravation claim on which it prevailed at hearing. Since SAIF can take no further relief than that which it received at hearing with respect to that case, it has no standing to request review, and its appeal of that case must be dismissed.

SAIF's attempt, in an untimely manner and without notice to the opposing party, to correct its error and perfect an appeal of WCB Case No. 81-07257 by telephoning a Board employe and requesting the correct case number to be penned onto the pending request for review was ineffective to prevent that order from becoming final by operation of law.

This case must be distinguished from those cases which are consolidated at hearing resulting in one order disposing of the issues raised under all the case numbers involved as designated in the one order. In such a case, the order is an inseparable whole notwithstanding multiple case numbers, and a request for review that designates only one of the case numbers nevertheless prevents the entire order from becoming final and allows the Board to exercise its jurisdiction over the entire order.

As mentioned earlier, consistent with the policy favoring resolution of workers' compensation cases with a minimum of adversarial tactics, the Board has allowed reasonable informality in the litigation of claims. However, this case by running afoul of the express provisions of ORS 656.289(3) and 656.295(1) goes beyond the pale of reasonable informality. For these reasons, the purported appeal in WCB Case No. 81-07257 must be dismissed. (See separate order under that case number decided this date.)

ORDER

The SAIF Corporation's request for review dated May 7, 1982 and received by the Board on May 11, 1982 is dismissed.

ANTONIO O. CASTENEDA, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Garrett, et al., Defense Attorneys

WCB 84-07875, 84-05334 & 84-02608
January 15, 1985
Order of Dismissal

Claimant has requested review of Referee Daron's orders on reconsideration in the above referenced cases. The Board dismisses for lack of jurisdiction.

On November 30, 1984 the Referee issued identical orders in the three referenced cases dismissing the requests for hearing on the ground that claimant had failed to appear at hearing. Claimant's attorney requested reconsideration on December 20, 1984. The Referee issued identical orders denying reconsideration in all three cases on January 2, 1985. Claimant requested review of the January 2, 1985 orders on January 4, 1985.

ORS 656.289(3) provides that a Referee's order becomes final if no party requests Board review within 30 days of the date the order is mailed. No party requested review of the Referee's November 30, 1984 orders within 30 days. Unfortunately, the November 30, 1984 orders were not abated. Consequently those orders became final by operation of law and the Referee lost jurisdiction over the claims. Therefore, the Referee's orders denying reconsideration are a nullity. Any request for review of those orders denying reconsideration is also a nullity.

ORDER

Claimant's requests for review in the above referenced cases are dismissed.

MINDY L. CHAPMAN (CRONKITE), Claimant
Bischoff & Strooband, Claimant's Attorneys
Gilah Tenenbaum, Defense Attorney

WCB 83-12211
January 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee Neal's order that set aside its denial of claimant's medical services claim for chiropractic treatments. The issue is the reasonableness and necessity of claimant's requested treatment.

On December 22, 1981 claimant submitted a Form 801 claiming that she injured her low back while working as a nurses aide on October 28, 1981. Evidently claimant did not seek medical treatment for this injury until December 2, 1981. X-rays interpreted by Dr. Markee on December 2, 1981 showed that claimant had a normal lumbar and thoracic spine. Claimant's claim was accepted by the insurer.

On December 30, 1981 Dr. Matthews examined claimant. He concluded that claimant had a normal spinal examination, although she complained of low back pain without radiculopathy. Dr. Matthews opined that claimant's chronic tension was a significant factor in her condition. Dr. Matthews found claimant medically stationary on February 1, 1982 and released her for return to work. He opined that claimant had no permanent impairment. Claimant returned to light duty work.

On February 15, 1982 claimant returned to Dr. Matthews. His chart notes show that claimant requested that he take her off work again, but that he declined to do so because there was not medical justification. On February 22, 1982 claimant's claim was closed by a Determination Order amended by a second Determination Order issued February 24, 1982, neither of which awarded any permanent disability.

Another of Dr. Matthews' chart notes, on March 8, 1982 recounts a communication from the insurer whereby the doctor noted that claimant had refused to return to light work that was within her medical and physical capabilities.

Between May and September of 1982 claimant was treated by Dr. McIlvaine, a chiropractor. Dr. McIlvaine's reports show that claimant's back pain was improving. Claimant was treated by Dr. Narus, an osteopath, between August and October of 1982. His treatment approach was to prescribe physical therapy and a

combination of pain medications. The record shows that claimant missed a majority of her scheduled physical therapy sessions. On October 18, 1982 Dr. Narus opined that claimant's failure to return to work was based upon some factors other than physical. He did not elaborate upon what those factors may have been.

An independent medical examination conducted by Dr. Weiss on December 13, 1982 was normal, although claimant did complain of back pain. Dr. Weiss encouraged claimant to increase her activity. The Orthopaedic Consultants panel examined claimant on March 9, 1983 and concluded that claimant was medically stationary and that her impairment from the October 1981 injury was "zero." Dr. Narus concurred "wholeheartedly" with the Orthopaedic Consultants on April 26, 1983.

Claimant had requested a hearing on the Determination Order. On June 20, 1983 Referee Brown approved a stipulation entered into between claimant and the employer and insurer that provided: that claimant had fully and completely recovered from her industrial injury; that the Determination Orders were affirmed; that claimant would receive $3,200; that claimant's attorney would receive $500 paid by the insurer; and, that claimant's request for hearing was dismissed with prejudice.

Claimant returned to see Dr. McIlvaine on or about September 15, 1983. Dr. McIlvaine responded to the insurer on September 19, 1983 that he had not treated claimant since September 1982 and that claimant had told him that she was seeking treatment on the advice of her attorney to "keep her claim open." Dr. McIlvaine further stated that he was unaware of the previous stipulation and that he did not treat claimant nor authorize time loss. The record clearly shows that Dr. McIlvaine no longer considered himself to be claimant's treating physician. On December 14, 1983 the insurer issued the first of three denials in issue, which denied the compensability of care provided by Dr. McIlvaine on the ground that claimant had stipulated that she had completely recovered and needed no care.

On February 25, 1984 Dr. McIlvaine wrote to claimant's attorney's office, expressing offense at having become involved in claimant's workers' compensation claim. He clearly stated that he had no idea of claimant's present condition as he had not treated her for over one year. On March 26, 1984 the insurer issued the second denial, denying compensability of care by Dr. McIlvaine on the ground that it was not reasonable or necessary. We conclude that based upon Dr. McIlvaine's apparent offense at even being peripherally involved in claimant's case, treatment by him was probably not even possible.

Twelve days prior to the hearing claimant was examined by Dr. Churchill, chiropractor. In his report dated June 7, 1984 Dr. Churchill recited that claimant had a normal range of back motion, however, with pain, some tenderness on palpation, and that she had in his opinion suffered an "excerebration" of her 1981 injury with "dysarthoskenetic lesions" at L4-5, (which he explained as meaning that one side of the vertebra moved too much and the other side not enough.)

On June 14, 1984 the insurer denied compensability of treatment by Dr. Churchill based upon the stipulation. We agree that the denial should be upheld, but not based upon the stipulation.

The first two denials denied claimant's requests for treatment by Dr. McIlvaine. We conclude from the evidence that claimant did not request treatment from Dr. McIlvaine, or, if she did, he refused it. The Referee was correct in upholding those denials and we do likewise, for the reason that treatment by Dr. McIlvaine is neither reasonable nor necessary.

The insurer has based its denial of the compensability of Dr. Churchill's treatment upon the June 1983 stipulation. To the extent that that stipulation purports to foreclose claimant from exercising her lifetime rights to reasonable and necessary medical services under ORS 656.245, it is an invalid release under ORS 656.236(1). EBI v. Freschettz, 71 Or App 526 (1984). We find, however, that based upon the pursuasive evidence claimant has not established that treatment by Dr. Churchill is reasonable or necessary. Dr. Churchill's opinion, secured only twelve days before the hearing, is directly contrary to that of every other health care provider to have examined claimant over the course of her treatment for what appears to have been a slight injury. We accord it little weight. On de novo review we conclude that claimant has not shown that she requires care for any compensable condition.

ORDER

The Referee's orders dated June 28, 1984 and July 27, 1984 are affirmed in part and reversed in part. Those portions of the Referee's orders that set aside the insurer's denial dated June 14, 1984 and awarded claimant's attorney a fee for prevailing on the denial are reversed and the insurer's denial of June 14, 1984 is reinstated and affirmed. The remainder of the Referee's orders are affirmed.

SUSAN L. DEW, Claimant
Cowling & Heysell, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08382
January 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Mongrain's order that set aside its denial of claimant's claim for injury to her left leg (knee) and awarded claimant interim compensation pursuant to the Court of Appeals opinion in Bono v. SAIF, 66 Or App 138 (1983). The issue is compensability.

The Board affirms and adopts that portion of the Referee's order that set aside SAIF's denial of claimant's left knee claim.

The Referee's order regarding interim compensation was correct at the time it was entered, July 13, 1984. However, the Supreme Court reversed the Court of Appeals on December 28, 1984. Bono v. SAIF, 298 Or 405 (1984). Under the Supreme Court's Bono case, claimant is entitled to interim compensation only for those periods of time, if any, that she "left work," as that term is used in ORS 656.210(3). Id., Slip Op at 4. Because we affirm the Referee's order setting aside SAIF's denial and remand claimant's claim for processing, in this particular case SAIF is in the best position to determine the amount, if any, of interim compensation to which claimant is entitled.

ORDER

That portion of the Referee's order dated July 13, 1984 granting claimant interim compensation is reversed. The remainder of the Referee's order is affirmed. Claimant's claim is remanded to the SAIF Corporation for processing pursuant to law, including the payment of any interim compensation to which claimant may be entitled. Claimant's attorney is awarded $500 for services on Board review for prevailing on the issue of the denial, to be paid by the SAIF Corporation.

MAURICE L. EDWARDSON (Deceased), Claimant
Bloom, Marandas & Sly, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-04745
January 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The Personal Representative of the claimant's estate requests review of Presiding Referee Daughtry's order that dismissed the Personal Representative's request for a hearing on the issue of permanent partial disability arising out of the deceased claimant's compensable heart condition. The issue is whether the Personal Representative has standing to request a hearing.

Claimant suffered a myocardial infarction on October 11, 1977 and claimed workers' compensation benefits. His heart attack was found compensable by a Referee and the Board, who were affirmed by the Court of Appeals on November 9, 1981. Between December 22, 1981 and February 4, 1982 claimant participated in a vocational rehabilitation program.

On March 3, 1982 the Evaluation Division directed the SAIF Corporation to secure a claim closure medical examination. That examination was ultimately scheduled for June 10, 1982. There is no evidence that any party intentionally sought to delay the examination. On March 22, 1982 claimant began a new job as a motel desk clerk.

On May 10, 1982 claimant suffered a massive myocardial infarction, from which he died the following day. SAIF submitted a Form 1503 for claim closure to the Evaluation Division on June 28, 1982. A Determination Order issued July 12, 1982 granted an award for temporary disability, which the evidence shows had been paid, in fact slightly overpaid, before the claimant's death. The Determination Order also found that claimant's death from his heart attack entitled his "beneficiaries" to an award of compensation for a fatal injury.

Claimant had no spouse and no children. It is stipulated that the deceased claimant's mother is the personal representative of claimant's estate. Claimant's mother seeks a hearing to determine the amount of permanent disablity award that claimant would have been granted had claimant survived.

The Referee found that,

> "[T]he statutes provide for a continuation of certain benefits, following the death of the injured worker, to those people who would normally have looked to that worker for their support. The workers'

compensation scheme is not intended to create an 'estate' for the deceased worker which can be distributed, according to general probate law, to individuals who are statutorily entitled to receive the benefits but who were not truly dependent upon the deceased injured worker. (Emphasis in original.)

"The plan was never intended to benefit all persons who might arguably be entitled to some sort of relief. Leech v. Georgia-Pacific Corp., 259 Or 161 (1971).

". . . . .

"The workers' compensation scheme is remedial and, therefore should be liberally construed. [Citation omitted.] . . . The plain language of a statute controls, if there is no ambiguity therein, but, if an ambiguity exists, it must be resolved in favor of compensation. Fossum v. SAIF, 289 Or 787, 792 (1982).

". . . . .

"I find no ambiguity in ORS 656.218 wherein it specifies those individuals who are entitled to file a Request for Hearing and to pursue the matter to final determination. The individuals having that power are limited to those who 'would have been entitled to death benefits if the injury causing the disability had been fatal.' Those individuals are identified in ORS 656.204 as being the 'spouse', 'children', or 'dependent.' I find the statutory scheme to be unambiguous and therefore, unless the decedent's mother is a 'dependent' as defined in ORS 656.005(11), she has no standing to file a Request for Hearing. The decedent's mother has not established that she is a 'dependent', nor even alleged that she is, so her Request for Hearing must be dismissed."

The Board affirms and adopts the well-reasoned order of the Referee.

ORDER

The Referee's order dated July 10, 1984 is affirmed.

BENJAMIN G. PARKER, Claimant
Dean Heiling, Claimant's Attorney
Walker & Johnson, Defense Attorneys

WCB 82-09534
January 15, 1985
Order on Remand

On review of the Board's order dated January 26, 1984 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.

E.H. QUINN, Claimant
Kirkpatrick & Zeitz, Claimant's Attorneys
David Horne, Defense Attorney
Rankin, et al., Defense Attorneys

WCB 84-04984 & 84-04985
January 15, 1985
Order Denying Motion to Dismiss

This case is before the Board on a request for review of Referee Leahy's order filed by the self-insured employer, the Visiting Nurses Association. Wausau Insurance has now moved to dismiss the request for review against it on the ground that the Referee's order upheld its denial of responsibility for claimant's condition and claimant has not filed a request for review against Wausau.

Wausau's argument apparently is that the Board has no jurisdiction to decide a responsibility question between it and the self-insured employer unless claimant requests review of the Referee's order which assigned responsibility to the self-insured employer rather than to Wausau. We reject that argument. ORS 656.289(3) states that "when one party requests a review by the Board, the other party or parties shall have the remainder of the 30-day period . . . in which to request Board review in the same manner." The implication of this statute is that when one of the parties affected by a Referee's order requests review, then all other parties to the proceeding before the Referee have the right to file a cross-request for review and are thereby made party to the proceedings before the Board. Furthermore, ORS 656.295(6) provides that the Board may make such disposition of the case as it determines to be appropriate. Among the possibly appropriate decisions which might be made in a responsibility case is that the party whom the Referee found not to be responsible may be found responsible before the Board.

Wausau's motion to dismiss is denied. Wausau has 20 days from the date of this order in which to file its respondent's brief.

IT IS SO ORDERED.

CLARENCE L. LOUSIGNONT, Claimant
Coons, McKeown, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08896
January 17, 1985
Order of Dismissal

The claimant has requested review of Referee's order dated November 29, 1984. The request for review was filed with the Board on January 4, 1985, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

The claimants request for review is hereby dismissed as being untimely filed.

The SAIF Corporation has petitioned the Board for resolution of a dispute concerning the proper distribution of the proceeds of a third party recovery obtained by claimant. ORS 656.593(1)(d); 656.593(3). Claimant has requested that the Board refer this matter to a Referee for an evidentiary hearing, citing Denton v. EBI Companies, 67 Or App 339 (1984).

On October 10, 1979 claimant's right hand was caught in a machine at work, resulting in injury. He filed a workers' compensation claim with his employer, whose industrial insurer was the SAIF Corporation. The claim was accepted and benefits paid pursuant to law. In addition, claimant elected to pursue a civil action for damages against an allegedly negligent third party. ORS 656.154, 656.578. In October or November of 1983 claimant and the third party negotiated a settlement of the third party action. Claimant obtained SAIF's approval, as required by ORS 656.587. There is a factual dispute concerning the precise terms of the agreement between claimant and SAIF. SAIF contends that its approval of the settlement was conditioned upon claimant's formal request that his workers' compensation claim be denied. Claimant maintains that the agreement was not couched in terms of claimant requesting the issuance of a denial, but that claimant would accept a denial of future workers' compensation benefits, once issued by SAIF.

In view of the conclusion we reach, we find this factual discrepancy of little or no significance. What is important is our conclusion that when claimant's third party action was settled, and the settlement approved by SAIF, there was a meeting of the minds between claimant and SAIF concerning two essential elements: SAIF agreed to compromise its statutory lien by accepting approximately $5,000 less than it would otherwise be entitled to in full satisfaction of its lien, in consideration for, in effect, claimant's withdrawal of his admittedly compensable and accepted workers' compensation claim. The precise details of the withdrawal may not have been completely agreed upon; however, it was understood that SAIF would retroactively deny the claim, either by issuance of a formal denial or by the parties' stipulation, and claimant would not contest the denial, thereby relinquishing his right to further benefits in connection with his workers' compensation claim.

After claimant's third party action was settled with SAIF's approval, but before the agreement between SAIF and claimant was reduced to writing or SAIF had an opportunity to issue a formal denial, SAIF became aware of the Supreme Court's then-recent decision in Bauman v.SAIF, 295 Or 788 (1983), decided October 25, 1983. Bauman held that a claim, once accepted, may not be denied unless there is a showing of "fraud, misrepresentation or other illegal activity." Upon becoming aware of this recent decision, SAIF communicated with claimant's attorney and informed him that, as a result of the court's preclusion of retroactive denials, SAIF would be unable to comply with its agreement. SAIF, therefore, advised that it insisted on a distribution of the third party proceeds in accordance with the statutory formula, ORS 656.593(1), which meant that the $5,000 balance would be paid to SAIF rather than claimant. Claimant responded that he was not willing to alter the terms of his agreement with SAIF, and that he remained willing to accept a denial relieving SAIF of future obligations in

connection with his workers' compensation claim. A partial distribution of the third party proceeds was made, with the disputed $5,000 balance being held in trust.

First we address claimant's request for an evidentiary hearing. Traditionally this Board has resolved disputes concerning the distribution of a third party recovery based upon documentary exhibits submitted by the parties, including any necessary and appropriate affidavits, together with written argument. There is no right to a hearing in controversies arising under ORS 656.578 et seq. Marvin Thornton, 34 Van Natta 998 (1982). This Board, however, has an obligation to afford the parties adequate procedures for developing an evidentiary record sufficient for judicial review. Blackman v. SAIF, 60 Or App 446 (1982). In the event it was necessary to do so, as where resolution of a factual dispute turned on the credibility of a certain witness or witnesses, the Board would have inherent authority to refer a dispute to a Referee in order to take testimony and make appropriate factual findings. This is not such a case, however. As discussed above, the material facts concerning the agreement between SAIF and claimant are not actually in dispute.

We note in passing that claimant's reliance upon Denton v. EBI Companies, supra, is misplaced. Although the court's opinion makes reference to a hearing in Denton, no hearing was held. That case was resolved by the Board based upon the parties' submission of documentary evidence and written argument. John Denton, 34 Van Natta 1598 (1982). For the foregoing reasons, claimant's request for an evidentiary hearing is denied.

Turning to the issue of the proper distribution of the remaining proceeds of claimant's third party recovery, we find and hold that the remaining balance shall be paid to and retained by claimant, and that the parties' agreement, which formed the basis of the settlement of claimant's third party action, shall be executed. In its petition to the Board, SAIF relies upon Bauman v. SAIF, supra, in support of its refusal to comply with its agreement. SAIF states that it has no basis upon which it can deny the compensability of claimant's previously accepted claim and, therefore, Bauman precludes denial by any means. SAIF contends that a "mutual mistake" was made by the parties with regard to the agreed upon distribution of the settlement proceeds.

We have recently decided, in a case which is factually very similar to this case, that Bauman is not a legal impediment to agreements of the nature involved herein. Roger Riepe, 37 Van Natta 3 (January 8, 1985). In Riepe we stated, "The concern which gave rise to the Bauman decision was the practice of employers and insurers, which had been fostered by the court's earlier decision in Frasure v. Agripac, 290 Or 99 (1980), of accepting a claim initially, paying compensation and later denying the claim ab initio." 37 Van Natta at 5. We went on to review the concerns addressed by the court in Bauman and concluded, "None of those concerns are present in this case, or others like it, where the claimant and industrial insurer are dealing at arms' length in an effort to effectuate the best possible resolution of claimant's third party action and make a just and proper distribution of the proceeds." 37 Van Natta at 5.

In Riepe we found a "potential stumbling block mentioned by neither party," which is also present in this case: ORS

656.236(1), the statutory prohibition against releases. It cannot be denied that the parties' agreement contemplates claimant's withdrawal of his workers' compensation claim and relinquishment of all future rights in connection with his workers' compensation claim, in exchange for the present receipt of a larger portion of his third party recovery, that is, the sum of $5,000. This constitutes a release in violation of the statute. Ordinarily, such an agreement would not be subject to approval. EBI Companies v. Freschette, 71 Or App 526 (1984); Walter E. Ginn, 36 Van Natta 1 (1984); Warren C. Bacon, 35 Van Natta 1694 (1983); Duane E. Maddy, 35 Van Natta 1629 (1983); Donald T. Campbell, 35 Van Natta 1622 (1983); Arnold Androes, 35 Van Natta 1619 (1983). As in Riepe, however, this case falls within a narrow exception to the statutory prohibition against a worker's release of his rights, as stated in ORS 656.587. That statute provides:

> "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. ORS 656.236 does not apply to compromises and settlements under ORS 656.578 to 656.597." (Emphasis supplied.)

Although the parties' agreement, which contemplates the release of claimant's remaining workers' compensation rights, ordinarily would be prohibited by ORS 656.236(1), in the context of the settlement of claimant's third party action, it is not. Roger Riepe, supra.

For the reasons stated herein, and for the additional reasons stated in Roger Riepe, supra, we find and hold that the agreement entered into by and between claimant and SAIF, concerning the just and proper distribution of the proceeds of claimant's third party recovery shall be implemented, and claimant shall be paid and retain the balance remaining from the proceeds of his third party recovery.

IT IS SO ORDERED.

G. VICTORIA ADAMS-PRATT, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-05171
January 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Fink's order which: (1) granted claimant an award of 32° for 10% unscheduled disability in addition to the 16° for 5% unscheduled disability previously awarded by Determination Order; (2) set aside its partial denial of claimant's DMSO treatments; and (3) awarded claimant's attorney $2,500 for prevailing on the denial issue. Compensability of DMSO treatments and the attorney's fee are the issues on review.

On review, SAIF concedes that the Referee was correct in setting aside its denial of DMSO treatments. However, it argues

that the Board should "modify" the Referee's order to apply only to DMSO treatments received prior to January 16, 1984. SAIF reasons that OAR 436-69-201(11), which provides that DMSO treatments are not reimbursable unless directed at interstitial cystitis became effective on January 16, 1984 and, therefore, any DMSO treatments received after that date are not reimbursable.

The regulation does not provide for retroactive application. The Court of Appeals has said:

> "Generally, statutes or regulations that say nothing about retroactive application are not applied retroactively if such a construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions." Barrett v. Union Oil Distributors, 60 Or App 483, 486 (1982).

Based on those considerations, we conclude that OAR 436-69-201(11) should not be applied retroactively to apply to the DMSO treatments which were at issue in this case.

We do not apply the regulation to future treatments because those treatments were not at issue before the Referee. Furthermore, all issues concerning the validity or application of the new rule were not and could not be before the Referee because the rule was not effective at the time of the Referee's order. They are, therefore, not properly before the Board. Should SAIF wish to challenge claimant's right to reimbursement for DMSO treatments following the effective date of the new rule, the proper path would be to issue a new partial denial relying on the rule.

SAIF also contends that the Referee's award of $2,500 in attorney's fees is excessive. We agree. Considering the novel issue presented, the amount of time expended on the case and the result obtained, we conclude that claimant's attorney would be adequately compensated by an award of $1,800 rather than the $2,500 awarded by the Referee.

ORDER

The Referee's order dated December 16, 1983 is affirmed in part and modified in part. That portion of the Referee's order which awarded claimant's attorney $2,500 is modified to award claimant's attorney $1,800. The balance of the Referee's order is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the SAIF Corporation.

LEROY GARDNER, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 81-08924
January 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Quillinan's order which: (1) declined to award a penalty and attorney's fee for the insurer's delay in accepting or denying an alleged claim for referral to the Northwest Pain Center; (2) declined to award additional temporary total disability for the period from January 11, 1983 to October 27, 1983; and (3) upheld Determination

Orders awarding 67.5° for 45% scheduled disability for injury to the right hand and 144° for 45% unscheduled disability for injury to the neck.

The Board affirms and adopts those portions of the Referee's order relating to claimant's entitlement to additional temporary and permanent disability compensation.

Claimant contends that he is entitled to a penalty and attorney's fee based on the insurer's failure to accept or deny compensability of pain center evaluation within 60 days of Dr. Ellison's December 6, 1982 letter suggesting the referral. There being no compensation due upon which to base a penalty, no penalty or attorney fee can be awarded. See e.g. Darrel W. Carr, 36 Van Natta 16, modified, 36 Van Natta 164 (1984). Accordingly, we do not determine whether a penalty and attorney's fee might otherwise be appropriate.

ORDER

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

DANIEL L. HUTCHINSON, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-07685
January 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Neal's order which upheld a Determination Order awarding 100° for 100% scheduled disability for loss of vision in claimant's right eye. Claimant contends that permanent partial disability awards should also have been made for his left eye, jaw, nose, headaches and pain.

On de novo review of the record we affirm the order of the Referee. Although the lay testimony in this case is sufficient to establish that claimant currently experiences problems with his left eye, jaw and nose, and that he has recurrent headaches, there is no evidence in the record that these impairments are permanently disabling.

ORDER

The Referee's order dated July 16, 1984 is affirmed.

KENNETH D. KIRKWOOD, Claimant
Hayner, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 83-09857
January 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order which upheld: (1) the self-insured employer's partial denial of medical services for claimant's right knee condition; and (2) the employer's denial of his left knee and low back conditions. On review, claimant contends his compensable 1981 right knee injury has materially contributed to his current need for right knee replacement surgery and that the compensable injury is causally related to his left knee and low back conditions. We agree and reverse the Referee's order.

As a preliminary matter, claimant contends that he has established a claim for aggravation. However, a review of the record reveals that the parties stipulated at hearing that the issues before the Referee were the compensability of medical services pursuant to ORS 656.245 for claimant's right knee, left knee and low back conditions. Although the parties agreed claimant's right knee condition had worsened, they further stipulated that if the 1981 injury was determined to have materially contributed to claimant's need for right knee replacement surgery, the claim should be reopened as of the date claimant underwent that medical treatment. Consequently, the claim for aggravation is not before us.

Claimant is a 62 year old retired mill worker. In late January 1981 he felt his right knee "pop" when he jumped off a crosswalk between two booms. A few days later, claimant was examined by Dr. Keizer, his family physician, who noted slight effusion of the joint. Dr. Keizer further reported that the right knee was swollen, as well as quite tender and sore, which caused claimant to limp and to experience difficulty in straightening his leg. Dr. Keizer diagnosed an acute strain. Dr. Holbert, claimant's treating orthopedist, examined claimant in March 1981 and diagnosed his condition as "traumatic aggravation of osteoarthritic changes in his right knee."

Claimant returned to work in April 1981 and worked, with the assistance of a coworker, until his July 1981 retirement. In March 1982 a Determination Order awarded claimant 20% permanent right leg disability. This award was subsequently increased to 70% by virtue of an August 1983 stipulation.

Claimant has experienced two prior injuries to his right leg. In 1967 claimant's right knee was smashed against the steering column of a jitney, prompting a lateral meniscectomy. In 1972 claimant suffered a fracture of the right fibular head and a slightly depressed lateral tibial plateau in his right knee. Both injuries were treated by Dr. Holbert. Following both injuries, claimant returned to his regular work and did not experience any further knee problems sufficient to keep him from working.

Prior to the January 1981 injury, claimant had been complaining of pain in his right knee. In September 1980 claimant was examined by Dr. Keizer. Claimant described pain in the external part of his right knee which had been increasing and was bothering him "a lot." X-rays revealed an extensive amount of arthritis. Dr. Keizer opined that claimant's work was aggravating the condition and that it was very likely claimant would have to change his occupation or modify his duties.

In September 1982, in preparation for his "extent of disability" hearing, claimant was examined by Orthopaedic Consultants. Claimant complained of right knee, left knee and low back pain. He had been previously examined by the Consultants in November 1981, at which time they had considered his impairment to be moderate. After the September 1982 evaluation, the Consultants evaluated claimant's right knee impairment as moderately severe, with impairment attributable to the 1981 injury classified as mildly moderate. The Consultants opined that the increased impairment since their November 1981 examination was due to a natural progression of degenerative arthritis. The Consultants also attributed claimant's left knee and lumbar spine complaints

to the natural progression of degenerative arthritis, finding his symptoms in no way indicated they were the result of any industrial injury.

In June 1983 Dr. Holbert proposed right knee replacement surgery to relieve claimant's right knee, left knee and low back symptoms. The employer denied the surgery request and further denied the left knee and low back "claims."

In January 1984 Dr. Puziss, orthopedist, reviewed the medical file and examined claimant. Dr. Puziss opined that it was medically probable that given claimant's preexisting arthritis, the industrial injury was not a materially contributing factor to his need for surgery. In reviewing claimant's x-rays, the doctor noted that the right knee arthritis was already moderately severe at the time of the 1967 surgery. Dr. Puziss felt the surgery hastened the arthritis' progression. Due to the minimal effusion in the right knee shortly following the January 1981 injury, Dr. Puziss reasoned the injury was not a significant contributing factor to claimant's impairment. Since the x-rays taken at the time of the January 1981 injury demonstrated increasing arthritic change throughout the knee, Dr. Puziss concluded "in all probability this injury merely increased his symptoms and did not specifically aggravate his underlying significant arthritic condition."

Dr. Holbert acknowledged that at the time of the industrial injury, claimant's right knee was already in significant difficulty. However, he felt the injury decompensated the knee to the point that he had not worked significantly since. Dr. Holbert opined that a knee with a lesser preexisting problem might have recovered, but with the magnitude of preexisting difficulty in the knee, the knee did compensate at the time of the injury and had never recovered to a level of industrial competency.

Concerning the left knee and low back complaints, Dr. Holbert felt both conditions were osteoarthritic, but were also related to claimant's right knee condition. Claimant's low back discomfort indicated a temporary aggravation attributable to claimant's limp. The wear on claimant's osteoarthritic left knee was accelerated by claimant's accomodation for his right knee, i.e. standing primarily with his weight on his left leg.

Although the question is a close one, we find that claimant's current need for right knee treatment is compensable. The conflict centers upon "a battle of experts." Dr. Holbert, who believes the need for treatment is related to the industrial injury, and Dr. Puziss, who does not. When medical evidence is divided, the tendency is to give greater weight to the conclusions of treating physicians, absent persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810, 814 (1983); Abbott v. SAIF, 45 Or App 657 (1980); Hamlin v. Roseburg Lumber Co., 30 Or App 615 (1977).

Since we do not perceive persuasive reasons not to do so, we accord the opinion of Dr. Holbert greater weight. Dr. Holbert has been claimant's treating orthopedist since 1967, when he performed claimant's right knee surgery. Although he acknowledges the significance of claimant's preexisting arthritis, Dr. Holbert remains steadfast in his conclusion that the industrial injury materially contributed to claimant's current right knee medical

needs. Dr. Puziss based his opinion to a degree upon the minimal effusion present in the joint post-injury. Dr. Keizer noted "slight effusion" in the joint shortly after the January 1981 injury. However, Dr. Keizer also reported that the knee was swollen and quite tender and sore, causing claimant to limp and to experience difficulty in straightening his leg. In addition, Dr. Keizer diagnosed claimant's right knee condition as an acute strain. This description bolsters Dr. Holbert's opinion concerning the materiality of the industrial injury's contribution to claimant's current right knee condition.

Unquestionably, claimant's preexisting arthritic condition has played a significant role in claimant's current need for medical treatment. However, the evidence preponderates that the January 1981 injury has materially contributed to that medical need. Accordingly, the proposed medical services for his right knee are compensable pursuant to ORS 656.245.

Since we find Dr. Holbert's opinion persuasive in determining the compensability of claimant's current right knee condition, it follows that we also afford the treating physician's opinion great weight in judging the compensability of claimant's left knee and low back conditions.

The employer argues that Dr. Holbert fails to relate the conditions to claimant's industrial injury. The employer further contends Dr. Holbert relates the conditions to claimant's current right knee condition, his limp and to his habit of carrying his weight on his left side. It is true that Dr. Holbert does not specifically mention the industrial injury in relating claimant's current right knee condition to his left knee and low back complaints. However, a review of the treating physician's entire opinion leads one to the inescapable conclusion that the left knee and low back complaints are related to claimant's current right knee condition, of which, in Dr. Holbert's opinion, a material contributing factor is the industrial injury.

Furthermore, we find Dr. Holbert's opinion more persuasive than the contrary opinion of the Orthopaedic Consultants, who examined claimant approximately nine months before the treating surgeon proposed the right knee replacement surgery as a means to relieve claimant's ongoing symptoms. Moreover, the primary thrust of the Consultants' examination was the evaluation of claimant's permanent right knee impairment, not the relationship between his left knee and low back condition and his compensable injury.

Consequently, we find claimant's current left knee and low back conditions causally related to his compensable right knee condition and, therefore, compensable pursuant to ORS 656.245.

ORDER

The Referee's order dated March 30, 1984 is reversed. The employer's denials dated October 5, 1983 are set asode. Claimant's counsel shall receive $1500 for services at the hearing level and on Board Review, to be paid by the employer.

JACKIE J. MADDEN, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF CORP Legal, Defense Attorney

WCB 82-05211
January 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Neal's order which overturned its partial denial of medical benefits for claimant's DMSO treatments. SAIF argues that the Referee erred in not dismissing the claim for lack of jurisdiction. In the alternative, SAIF argues on the merits that the Referee erred in overturning its denial.

The Board rejects SAIF's argument that we do not have jurisdiction. See SAIF v. Belcher, 71 Or App 502 (1984).

Claimant has an accepted claim for neck, right arm and shoulder pain. Claimant has received awards totaling 128° for 40% unscheduled disability and 19.2° for 10% scheduled right arm disability.

In June 1979 claimant first saw Dr. Stanley Jacob of the Oregon Health Sciences University. Dr. Jacob then began treating claimant with DMSO. In October 1979 a hearing was held concerning claimant's travel expenses from her home in the Eugene area to Portland for medical treatment. The majority of this treatment was with Dr. Franks, a neurologist, however, some of it was the DMSO treatment with Dr. Jacob. The Referee in that case found SAIF liable for the travel expenses. His order became final by operation of law. Claimant contends that the compensability of the DMSO treatment is res judicata as a result of that order. We disagree. The compensability of the DMSO treatment was not in issue at that time. In fact, SAIF was paying for the treatment. The only dispute concerned the travel expenses incurred to receive the treatment. We do not believe this was an issue which was necessarily included in the issues raised at that time. See James R. Kunst, 36 Van Natta 238, 36 Van Natta 380, 36 Van Natta 861 (1984).

It is well established that claimant is entitled to medical services including palliative care for an accepted condition so long as the treatments are reasonable and necessary. Wetzel v. Goodwin Brothers, 50 Or App 101 (1981). SAIF argues that it should not be liable for the DMSO treatments because DMSO is an experimental drug. Phrased differently, SAIF is apparently arguing that because DMSO is experimental, it is not reasonable and necessary. SAIF also relies on OAR 436-69-201(10) which provides:

> "Insurers and claimants are not responsible for payment for treatment procedures rendered in connection with the compensable injury that are not approved and taught by accredited institutions of the licentiate's profession. If the insurer believes procedures to be inappropriate, of unproven value, or experimental in nature, the issue may be referred to the Department for referral to a committee of consultants of the physician's peers."

The first sentence of this regulation does not support SAIF's position because Dr. Jacob, himself, is a faculty member at an accredited medical school. The second sentence concerns the Department's peer review procedure. That sentence is only relevant insofar as a decision by the peer review committee that a drug was inappropriate, of unproven value or experimental would be considered in our decision whether use of that drug was reasonable and necessary. In this case, there is no evidence that a peer review committee has considered the question of DMSO.

SAIF's position is best summarized by a letter from its medical advisor, Dr. Norton, to Dr. Russell, the Workers' Compensation Department's Medical Director:

> "I object to the use of DMSO on SAIF claimants for two reasons.
>
> "1. This is human experimentation, and I do not believe that employers have agreed to contribute to the costs of developing new drugs...nor to my knowledge has the legislature specified the costs for medical experimentation are chargeable to the workers' compensation benefits system.
>
> "2. The worker is incapable of deciding the safety of DMSO and other experimental drugs or procedures, and neither is the legislature. Federal Drug Administration is charged with determining the standards of safe experimentation in the United States. When these standards are violated, in my opinion there is undue risk of harm to the worker, and undue risk to the employer for responsibility for payment for future long-term morbidity or mortality of the worker."

Dr. Jacob's position is:

> "When a medicinal is approved for a single indication by the FDA, licensed physicians are free to use the medication for other indications. Additionally Oregon statute states it is the public policy of the State of Oregon that DMSO be available to patients through licensed physicians.
>
> "All our patients are charged only for professional services rendered. No charge is made for DMSO."

The Food Drug and Cosmetic Act, 21 USC § 301 et seq. concerns the regulation of drugs which travel in interstate commerce. 21 USC §331 prohibits the transportation of mislabeled drugs in interstate commerce. 21 USC §352 contains the requirements for labeling drugs. The record in this case reveals that DMSO has an approved label which indicates that it is recognized for the treatment of interstitial cystitis. In summary, DMSO may legally be shipped in interstate commerce only if it contains a label indicating that it is recognized by the FDA for treatment of

interstitial cystitis. Federal regulation does not concern how a drug is used by a prescribing physician once it has passed out of interstate commerce. See, New Drugs for Nonapproved Purposes (Methotrexate for Psoriasis): Hearings Before a Subcomm. of the House Comm. on Government Operations, 92nd Cong., 1st Sess. 131, 133 (1971); Kessler, Regulating the Prescribing of Human Drugs for Nonapproved Uses Under the Food, Drug, and Cosmetic Act, 15 Harvard Journal on Legislation 693 (1978). The U.S. Supreme Court has stated:

> "It is well settled that the State has broad police powers in regulating the administration of drugs by health professionals." Whalen v. Roe, 429 US 589, 603 n 30 (1977).

The Oregon Court of Appeals has held that the state has plenary power to regulate the practice of medicine. Whitmire v. Board of Chiropractic Examiners, 21 Or App 139 (1975).

The right to prescribe drugs is included in the statutory definition of the practice of medicine. ORS 677.085(2). The statutes contain a specific policy statement favoring making DMSO "available for human use in Oregon in safe form and for prescriptive use through proper medical channels." ORS 689.545. ORS 689.535(3)(c) provides: "It shall be lawful for a licensed physician to prescribe DMSO for any person."

In determining whether it was reasonable and necessary to prescribe DMSO to claimant, we consider the fact that the FDA considers it an experimental drug to be worthy of some weight. However, that fact is outweighed by the fact that the state, which has plenary power to regulate physician's prescriptions, has specifically encouraged the prescription of DMSO. That fact, accompanied by the uncontroverted evidence that DMSO provides symptomatic benefit to claimant is sufficient to establish to our satisfaction that DMSO is a reasonable and necessary treatment which is compensable under ORS 656.245.

We note that a recent Department regulation which became effective after the Referee's order provides that DMSO is "not reimbursable unless prescribed for treatment of compensable interstitial cystitis." OAR 436-69-201(11) (effective January 16, 1984). The validity of that regulation is not before us, however, considering the holding here, its validity is questionable.

ORDER

The Referee's order dated October 5, 1983 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

MAXINE P. ROBINSON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-05121 & 81-10158
January 21, 1985
Order on Remand

This case is before the Board on remand from the Court of Appeals. Referee Brown initially found that claimant's occupational disease claim was compensable. The SAIF Corporation requested review of the compensability portion of the Referee's order. The Board found that the claim was not timely filed and, therefore, did not decide on the merits whether claimant had proven the claim. Maxine R. Robinson, 35 Van Natta 1278 (1983). The Court of Appeals reversed on the timeliness issue and remanded for a decision on the compensability of the claim.

Claimant worked for SAIF's insured, Struther's Furniture, from 1974 until December 1978. She alleges that her exposure to chemicals, particularly phenol hydrocarbons and formaldehyde, while working at Struthers caused or aggravated a sensitivity which is manifested as dizziness, fatigue and nausea.

In October 1980 Dr. Gambee, claimant's physician, noted that claimant had developed a chemical sensitivity. He noted that claimant's workplace at the furniture store contained many chemicals due to the "gassing out" of furniture. He opined that her exposure at work aggravated her sensitivity.

In March 1981 Dr. Gambee opined:

> "Since the work environment that [claimant] described to me consisting of synthetic fabrics, furniture using particle board, poorly ventilated, no air conditioning, and uncomfortably warm, would all contribute to the gassing out process, then I would think that her environment could well be one in which one would become sensitized to chemicals.
>
> "I do not feel that all of [claimant's] health problems are due to her work environment. There are other factors in her life and lifestyle that are deleterious to optimal health. But since her disability insurance apparently applies only to her ability to maintain gainful employment in her particular occupation, then I think she qualifies for disability."

On August 5, 1981 Dr. Morgan examined claimant. He noted that according to claimant's history her health deteriorated after a period of working in the furniture store. He opined: "Daily exposure to the fumes emanating from new items of furniture are quite capable of inducing this type of sensitivity...."

On October 21, 1981 Dr. Jacobson evaluated claimant at SAIF's request. He stated:

> "I feel that there is a substantial question that her own environmental exposure to 'allergens' (chemicals) isn't

greater at home than it was at work. The patient has lived in a mobile home for ten years and had new carpets installed just prior to the onset of symptoms. It is well documented that mobile homes have a higher concentration for formaldehyde and a variety of other chemicals....The patient also had new carpeting in her home about five years ago. If chemicals from new carpets at her place of employment were responsible for her symptoms then why not also at home."

At deposition, Dr. Jacobson testified that hydrocarbons and formaldehyde are ubiquitous. He also testified that there was no way he could determine whether the work exposure was the major cause of claimant's sensitivity.

In proving an occupational disease claim, claimant has the burden of proving that her exposure at work was the major contributing cause of her disability. SAIF v. Gygi, 55 Or App 570 (1982). Dr. Gambee indicates that her work exposure contributed to her sensitivity, but he also aknowledges that other factors are implicated. He voices no opinion on the major cause question. Dr. Morgan only indicates that claimant's work could contribute to her sensitivity. Dr. Jacobson notes several other significant potentially causative factors and opines that it is impossible at this time to determine if claimant's occupational exposure was the major cause of her disability. We conclude, on this record, that claimant has failed to sustain her burden of proof.

ORDER

SAIF's denial of October 28, 1981 is reinstated an affirmed.

MARLYN A. ANDERSON, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-02995
January 24, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Thye's order which denied claimant's request for medical services under ORS 656.245. We find that the medical services are compensable and reverse.

We make the following findings of fact. Claimant had a compensable automobile accident in 1967 in which he suffered injury to his head, neck, shoulders, back and legs. Claimant had previous head and neck injuries dating back to 1961. Also, claimant has degenerative disc disease in his spine. After his 1967 accident claimant twice was hospitalized and conservatively treated for neck and head pain. A cervical and thoracic myelogram in 1970 was normal. His claim was closed in 1972 with an award of 16° for 5% unscheduled permanent disability.

In 1970 Dr. Knox, neurologist, began treating claimant and diagnosed a cerebral contusion and/or traumatic subarachnoid hemorrhage with a severe whiplash injury. Between 1970 and 1981 claimant continued to see Dr. Knox intermittently for ongoing symptoms in the head, neck and upper dorsal spine. In December 1980 claimant sustained an exacerbation of his chronic neck pain

when he was struck in the back of the neck by a jack. Claimant testified that the jack incident aggravated his neck for a week or two, but was not what prompted him to see the doctor.

On January 20, 1981 Dr. Oxenhandler treated claimant for whiplash injury and headaches. A March 1981 CT scan reported moderate cerebral atrophy. Claimant subsequently came under the care of Dr. McGee, neurosurgeon, who performed a myelogram which showed an extradural defect at C-3/C-4 on the right. In April 1981 Dr. McGee performed a right cervical hemilaminotomy at C-2 through C-4 with wide right C-2/C-3 and C-3/C-4 foraminotomies. Claimant stated that the day following the surgery he noted a marked decrease in his constant headache.

The Orthopaedic Consultants opined in July 1981 that claimant never recovered from the 1967 injury and that between 1967 and 1981 degenerative changes had probably progressed in the cervical spine. The Consultants also stated that the 1967 trauma was not entirely responsible for all subsequent problems but by history did result in a neck injury and thus contributed to his chronic persistent symptoms through the intervening years. The Consultants concluded:

> "it would appear that several factors are involved in the patient's current complaints; namely previous injuries to the cervical spine, the injury which occurred on December 7, 1967 and finally the natural progression of degenerative changes which would be expected to progress through the passage of time. Thus there was some contribution to the necessity for surgery by the two car collision of December 7, 1967 but we cannot assign a specific percentage based upon any medical probability."

The only other medical opinion regarding causation is that of Dr. Knox, dated June 20, 1983:

> "the patient's industrial accident of 1967 is the underlying cause of his current and recently past need for treatment. Certainly the injury to the neck in December of 1980 is a complicating factor, but is by no means the primary cause of the patient's problems."

Claimant's aggravation rights had expired, ORS 656.273(4), so he requested that the Board exercise its own motion authority under ORS 656.278 and reopen his claim for a worsened neck condition. The Board denied claimant's request and concluded that the evidence did not establish a causal link between claimant's underlying disc disease or his worsened cervical condition and the 1967 compensable injury. Board Own Motion Order Number 81-0136M (September 29, 1981). That order was not appealable. ORS 656.278(3).

Claimant subsequently requested a hearing on the SAIF Corporation's refusal to pay for medical services under ORS 656.245. SAIF contended that the Board's Own Motion Order was res judicata on the issue of the causal connection between claimant's worsened condition and the 1967 injury. The Referee found that

the 1967 injury was not a material contributing cause of claimant's need for medical services. He did not reach SAIF's res judicata defense.

After considering the two medical opinions in the record, we find that the 1967 injury was a material contributing cause of claimant's need for medical services. Furthermore, we find that claimant's medical services claim is not barred by the Board's Own Motion Order. Claimant has a right to medical services for conditions resulting from his compensable injury for the rest of his life. ORS 656.245. Thus, claimant is entitled to a hearing on a denial of those services, and entitled to appeal the decision by the Referee as provided by statute. ORS 656.289; 656.295; 656.298. Claimant cannot be deprived of those rights by way of an unappealable Board order denying reopening under ORS 656.278. Incidentally, the Board now has a practice of referring medical services questions for hearing before acting on own motion requests involving such questions.

ORDER

The Referee's order dated November 18, 1983 is reversed. This claim is remanded to the SAIF Corporation for acceptance of medical services under ORS 656.245. Claimant's attorney is awarded $700 for services at hearing and $500 for services on Board review, to be paid by the SAIF Corporation.

JOHN K. EDER, Claimant
Pozzi, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-12044
January 24, 1985
Order Rescinding Order of Dismissal

On January 21, 1985 the Board issued an Order of Dismissal in this case on the basis that the request for review had been withdrawn. The Board has discovered that the order was erroneous. Claimant has not withdrawn his request for review. Accordingly, the Board rescinds its Order of Dismissal dated January 21, 1985.

The insurer has moved to dismiss claimant's request for review on the basis that claimant has not filed 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.

ORDER

The Board's order of dismissal dated January 21, 1985 is rescinded. The insurer's motion to dismiss is denied.

CHARLES R. JONES, Claimant
James W. Powers, Claimant's Attorney
Minturn, et al., Defense Attorneys

WCB 82-06176
January 24, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Mason's order which set aside its partial denial of claimant's heart condition. Claimant cross-requests review of that portion of the Referee's order which did not award an attorney's fee even though claimant had prevailed on the compensability issue.

Claimant's attorney was entitled to a fee for prevailing on the compensability issue. Accordingly, we award claimant's attorney a fee of $800 for services at hearing. On the compensability issue the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated December 15, 1982 is affirmed in part and modified in part. Claimant's attorney is awarded $800 for services at hearing, to be paid by the SAIF Corporation. The balance of the Referee's order is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

ALLAN KYTOLA, Claimant
David C. Force, Claimant's Attorney
Brian L. Pocock, Defense Attorney

WCB 82-06536
January 24, 1985
Order on Reconsideration

Claimant requests reconsideration of the Board's Order on Review dated January 9, 1985. The motion is granted.

Claimant requests that the Board reconsider and find that it had no jurisdiction. In the alternative claimant requests that the Board state the basis for its decision that it has jurisdiction over this case.

The basis for the Redetermination Order issued by the Evaluation Division on July 1, 1982 is ORS 656.206(5). Claimant requested a hearing on July 21, 1982 raising as an issue permanent total disability. The Referee proceeded under that request for a hearing and found in claimant's favor. The self-insured employer requested review and the Board in the exercise of its review authority reversed the Referee. Thus the jurisdictional basis for the Board's order is the Evaluation Division's authority under ORS 656.206(5) to reevaluate claimant's permanent total disability award together with the Referee's authority under ORS 656.283 to hear any matter concerning a claim and the Board's authority under ORS 656.295 to review the Referee's decision.

As clarified, the Board adheres to its Order on Review.

ORDER

The Board's Order on Review as modified by this order is adhered to and is hereby republished.

DAVID A. MARTINA, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-02167
January 24, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Daron's order which granted claimant an award of 80° for 25% unscheduled disability in addition to the 32° for 10% unscheduled disability granted by Determination Order and which assessed a penalty and associated attorney's fee for SAIF's unreasonable delay in the payment of compensation. Issues are extent of disability and the propriety of the penalty and associated attorney's fee.

The Board affirms and adopts those portions of the Referee's order concerning the penalty and associated attorney's fee.

On the issue of extent of disability, the Board finds upon de novo review of the record that claimant would be most appropriately compensated by a total award of 64° for 20% unscheduled disability.

ORDER

The Referee's order dated October 27, 1982 is affirmed in part and modified in part. Claimant is awarded 64° for 20% unscheduled disability in lieu of all previous awards for this injury. The balance of the Referee's order is affirmed. Claimant's attorney is awarded $350 for services on Board review, to be paid by the SAIF Corporation.

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
January 24, 1985
Order on Reconsideration

Claimant requests reconsideration of the Board's order on review dated December 7, 1984. Claimant notes that the Board's order states as the third issue raised by claimant:

> "On review claimant argues...(3) that he is entitled to interim compensation plus a penalty and associated attorney's fee for SAIF's late denial."

Claimant states:

> "What Claimant proposed was that the Board find him entitled to interim compensation under Bono [v. SAIF, 66 Or App 138 (1984)] and award a penalty and attorney fees for late denial accordingly. However, he agreed that if this were to take place, all such interim comp would be offset, dollar for dollar, by the regular TTD received by the same Claimant from the same carrier for the same period of time. That would zero out the interim compensation itself, but give the Board a figure against which to compute penalties and award an attorney fee."

Claimant commendably consents not to obtain double recovery. However, under claimant's proposal, interim compensation would still be due on a claim in which temporary total disability was already being paid. Claimant's proposal only contemplates that the carrier would be allowed to recoup the interim compensation because claimant so consents. We are unwilling to adopt such a proposal. We continue to believe that an insurer should not be required to pay interim compensation to a claimant who is already receiving temporary total disability from the same insurer. The fact that the Supreme Court in Bono v. SAIF, 298 Or 405 (1984) has held that a claimant who is working is not entitled to interim compensation reinforces our conclusion that a claimant who is already obtaining TTD benefits is also not entitled to interim compensation benefits even if claimant voluntarily consents to recoupment of those benefits.

Because we find that claimant is not entitled to interim compensation benefits, there is nothing due upon which to base a penalty or associated attorney's fee.

ORDER

The Board's order on review as clarified by this order is adhered to and republished.

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

WCB 83-10618 & 83-10619
January 24, 1985
Order on Reconsideration

Claimant requests reconsideration of the Board's order on review dated January 8, 1985. The motion is granted. On reconsideration the Board adheres to its previous order with the following clarification.

Claimant has two claims against the SAIF Corporation. The first involves a knee injury in September 1977. The second involves a shoulder injury in 1979. In 1982 claimant began to complain of problems in the left arm and hand. SAIF denied the compensability of the arm and hand problems under the number assigned to the knee claim. Claimant requested a hearing to protest the denial. At hearing, SAIF conceded that the arm and hand problems were a compensable consequence of the 1979 shoulder injury. The Referee noted SAIF's concession in his order and upheld SAIF's denial of the arm and shoulder problems as not being related to the compensable knee claim. The Referee concluded that there was no basis for awarding an attorney's fee as claimant had not prevailed on the only issue raised by the request for hearing, compensability of an aggravation claim on the knee injury. We agree with the Referee that the arm and hand problems are not a compensable consequence of claimant's knee injury. We also agree with the Referee that there is no basis upon which to award an attorney's fee to claimant.

ORDER

The Board's order on review dated January 8, 1985 as clarified by this order is adhered to and republished.

DAVID A. YODER, Claimant
Schwabe, et al., Defense Attorneys

WCB 83-07861
January 24, 1985
Order Denying Dismissal

The self-insured employer has moved to dismiss claimant's request for review on the ground that it was never served with a copy of the request for review.

On February 24, 1984 Referee Mongrain entered an Opinion and Order. Subsequently on March 20, 1984 the Referee issued a republished Opinion and Order. On March 27, 1984 the Board received a document from claimant requesting review in this case. On April 3, 1984 the Board issued an acknowledgment of claimant's request for review. The employer's attorney represents that he received a copy of the Board's acknowledgment on April 13, 1984.

In Argonaut v. King, 63 Or App 847 (1983) the court stated: "We hold that compliance with ORS 656.295 requires that statutory notice of the request for review be mailed or actual notice be received within the statutory period." 63 Or App at 852. In this case there is no indication that claimant mailed notice of his request for review to the employer or any of its agents. However, by its own admission the employer received actual notice of the request for review by the Board's acknowledgment dated April 13, 1984, before the 30 day period had elapsed. Accordingly the employer's motion to dismiss must be denied.

On November 26, 1984 the Board received a document from the claimant which is apparently intended to be his brief before the Board. A copy of claimant's brief is being forwarded to the employer's attorney. The employer has 20 days from the date of this order in which to file its respondent's brief in this matter. Claimant will be allowed 10 days following receipt of the employer's brief in which to file a reply brief. At the end of the time allowed for briefing the case will be docketed for Board review.

JUAN ALONZO, Claimant
Allen & Vick, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 81-09123
January 25, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of Referee Foster's order which granted claimant an award for permanent total disability in lieu of all previous awards which totaled 288° for 90% unscheduled disability and 52.5° for 45% scheduled disability to the right leg.

The Board affirms and adopts the Referee's order with the following comment. Following termination of his vocational training program, claimant is entitled to have the extent of his disability reevaluated. Hanna v. SAIF, 65 Or App 649 (1983).

ORDER

The Referee's order dated October 29, 1982 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the insurer.

RANDY L. TOWNSEND, Claimant
Francesconi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08444
January 25, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee T. Lavere Johnson's order which upheld the SAIF Corporation's partial denial of medical benefits for massage therapy. On review, claimant contends his massage treatments are compensable.

On de novo review we agree with the Referee that claimant has failed to establish by a preponderance of the persuasive evidence that his massage treatments are compensable. We are not persuaded that the masseuse was a duly licensed massage technician. Even if the masseuse is a licensed massage technician we are not persuaded that such a license permits him to perform "medical services" as that phrase is used in OAR 436-69-301(2).

ORDER

The Referee's order dated August 9, 1984 is affirmed.

WILLIAM F. CROSSLEY, Claimant
Evohl F. Malagon, Claimant's Attorney
Cummins, et al., Defense Attorneys

Own Motion 84-0533M
January 29, 1985
Interim Own Motion Order

On December 17, 1984 the Board issued an Own Motion Order reopening claimant's claim for the payment of time loss benefits commencing November 14, 1984 and continuing until closure pursuant to ORS 656.278. Claimant subsequently entered into a stipulation signed by Referee McCullough on January 7, 1985 by which Georgia-Pacific formally accepted responsibility for claimant's recent problems.

By Form 1503 dated January 15, 1985, Georgia-Pacific submitted claimant's claim to the Board for closure pursuant to its interpretation of the signed stipulation. We note that page two of the stipulation states that "Claimant's claim shall remain in its closed status, ..." We find that, in context, this statement means that the claim shall not be opened pursuant to ORS 656.273. In the stipulation both parties agreed that this claim was properly in the Board's own motion jurisdiction and that claimant would have the opportunity to pursue his claim for benefits with the Board. In fact, the parties agreed that ". . . the exercise of Own Motion jurisdiction by the Workers' Compensation Board would be appropriate."

Therefore, the Board declines to issue a closure order based on a sentence in a stipulation which has been taken out of context. Rather, we interpret the overall intent of the stipulation as providing that the claim be opened pursuant to the Board's own motion jurisdiction. Accordingly, we deny the employer's request to close the claim. When claimant's condition has become medically stationary, the claim should again be submitted to the Board for closure under ORS 656.278.

IT IS SO ORDERED.

RANDALL R. NEWTON, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 80-09516
January 29, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Gemmell's order awarding claimant 135° for 45% scheduled disability for loss of binocular vision, in lieu of a Determination Order award of 41° for 41% scheduled disability for loss of vision of the left eye. SAIF contends that claimant's visual loss is not compensable and that an award for binocular loss of vision is unwarranted. The issues on review include the effect of the prior determination that claimant's eye condition is compensable and extent of disability.

Claimant was compensably injured in 1977 when struck and knocked to the ground by a piece of falling equipment. Claimant experienced no signficant eye difficulties until May 1979, when left eye vision diminished rapidly. Claimant sought treatment from Dr. Flaxel, a North Bend ophthalmologist, who referred claimant to Dr. Chenowith, a Portland doctor limiting his practice to diseases and surgery of the retina and vitreous. Bilateral dialyses with retina detachment was diagnosed and surgery was performed on both eyes. SAIF initially denied compensability of the eye condition, but following an April 8, 1980 hearing, the condition was found compensable, the Referee stating that the only medical evidence presented consisted of opinions of Dr. Flaxel. The Referee's order was upheld by the Board and was not appealed.

In connection with the present litigation claimant offered a letter dated March 21, 1980 from Dr. Chenowith to claimant's attorney. Dr. Chenowith therein opines that the eye condition was secondary to degenerative changes, and not secondary to either direct or indirect trauma. Dr. Chenowith offers a quite reasonable explanation for his opinion. The parties stipulated that this report was not made a part of the record at the April 1980 hearing and that defense counsel did not have or know of the report at the time of the prior hearing. In the absence of persuasive evidence to the contrary, we presume that claimant's attorney received the report in advance of the April 1980 hearing. See ORS 40.135(m), (q).

SAIF contends that compensability should be decided anew, arguing that claimant's attorney had an obligation to make the report known and that we have inherent power to set aside the earlier finding. See ORCP 71 C.

In 1980, discovery and disclosure was governed by OAR 436-83-400(3) (superceded 1984) and OAR 436-83-460 (superceded 1984). OAR 436-83-400(3) provided:

> "As soon as practicable and not less than 10 days prior to the hearing each party shall file with the assigned referee and provide all 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." (Emphasis added)

OAR 436-83-460 provided in pertinent part:

> "Upon demand of any claimant requesting a hearing, the DRE/SAIF and its representatives shall within 15 days of mailing said demand furnish to claimant or his representatives, without cost, copies of all medical and vocational reports and other documents relevant and material to the claim which are then or come to be in the possession of the DRE/SAIF or its representatives, except that evidence offered solely for impeachment need not be so disclosed." (Emphasis added)

OAR 436-83-400(3) was applicable to claimant, but did not require disclosure of Dr. Chenowith's report as claimant did not rely on that report. OAR 436-83-460 required full disclosure, but imposed this obligation only on insurers and employers. Claimant was not obligated to disclose Dr. Chenowith's report under the rules in effect in 1980. Bauman v. SAIF, 295 Or 788, 794 (1983) prohibits reexamination of compensability absent a showing of fraud, misrepresentation or other illegal activity. This showing must be by a preponderance of the evidence. Parker v. D. R. Johnson Lumber Co., 70 Or App 683 (1984). No such showing having been made, the prior finding of compensability remains binding.

Regarding extent of permanent disability, the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated June 15, 1982 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

MARRIA J. BJORKMAN, Claimant
Kirkpatrick & Zeitz, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-09835
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Knapp's order that granted claimant an award of permanent total disability on account of her low back condition. Claimant contends on review that the Referee erred in refusing to admit into evidence eight medical journal articles dealing with the condition of arachnoiditis. The issues are extent of disability and the admissibility into evidence of medical journal articles.

The Board affirms and adopts the order of the Referee with the following comment. The Referee found that claimant was permanently and totally disabled due to her medical condition alone. The medical evidence clearly establishes that claimant suffers from adhesive lumbar arachnoiditis. This condition causes severe, disabling pain. On our de novo review of the record we find no medical or other evidence that controverts claimant's treating physician's opinion that claimant is precluded from working, even on a restricted or limited basis.

ORDER

The Referee's order dated June 6, 1984 is affirmed. Claimant's attorney is awarded $350 for services on Board review, to be paid by the SAIF Corporation.

ROBIN L. CAMPBELL, Claimant
Paul G. Mackey, Deputy Counsel (Mult. Co.)
SAIF Corp Legal, Defense Attorney

WCB 82-04291, 82-04290, 82-04289 & 82-04288
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Multnomah County, Oregon, as the self-insured employer, requests review of Referee Mulder's order that found it, rather than the SAIF Corporation's insured, State of Oregon, is the employer responsible for claimant's industrial injuries. The issue is responsibility.

The Board agrees with the result reached by the Referee, however, we arrive at that result by a different route.

Claimant was employed as a clerk in the traffic section of the Multnomah County District Court. She was hired, supervised and controlled by persons under the direction and control of the Multnomah County District Court Administrator. Although the Referee referred to the "right of control" criterion of Multnomah County v. Hunter, 54 Or App 718, 722 (1982), he did not elaborate upon how, or if, that case affected his decision. Under the holding of Hunter, it appears that the Referee's conclusion that Multnomah County is the responsible employer was erroneous. See Gary L. Smith, 34 Van Natta 522, 523 (1982) (Office assistant for Multnomah County Circuit Court was state employe for workers' compensation purposes.)

We find, however, that Multnomah County is barred from denying responsibility. Claimant's industrial injuries occurred on February 6, 1979 and January 28, 1980. The claims for these injuries were accepted and processed by Multnomah County. It was not until April 29, 1982 that Multnomah County denied responsibility. At the hearing, counsel for Multnomah County conceded that the Board's case of Cleve A. Retchless, 35 Van Natta 1788, 1790 (1983), is on point and controlling. In Retchless the Board held that Bauman v. SAIF, 295 Or 788 (1983), barred an employer/insurer from denying responsibility for a claim, as well as compensability, once the claim had been accepted and the statutory 60-day period had elapsed.

The Referee ruled that Retchless does not apply in this case. That ruling was erroneous. See also Paul G. Harvey, WCB Nos. 83-08344 and 83-08345, decided this date. Having accepted responsibility for claimant's injuries, Multnomah County may not now deny it.

ORDER

The Referee's orders dated February 29, 1984 and May 11, 1984 are affirmed.

ROBERT T. CRILLY, Claimant
Carney, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-02442
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Podnar's order which: (1) found that the SAIF Corporation was not required to respond to a treating chiropractor's letter since the letter did not constitute a request for reopening or reinstatement of temporary disability benefits; (2) upheld SAIF's partial denial of responsibility for claimant's left shoulder and elbow injury; and (3) declined to award interim compensation, penalties and accompanying attorney fees.

After conducting our de novo review of the record, we affirm the order of the Referee with the following comments. We do not interpret the treating chiropractor's letter as a request for reinstatement of temporary benefits. Even if we considered the letter as a request for reinstatement, the persuasive evidence does not establish that circumstances which justified the prior request for claim closure no longer existed due in material part to the effects of the compensable injury. David Cheney, 35 Van Natta 21 (1983).

We also affirm that portion of the Referee's order concerning the interim compensation issue. A February 10, 1982 SAIF memorandum does indicate that SAIF was aware claimant was relating his recent shoulder injury to his compensable back injury. However, SAIF did not receive medical verification of claimant's inability to work until it received the March 15, 1984 letter from claimant's counsel, which included medical reports from claimant's treating physician. SAIF's partial denial issued March 26, 1984, thereby relieving SAIF of its obligation to pay interim compensation. ORS 656.273(6).

ORDER

The Referee's order dated June 21, 1984 is affirmed.

GILBERT R. CURRIE, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-11175
January 30, 1985
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review dated November 30, 1984.

The request is granted. On reconsideration, the Board adheres to and republishes its former order with the following modification: the award by the Referee of penalties for unreasonable denial is reversed.

The Referee found the denial was unreasonable because the claimant's treating physician clearly related the claimant's symptoms to the injury claimant reported as a result of an incident at work. The doctor merely repeated claimant's assertion that the original injury was work-related. The insurer denied the claim because it believed there was no work-related injury. The focus at hearing was to establish whether there was a work-related injury. Evidence was presented on both sides. We conclude that

the insurer did not act unreasonably considering the circumstances surrounding the development and presentation of this claim. Therefore, no penalties should have been awarded for unreasonable denial.

ORDER

The Board's Order on Review dated November 30, 1984, is hereby adhered to and republished as amended.

The Order of the Referee dated May 31, 1984, is affirmed in part and reversed in part. The award of penalties for unreasonable denial of claim is reversed. The remainder of the order is affirmed. No attorney fee will be awarded to claimant's attorney as no brief was filed.

ROBERT R. DELUGACH, Claimant
Walter Nunley, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-03095
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Mongrain's order which upheld the SAIF Corporation's March 10, 1983 denial of liability for current treatment of claimant's back. On review, claimant also seeks interim compensation, penalties and attorney's fees.

Claimant fell off a pile of veneer on August 20, 1976, suffering compensable injuries to his mid and lower back. Surgery was performed on September 14, 1976. He was eventually awarded a total of 128° for 40% unscheduled disability.

On April 17, 1981 claimant was involved in a motor vehicle accident. Claimant's primary treating physician, Dr. Dunn, stated in a March 2, 1982 letter to claimant's auto insurance carrier, the Prudential Insurance Company, that all treatments after the auto accident were directed exclusively to claimant's right leg symptoms resulting from the motor vehicle accident. A right hemilaminectomy at L4-5 and L5-S1 with excision of extruded L5-S1 disc and bilateral lateral fusion of L5 to the sacrum was performed on May 27, 1982. Based on medical information in its file, primarily Dr. Dunn's chart notes, on August 6, 1982 SAIF denied liability for the surgery. Claimant received a copy of the denial on August 7, 1982. Claimant allowed the denial to become final without requesting a hearing.

The May 1982 surgery gave claimant only temporary relief. On November 2, 1982 Dr. Melson wrote SAIF that the fusion had been resorbed, that claimant suffered from prominent nerve root irritation at L5 on the right, and that claimant clearly needed further surgery. Dr. Melson stated that the second surgery appeared historically and medically directly related to the industrial injury and 1976 laminectomy. He requested that the claim be reopened. SAIF received Dr. Melson's letter on or about November 6, 1982.

A copy of Dr. Corson's December 2, 1982 letter to Adult and Family Services regarding authorization for a third surgery was received by SAIF on January 13, 1983. That letter in part states:

"He had initially an uneventful postoperative course but in the subsequent

months has developed increasing pain in his lower extremity which has now become intolerable. A repeat lumbar myelogram done on October 7, 1982 showed a small defect on the right side at L5-S1. A CAT scan done immediately following this showed that his fusion mass bone has totally disappeared.

"This man's current status is that of essentially being bed bound because of his low back and lower extremity pain. He has pseudoarthrosis at the site where the fusion was attempted, between L5 and S1, and has symptoms of recurrent right S1 nerve root irritation.

"I feel there is little question that it is necessary to reexplore the disc space, free up the nerve roots of disc material or scar tissue and attempt to re-fuse the L5-S1 level."

A third surgery was performed on December 20, 1982. The L5-S1 disc space was explored, the pseudoarthrosis was excised, and the fusion between L5 and S1 was repaired with the implantation of an osteostim.

After some correspondence between claimant's attorney and SAIF, SAIF issued a second denial on March 10, 1983. The March 10, 1983 denial in part stated:

"SAIF Corporation issued an aggravation denial on August 6, 1982 on the basis that the condition requiring treatment (including surgery of May 26, 1982) was due to an intervening injury. We have since received your aggravation application dated February 25, 1982. As the medical information in our file indicates that your current condition and treatment has been a continuation of the condition and treatment denied by our SAIF letter of August 6, 1982, it is SAIF's position that the denial of August 6, 1982 continued to apply. SAIF is, therefore, reaffirming the denial of August 6, 1982 at this time."

SAIF's attorney objected to the introduction of Dr. Dunn's November 22, 1983 report because it was not provided to him at least 10 days before the hearing. See former OAR 436-83-400(3). The report stated the doctor's opinion that the motor vehicle accident caused only a temporary worsening, from April 17, 1981 to June 16, 1981, and that all other symptoms and treatment related to the industrial injury. The Referee refused to admit the exhibit on the ground that SAIF did not see the report until the date of hearing and that SAIF was prejudiced by the late submission of the document. We agree with the Referee and find that he did not abuse his discretion in refusing to admit the late exhibit. See Dale R. David, 36 Van Natta 1531 (1984).

Claimant contends that he is entitled to interim compensation, penalties and attorney's fees. Although Dr. Melson's November 2, 1982 letter states a claim for aggravation, it does not state that claimant is unable to work as a result of the worsened condition. See ORS 656.273(6). We conclude that Dr. Corson's December 2, 1982 letter provided SAIF with its first medical verification of claimant's inability to work in relation to the claimed worsened condition. Interim compensation is due from January 13, 1983, the date SAIF received a copy of Dr. Corson's letter, through March 10, 1983, the date of the denial.

SAIF contends that claimant is not entitled to a penalty and associated attorney's fee for SAIF's unreasonable delay in paying interim compensation because claimant did not request a penalty at the hearing. Clark v. SAIF, 50 Or App 139 (1981) and Mavis v. SAIF, 45 Or App 1059 (1980). We agree.

Finally, we review the Referee's holding that since claimant's continuing problems are but extensions of the unsuccessful May 27, 1982 surgery, the August 6, 1982 denial is res judicata as to claimant's later problems. Once the period for requesting a hearing on the August 6, 1982 denial had passed, the denial stood as a bar to all claims arising under the same aggregate of operative facts. Million v. SAIF, 35 Or App 1097, 1102 rev. denied 289 Or 337 (1980). On our review of the record we are persuaded that the May 27, 1982 surgery and all problems subsequent thereto shared a common genesis. Claimant's failure to request a hearing on the August 6, 1982 denial precludes further inquiry regarding the compensability of claims arising under that particular set of operative facts. The fact that the March 10, 1983 denial refers to a non-existent aggravation application dated February 25, 1982 has no effect on our decision concerning the validity of that denial. The March 1983 denial is clearly based on the fact that claimant's condition is the same as that denied by the August 1982 denial. Accordingly, we affirm the Referee's approval of SAIF's March 10, 1983 denial. See also James R. Kunst, 36 Van Natta 861 (1984).

ORDER

The Referee's order dated January 6, 1984 is affirmed in part and modified in part. Claimant is awarded interim compensation from January 13, 1983 through March 10, 1983. Claimant's attorney is awarded $350 for services on Board review, to be paid by the SAIF Corporation. The Referee's order is affirmed in all other respects.

MICHAEL R. DOUGLAS, Claimant
Robert L. Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-01493
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Galton's order which set aside its denial of claimant's industrial injury claim for tendinitis. SAIF cites as error the failure of the Referee to dismiss the case for claimant's failure to appear at hearing, pursuant to OAR 438-06-070, and the introduction by the Referee of issues that were not raised by the parties. We reverse because we find that it was error not to dismiss the request for hearing.

Claimant did not appear at the hearing. His attorney asked the Referee to issue an Order to Show Cause why the case should not be dismissed as abandoned. SAIF requested dismissal pursuant to OAR 438-06-070, because it would give claimant the opportunity to appear within 30 days to show good cause why the request for hearing should not have been dismissed and would not require any further activity if he did not in fact appear. The Referee suggested that the case could be decided on the record submitted. Claimant's attorney said he preferred the Order to Show Cause to allow more time to locate claimant, but would rather that the Referee rule on the record than dismiss. SAIF asked that the Referee not rule based on the record as it was developed at that point.

OAR 438-06-070 states:

> "Failure of a party to appear at a hearing without good cause constitutes a waiver of appearance. If the party failing to appear is the party that requested the hearing, the request for hearing may be dismissed unless good cause is shown and the other party is not prejudiced thereby.

Claimant's attorney had attempted to locate claimant. Mail to claimant's last known address was returned with no forwarding address. No cause for claimant's absence appears in the record. Claimant's attorney referred to claimant, stating, "I think in establishing my case, his testimony is pretty essential." SAIF requested dismissal. We infer that SAIF, the party requesting dismissal, would not be prejudiced by granting dismissal. On these facts, we find that the request for hearing should have been dismissed and, therefore, we reverse the order of the Referee and dismiss claimant's request for hearing pursuant to OAR 438-06-070. See Warren F. Stier, 36 Van Natta 334 (1984); Edward R. Cantrell, 36 Van Natta 312 (1984); cf. John M. Barbour, 36 Van Natta 304 (1984).

ORDER

The Referee's order dated May 25, 1984, is reversed and claimant's request for hearing is dismissed.

LORY S. DUDLEY, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-06608
January 30, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Mulder's order which set aside SAIF's denial of claimant's claim for a hernia. The issue is compensability.

The test for compensability varies, depending upon whether an accidental injury or an occupational disease is being asserted. In this case, both claimant's arguments and the Referee's analysis are ambiguous on this point.

If an injury is claimed, we find the physical evidence to the contrary to be more persuasive; specifically, Dr. Norton's opinion: "It would have been impossible for the hernia to have

matured to this status [i.e., what was discovered at surgery] as a result of an injury occurring within the preceding two weeks."

If an occupational disease is claimed, there is absolutely no evidence of major causation.

ORDER

The Referee's order dated December 14, 1983 is reversed. The SAIF Corporation's denial dated July 16, 1982 is reinstated and affirmed.

ERNEST H. FOWKE, Claimant
Kirkpatrick & Zeitz, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-03357, 83-03356 & 84-00247
January 30, 1985
Order Denying Motion to Dismiss

INA, insurer for ICN Medical Labs, has moved to dismiss the SAIF Corporation's request for review on the ground that SAIF has failed to comply with ORS 656.295(2) and therefore the Board lacks jurisdiction.

The Referee issued an order in these three consolidated cases on November 20, 1984. SAIF filed a request for Board review which was received by the Board on December 11, 1984. SAIF sent copies to all parties with the exception of ICN and INA. The Board mailed an acknowledgment of the request for review to all parties including ICN and INA on December 13, 1984. It is clear from the record that neither ICN, INA nor any of their representatives received a copy of the request for review.

Argonaut v. King, 63 Or App 847 (1983) holds the statutory notice of a request for review is satisfied either by timely mailing of a copy of the request for review to the employer/insurer or by actual notice by the employer/insurer of the request for review within the 30 days. We have construed receipt of our acknowledgment as actual notice of the request for review. William E. Glass, 36 Van Natta 816 (1984). INA has the burden of proof in this motion to dismiss. It has failed to provide any evidence that it did not receive the Board's acknowledgment within 30 days of the Referee's order. Because the employer has failed to prove that it did not receive actual notice within the 30 days, its motion to dismiss must fail.

ORDER

INA's motion to dismiss is denied.

PATRICK D. GRACH, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-11510
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Seifert's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome. The issue is responsibility. Claimant also claims that he is entitled to a penalty and attorney fee for unreasonable delay.

Claimant has been a construction electrician since 1968. Over the years he has worked for more than 30 employers on assignment from his union hall. Two employers are important to this claim. Claimant worked for SAIF's insured from May through December of 1981. Between January 28, 1982 and May 14, 1982 claimant worked for an employer in the State of Washington. In May, June and July of 1982 claimant again worked for SAIF's insured. Claimant was laid off until late December 1982 when he again worked for SAIF's insured for a short time.

In April 1982, while employed by the Washington employer, claimant experienced neck pain and tingling and numbness in both hands and arms while playing volleyball. Claimant had suffered a neck injury some years earlier, and in January 1982 had twisted his neck in the shower causing similar symptoms. Concerned that he may have damaged a nerve, claimant saw his familiy physician, Dr. Kerns. Dr. Kerns's chart note of April 17, 1982 noted that claimant complained of "numbness in both hands that started with pain in the neck." A cervical spine x-ray caused Dr. Kerns to suspect possible nerve root involvement at C6-7. Claimant was referred to Dr. Karasek, a neurologist, for evaluation.

Claimant was not able to see Dr. Karasek until October of 1982. On October 29, 1982 Dr. Karasek diagnosed probable carpal tunnel syndrome based upon a positive Tinel's sign bilaterally. He also noted the existence of degenerative change at the C6-7 disc space. An analgesic was prescribed for neck pain and further studies were recommended.

On November 11, 1982 claimant underwent nerve stimulation studies, which showed significant distal median neuropathy bilaterally. On November 16, 1982 Dr. Matteri, orthopedic surgeon, diagnosed definite bilateral carpal tunnel syndrome and recommended surgical release. Claimant submitted his workers' compensation claim the next day, November 17, 1982. In the space on the 801 form for "date of injury," claimant inserted April 17, 1982.

On December 9, 1982 Dr. Matteri opined in a letter to SAIF that claimant's condition was work related, however, he could not say when claimant's symptoms began. SAIF denied claimant's occupational disease claim on December 13, 1982 on the ground that claimant's condition was not a direct result of claimant's employment with its insured. Claimant timely requested a hearing on the issue of SAIF's denial.

A hearing was scheduled and convened on July 25, 1983. That hearing was postponed at SAIF's request on the ground that, contrary to the April 17, 1982 "injury" date shown on the Form 801, claimant contended for the first time at the hearing that his "injury" date was in October or November 1982.

On August 11, 1983 Dr. Matteri responded to SAIF's inquiry by stating:

> "I can certainly say that [claimant] had a carpal tunnel syndrome at the time I initially saw him for the problem in November of 1982. However, it must be noted that carpal tunnel syndromes are the result of chronic overuse and I rather suspect that it is highly probable the

> patient was having carpal tunnel symptoms as early as April of 1982 when he was noted to have hand numbness in conjunction with . . . what proved to be a relatively minor cervical injury."

On October 17, 1983 Dr. Karasek stated:

> "[Claimant's] carpal tunnel syndrome was present in November. It was definite. It was moderate to severe and, in my opinion, required surgery. I believe it was related to his activities as an electrician and would state that it probably came on gradually.
>
> "In reading Dr. Kerns [sic] notes I would say that [claimant] probably was experiencing some carpal tunnel symptomatology at the same [sic] of his neck pain when Dr. Kerns saw him in the spring of 1982."

On October 24, 1983 SAIF issued a second denial, essentially the same as the earlier December 1982 denial.

The Referee found no evidence to establish that claimant's work with SAIF's insured worsened his underlying carpal tunnel syndrome and upheld SAIF's denials. In so doing, the Referee implicitly found that the last injurious exposure rule does not apply in this case. See Boise Cascade Corp. v. Starbuck, 296 Or 238, 243 (1984); Bracke v. Baza'r, 293 Or 239, 250 (1982). We disagree with the Referee and find that the last injurious exposure rule does apply in [the] this case. As applied, the rule requires that SAIF's denials be set aside.

In Boise Cascade Corp. v. Starbuck, supra, 296 Or at 243, the court described two types of factual situations in occupational disease cases, one in which the last injurious exposure rule is applicable and one in which it is not. The last injurious exposure rule is not applicable where a claimant establishes that a specific employment actually caused the disability. See Bracke v. Baza'r, supra. The last injurious exposure rule is applicable, "[I]f a worker's disability results from exposure to potentially causal conditions in multiple employments and the onset of the disability is during a later employment or thereafter. . . ." Starbuck, supra, 296 Or at 243. See Fossum v. SAIF, 293 Or 252 (1982).

The Referee apparently based his finding that the last injurious exposure rule does not apply in this case on the evidence that claimant exhibited symptoms in April of 1982, while employed by the Washington employer. However, claimant received no treatment for his symptoms in April 1982, and it was not until November 1982 that he was diagnosed as having work related bilateral carpal tunnel syndrome. Nor was it until November 1982 that surgery was recommended. On de novo review, we find that claimant did not become "disabled" until his symptoms were diagnosed as carpal tunnel syndrome and treatment was recommended, in November 1982. Because claimant's condition admittedly arises out of "potential causal conditions in multiple employments. . . ," and because the onset of disability was during a period of unemployment following his employment with SAIF's

insured, SAIF's insured is responsible for claimant's condition under the last injurious exposure rule. Boise Cascade Corp. v. Starbuck, supra; Fossum v. SAIF, supra.

SAIF does not contend that claimant does not have carpal tunnel syndrome, nor does SAIF deny that the syndrome is related to claimant's work as a construction electrician. SAIF also does not contend that its insured could not have contributed to or caused claimant's syndrome. SAIF advances no evidence or argument that claimant's work for the Washington employer was the sole cause of claimant's syndrome. Therefore, SAIF is responsible for claimant's carpal tunnel syndrome. See FMC Corporation v. Liberty Mutual Ins. Co., 70 Or App 370 (1984).

Claimant contends he is entitled to a penalty and attorney fee for unreasonable delay in claims processing. SAIF issued its first denial of claimant's claim less than 30 days after claimant submitted his 801 form. Under ORS 656.262(6) that timing is not even a delay, much less an unreasonable delay. Claimant then contended for the first time at the first setting of the hearing that claimant's disability arose in November instead of April 1982. SAIF issued its second denial more than 60 days after the hearing was postponed. We do not believe it was necessary for SAIF to issue the second denial. Its timing is irrelevant.

ORDER

The order of the Referee dated June 19, 1984 is reversed. Claimant's claim is remanded to the SAIF Corporation for acceptance and processing according to law. Claimant's attorney is awarded $1,200 for services at the hearing level and $400 for services on Board review for prevailing in overturning the denial, both fees to be paid by the SAIF Corporation.

WILLIAM G. HAMRICK, Claimant
Steven C. Yates, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-10263
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Podnar's order which imposed a penalty and associated attorney's fee. The Referee found that the insurer's conduct constituted an "improper unilateral offset of compensation," warranting imposition of a penalty and attorney's fee.

We begin by noting that the Referee decided an issue other than the issue framed by the parties' argument. The Referee ruled that the insurer's recovery of overpaid temporary total disability pursuant to the provisions of former OAR 436-54-320 was unreasonable. The issue presented for decision, as stated in claimant's written argument to the Referee, is:

> "* * * [A]t what point does the carrier have a responsibility to adhere to the Court of Appeals' decision in [Forney v. Western States Plywood, 66 Or App 155 (1983)] * * * . Claimant contends, quite simply, that the carrier has but 14 days (in this case the overpayment was recovered out of temporary disability benefits) and

that their failure to have provided the wrongfully withheld TTD within 14 days of the Forney decision was unreasonable conduct and entitles the claimant to penalties and attorney fees."

This case was submitted by the parties on the following stipulated facts:

"On August 9, 1983 and August 15, 1983, claimant was issued temporary total disability checks covering the same period of entitlement. This resulted in a temporary total disability overpayment of $452.88. The overpayment was discovered by the carrier on or about October 17, 1983.

"Pursuant to [former] OAR 436-54-320, the overpayment was recovered by deducting 25% from each of claimant's next four time loss checks. The last deduction was taken on November 29, 1983. Thereafter, claimant again received full time loss checks.

"On October 26, 1983, claimant mailed a Request for Hearing alleging entitlement to penalties and attorney fees for alleged improper recovery of the overpayment.

"On December 5, 1983, the carrier referred the matter to counsel.

"On December 14, 1983, the Court of Appeals filed its decision in Forney v. Western States Plywood, which invalidated [former] OAR 436-54-320. The carrier's claims representative became aware of Forney on or about January 23, 1984.

"Also, on January 23, 1984, counsel for the carrier contacted claimant's attorney and offered to repay the overpayment if claimant would dismiss his Request for Hearing. Claimant's attorney indicated he would contact claimant and advise further. Additional contacts were made with claimant's attorney on February 10, 1984 and February 16, 1984.

"On February 17, 1984, claimant's attorney advised he would not dismiss the case without payment of an attorney's fee in addition to repayment of the overpayment.

"The overpayment was repaid to claimant on April 2, 1984 on advice of counsel and after claimant's attorney indicated he would not claim a lien on the overpayment and for attorney fees.

"Between the date of the Forney decision and the date the overpayment was repaid, the carrier's file indicates the following activity:

'Time loss checks were issued on December 27, 1983, January 10 and 24, 1984, February 7 and 21, 1984, March 6 and 20, 1984. TTD payments do not require inspection of the file by the claims representative. The file was reviewed by the claims representative on January 4, 1984 and February 23, 1984.'"

There is no authority cited by claimant in support of the proposition that within fourteen days of the Forney decision, the insurer was required to repay the previously recouped overpayment. The only authority that comes even close to supporting claimant's position is the Workers' Compensation Department administrative rule requiring payment of temporary disability benefits no later than the fourteenth day after the date of any litigation order directing payment of such compensation, OAR 436-54-310(3)(e). Of course, this rule would only apply in the case of a litigation order entered in this case directing payment of temporary disability benefits to this claimant.

The inquiry that must be made is whether the above-quoted stipulated facts evidence unreasonable conduct on the insurer's part. We find and hold that they do not. Upon being informed of the Forney decision, the insurer promptly notified claimant's attorney with regard to claimant's pending hearing request, offering to repay the previously recovered overpayment in exchange for a voluntary dismissal of claimant's hearing request. Claimant's resolve to obtain an insurer-paid fee resulted in an impasse. The insurer nevertheless repaid the compensation in question prior to the time that the hearing was scheduled to convene.

As to the issue decided by the Referee, it is now well-settled (as it was at the time the Referee's order issued), that an insurer's pre-Forney unilateral recovery of overpaid compensation accomplished in accordance with the provisions of former OAR 436-54-320 does not warrant imposition of a penalty/attorney's fee. "Although the rule could not validly authorize employer's action, until [the court's] decision in Forney an employer could have a 'legitimate doubt, from a legal standpoint' as to its liability for the full amount of claimant's temporary total benefits . . . and it was not unreasonable to rely on the rule." Zwahlen v. Crown Zellerbach Co., 67 Or App 3 (1984) (citations omitted). Also, see Forney v. Western States Plywood, 297 Or 628, 633 (1984), decided after issuance of the Referee's order: "It would be absurd to rule that an employer has unreasonably resisted payment of compensation when the employer in good faith relied on an administrative rule and legal orders from the Referee and, subsequently, the Workers' Compensation Board that the overpayment recovery was proper."

With regard to the issue raised and argued by the parties, i.e. whether the insurer's conduct after the court's decision in Forney constituted unreasonable delay, refusal or resistance to the payment or repayment of compensation, as indicated above, we

conclude that the insurer's conduct was reasonable at all times material herein.

An additional issue raised by the insurer before the Referee and again on review is whether the insurer should now be authorized to recover the double payment of temporary total disability. The Referee inexplicably refused to grant the insurer's request, which was made in its original submission and again on reconsideration. Claimant does not presently argue, nor did he argue before the Referee, in opposition to the insurer's request. We perceive no reason in law or logic as to why the insurer's request should not now be granted; therefore, we will enter our order accordingly.

ORDER

The Referee's order dated July 1984 is reversed. The insurer is authorized to recover the overpaid temporary total disability in the amount of $452.88, out of any permanent disability compensation to which claimant is or may become entitled.

CYNTHIA L. (BASH) HART, Claimant
Welch, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-06031
January 30, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Shebley's order which set aside its denial of claimant's occupational disease claim for her left leg phlebitis condition. On review, the sole issue is compensability.

We find that claimant has failed to prove that her underlying phlebitis condition worsened due to her work activities. Consequently, we reverse the Referee's order.

Claimant was 36 years of age at the time of hearing. She began working for the employer as a retail store manager in May 1982. In March 1983 claimant sought treatment from Dr. Krisciunas, complaining of pain in her left leg from standing on hard concrete floors at work. The "First Medical Report", Form 827, contained a check in the "yes" box to the question of whether the body part had been previously injured. Dr. Krisciunas diagnosed phlebitis of the left leg, did not release claimant to work and recommended one month of conservative treatment.

Dr. Geddes, an associate of Dr. Krisciunas, reported that claimant had experienced pain in the left leg for two weeks prior to seeking treatment. Dr. Geddes further reported that claimant had given a history of "deep venous thrombosis of the left leg approximately five years previously requiring intravenous heparin and ten days hospitalization." Claimant continued to receive conservative treatment from Dr. Geddes for approximately the next two months. She remained off work and her pain continued.

In May 1983 Dr. Geddes referred claimant to Dr. King, vascular surgeon. Dr. King reported "recurrent phlebitis by history in the left leg." The doctor also reported a right leg history occurring approximately seven to eight years previously, as well as right leg problems some five years ago, after the birth

of claimant's second child. Dr. King recommended anti-coagulant medication, the use of support hose and elevation of the extremities. Soon after this examination, Dr. King released claimant to return to work.

In June 1983, Dr. King opined that claimant's work activities "most probably" had caused an "exacerbation of a preexisting condition." The doctor conceded that this opinion was "obvious speculation on my part." Dr. King acknowledged that the stress of sitting for prolonged periods at work, as well as standing and walking on concrete floors might be a contributing factor. However, these activities "certainly" were not the cause of claimant's phlebitis.

In November 1983, Dr. King submitted his most recent opinion. The doctor concluded that claimant's employment may have aggravated her preexisting condition. However, Dr. King agreed with counsel for the insurer's statement that within a reasonable medical probability claimant's work activities did not worsen the underlying condition.

Claimant testified that she had experienced no difficulty with her left leg before working for the employer. She checked the "yes" box on the Form 827, indicating a prior left leg injury, because she experienced pain in the leg while working during the previous busy Christmas season. However, she received no medical treatment at that time. Claimant testified that she had experienced prior problems in her right leg, which resulted in her hospitalization approximately eight years ago. She wore stockings on both of her legs during her pregnancy, some six years ago, but had no problems with either leg.

The Referee found that claimant's work was the major contributing cause of the onset of claimant's pain and swelling in the left leg. He concluded that claimant need not prove a worsening of her underlying or preexisting disease condition, as required by Weller v. Union Carbide, 288 Or 27 (1979), because she was either completely asymptomatic or, at a minimum, not sufficiently symptomatic when her left leg problems became troublesome. The Referee relied on Patricia Lewis, 34 Van Natta 202 (1982) and Bert G. Harr, 35 Van Natta 1236, 1237 (1983) as support for his conclusion that Weller was inapplicable.

Subsequent to the Referee's order, the Oregon Supreme Court has held that the Weller analysis is the appropriate analysis for determining the compensability of an occupational disease claim regardless of whether the underlying condition was symptomatic or asymptomatic at the time of employment. Wheeler v. Boise Cascade Corporation, 298 Or 452 (1985). Accordingly, claimant must establish that her work activities caused a worsening of her underlying condition.

We find that the evidence does not establish that claimant's underlying left leg phlebitis condition was worsened by her work activities. Dr. King stated that claimant's underlying condition may have been exacerbated or aggravated by her work activities. However, Dr. King also agreed with the statement that within a reasonable medical probability, claimant's work activities did not worsen her underlying condition. The remaining physicians offered no convincing opinion concerning compensability. Since the evidence fails to satisfy this Weller requirement, it follows that claimant's occupational disease claim is not compensable.

ORDER

The Referee's orders dated December 9, 1983 and December 22, 1983 are reversed. The insurer's denial dated June 14, 1983 is reinstated and affirmed.

PAUL G. HARVEY, Claimant
Paul G. Mackey, Deputy Counsel (Mult. Co.)
SAIF Corp Legal, Defense Attorney

WCB 83-08345 & 83-08344
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Multnomah County, Oregon, as the self-insured employer, requests review of Referee Mulder's order that found it, rather than the SAIF Corporation's insured, State of Oregon, is the employer responsible for claimant's industrial injury and subsequent aggravation claim. The issue is responsibility.

The Board agrees with the result reached by the Referee, however, we arrive at that result by a different route.

Claimant was employed as a juvenile court counsellor for Multnomah County. He was hired, supervised and controlled by persons under the direction and control of the Circuit Court juvenile judges. Although the Referee referred to the "right of control" criterion of Multnomah County v. Hunter, 54 Or App 718, 722 (1982), he did not elaborate upon how, or if, that case affected his decision. Under the holding of Hunter, it appears that the Referee's conclusion that Multnomah County is the responsible employer was erroneous. See Gary L. Smith, 34 Van Natta 522, 523 (1982) (Office assistant for Multnomah County Circuit Court was state employe for workers' compensation purposes.)

We find, however, that Multnomah County is barred from denying responsibility. Claimant's industrial injury occurred on July 6, 1981. It was accepted and processed by Multnomah County and a Determination Order closed the claim on August 6, 1982 with an award for scheduled left leg disability. On or about June 6, 1983 claimant submitted an aggravation claim. Multnomah County denied responsibility on July 1, 1983. At the hearing, counsel for Multnomah County conceded that the Board's case of Cleve A. Retchless, 35 Van Natta 1788, 1790 (1983), is on point and controlling. In Retchless the Board held that Bauman v. SAIF, 295 Or 788 (1983), barred an employer/insurer from denying responsibility for a claim, as well as compensability, once the claim had been accepted and the statutory 60-day period had elapsed.

The Referee ruled that Retchless does not apply in this case. That ruling was erroneous. See also Robin L. Campbell, WCB Nos. 82-04288 through 82-04291, decided this date. Having accepted responsibility for claimant's underlying claim, Multnomah County may not now deny it.

ORDER

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

TIM J. MCAULIFFE, Claimant
Schwabe, et al., Defense Attorneys

WCB 84-01640
January 30, 1985
Order Denying Dismissal

The self-insured employer has moved to dismiss claimant's request for review on the ground that claimant has failed to comply with ORS 656.295(2) and, therefore, the Board lacks jurisdiction. The motion is denied.

The Referee issued an order in this matter on November 30, 1984. In a letter to the Board dated December 10, 1984 claimant requested Board review. The Board received the request for review on December 17, 1984. The employer's attorney has submitted an affidavit stating that neither the employer nor its attorneys ever received a copy of claimant's request for review. However, on December 19, 1984 the Board issued an acknowledgment of its receipt of the request for review. A copy of the acknowledgment was sent to the employer's attorneys. The affidavit does not indicate whether the employer's attorneys received the acknowledgment. However, because the employer has the burden of proof, we find that the employer has failed to prove that it did not receive a copy of the Board's acknowledgement.

Argonaut v. King, 63 Or App 847 (1983) holds the statutory notice of a request for review is satisfied either by mailing of a copy of the request for review to the employer/insurer within 30 days of the Referee's order or actual notice by the employer/insurer of the request for review within the 30 days. We have construed the acknowledgement as actual notice of the request for review. William E. Glass, 36 Van Natta 816 (1984). Because the employer has failed to prove that it did not receive actual notice within the 30 days, its motion to dismiss must fail.

ORDER

The self-insured employer's motion to dismiss is denied.

ALBERT NACOSTE, Claimant
Drakulich & Carlson, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-10457
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Peterson's order that required it to repay to claimant $6,720 withheld from his workers' compensation benefits for permanent total disability as an offset for what it perceived to be a previous overpayment of permanent partial disability benefits. SAIF contends that the offset was authorized by the language of a prior Board Order on Review.

Claimant sustained a compensable head injury in 1974. In 1976 his claim was closed by a Determination Order that granted him an award of 16° for 5% of the total allowable for unscheduled permanent partial disability for injury to his central nervous system. Claimant requested a hearing, at which he contended that he was permanently totally disabled. After a hearing held April 3, 1979 Referee Neal found against claimant on the issue of permanent total disability, but increased his permanent partial disability

award to 96° for 30% of the total allowable for unscheduled disability.

Claimant requested Board review of Referee Neal's order. On de novo review, the Board modified Referee Neal's order to grant claimant an award of permanent total disability. Albert Nacoste, 28 Van Natta 556 (January 17, 1980). The Board's order stated:

> "Claimant is hereby granted an award for permanent total disability as a result of injury to his central nervous system effective the date of this order. This is in lieu of any previous awards for unscheduled disability. . . ."

Id. at 562. The 25% additional permanent partial disability award granted by the Referee in April 1979 had been paid in full to claimant by the time the Board issued its Order on Review. See ORS 656.313(1).

SAIF petitioned for review by the Court of Appeals, which affirmed the Board's order without opinion in October 1980. 48 Or App 849 (1980). However, on February 20, 1980 SAIF announced its intention to begin recovering the permanent partial disability payments by withholding 25% of monthly permanent total disability benefits. This SAIF did until the entire amount paid, $6,720, was collected in February 1984. Claimant ultimately requested a hearing, challenging the propriety of SAIF's collection.

SAIF contends that the statement in the Board's previous order that, "This [permanent total disability award] is in lieu of any previous awards for unscheduled disability. . .," constituted both the creation of an overpayment and authorization to collect that overpayment by offsetting it against future benefits. Based upon all the evidence available to us, including the previous Board order and the briefs the parties filed with Court of Appeals, we are not persuaded by SAIF's argument.

Like the Referee, we are not permitted to alter our previous order once it has become final by operation of law. We see no need to do so in this case in any event. Our interpretation of the January 17, 1980 order is that the Board selected the date of its order as the beginning date for claimant's permanent total disability benefits because of the Referee's permanent partial disability award. We interpret the use of the phrase "in lieu of" as having been intended to stop permanent partial disability benefits as of January 17, 1980 and prospectively replace those benefits with permanent total disability benefits. We arrive at this interpretation because the Board relied upon the same evidence considered by Referee Neal in finding claimant permanently totally disabled. Fixing claimant's permanent total disability as having begun as of the date of the April 1979 hearing would have resulted quite clearly in an overpayment. Fixing the date as of the date of the Board order merely compensated claimant with permanent partial disability benefits between April 1979 and January 1980 and with permanent total disability benefits thereafter. To permit SAIF to recover the $6,720 paid between April 1979 and January 1980, without requiring it to pay permanent total disability benefits beginning in April 1979, would result in claimant being totally uncompensated for a nine month period. We are unable to conclude that the Board members who decided the case could have intended such a result.

The SAIF Corporation has also requested that it now be authorized an offset, if it is concluded that one was not authorized earlier. We have so concluded, however, in doing so we have found that there was no overpayment, therefore, no offset is allowed.

We agree with the Referee's resolution of the penalty issue.

ORDER

The Referee's order dated May 17, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

ROBERT W. NORTHEY, Claimant
Emmons, et al., Claimant's Attorneys
Minturn, et al., Defense Attorneys

WCB 83-01825
January 30, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Danner's order which awarded claimant benefits for permanent total disability. The issue for review is the extent of claimant's disability.

Claimant was originally injured on October 5, 1978 while employed as a machinery oiler. Claimant was diagnosed as suffering from a chronic lumbosacral sprain and degenerative disc disease, although Dr. Crosby, claimant's initial treating physician, expressed some skepticism concerning claimant's injury and motivation. A myelogram performed on December 1, 1978 was interpreted as normal, and claimant received conservative treatment.

The Orthopaedic Consultants reported on March 13, 1979 that claimant could be considered medically stationary. Claimant's impairment as a result of the injury was found to be mild. The Consultants were of the opinion that claimant would not return to his former occupation with or without limitations and that due to claimant's age (58) and limited education (fourth to fifth grade), that the prognosis for return to work was poor.

A Determination Order dated May 8, 1979 awarded claimant benefits for temporary total disability only.

A hearing in relation to the Determination Order was held in July 1979. Prior to the hearing claimant had made no efforts to seek employment, and he testified at the hearing that he had no intentions of doing so. The Referee awarded claimant permanent total disability.

Based on claimant's failure to have made reasonable efforts to obtain employment, the Board issued an Order on Review on January 23, 1980 which reversed the award of permanent total disability and awarded claimant 60% unscheduled permanent partial disability. Robert Northey, 28 Van Natta 599 (1980). The Board's order was subsequently affirmed by the Court of Appeals. Northey v. SAIF, 47 Or App 655 (1980).

In January 1980 claimant received a referral for vocational rehabilitation. Claimant's file was closed, however, as claimant felt that he could not physically pursue any form of training or work-related activity.

Claimant thereafter began treating with Dr. Kovachevich. In September 1981 Dr. Kovachevich reported that claimant's pain appeared to be worsening, although his objective findings appeared to be about the same as before. A CT scan performed on November 9, 1981 revealed some hypertrophic bone around the facet joints at L4-5 and L5-S1, with possibly some minimal narrowing of the neuroforamina at L4-5, but was otherwise interpreted to be normal. Dr. Kovachevich continued to express his opinion that claimant appeared to be worsening, although he admitted that it was almost impossible to point to any objective findings to substantiate this. On January 5, 1982 SAIF issued a denial of aggravation.

Claimant was thereafter referred to the Northwest Pain Center. Dr. Seres reported on February 8, 1982 that claimant had decided that he was not going to return to work, and that it was clear that claimant was "quite comfortable" with Dr. Kovachevich's statements that he was permanently disabled. A psychological evaluation performed by Dr. Ballering indicated that although claimant was a reasonable candidate for pain center therapy, he would very likely resist any attempts to return him to work.

Claimant was discharged from the pain center on February 26, 1982. The discharge reports indicate that claimant made exceptional progress in the control of his pain, that all pain behavior was dropped, that his gait returned to normal and that his strength increased from poor to good. It was recommended that claimant should not engage in any significant lifting and should avoid repetitive bending, stooping or twisting activities. Claimant indicated that his plans for the future were to maintain a retirement status.

Although claimant later experienced some exacerbation in his pain, it appears that he generally maintained the gains he made at the pain center.

On September 14, 1982 a hearing convened in relation to claimant's denied aggravation claim. Although he expressed some trepidation about doing so, Referee Foster set aside the denial and ordered the claim reopened. The Referee's order was affirmed by the Board on August 11, 1983. Robert W. Northey, 35 Van Natta 1189 (1983).

On December 28, 1982 claimant was again examined by the Orthopaedic Consultants. The Consultants diagnosed claimant as suffering from chronic lumbar strain with radicular symptoms, minimal degenerative osteoarthritis of the lumbar spine, peripheral vascular disease unrelated to claimant's injury and suspected functional overlay with a lack of motivation for return to work. Claimant's loss of function due to the injury was stated to be mild, and it was felt that claimant could return to some light duty occupation if he was motivated to do so. The Consultants found claimant to be medically stationary and stated that "In reviewing the previous examination in 1979, and comparing it with today's exam, there has been no significant interval change between the two exams."

Despite Dr. Kovachevich's continued statements that claimant was permanently disabled due to age and educational deficits, a Determination Order issued on February 14, 1983 awarding claimant benefits for temporary total disability. Claimant requested a hearing.

Although the Referee expressed some doubts about claimant's credibility, relying on Looper v. SAIF, 56 Or App 437 (1982), he concluded that claimant was entitled to benefits for permanent total disability. We disagree.

We are not convinced that from a physical standpoint alone claimant is permanently and totally disabled. All of claimant's treatment since the injury has been of a conservative nature. All diagnostic test findings have been minimal or normal. The Orthopaedic Consultants found claimant to be capable of returning to light duty work. The reports of the physicians at the Northwest Pain Center indicate that claimant would be capable of light duty work, but preferred to maintain his retirement status. Even Dr. Kovachevich, who has consistently stated that claimant is permanently and totally disabled, has not stated that claimant is totally disabled from a physical standpoint.

Nor can we conclude that when claimant's less than total physical disabilities are combined with his less than favorable social/vocational factors, he is permanently and totally disabled. Although claimant's age and education present some obstacles to employment, claimant is of at least average intelligence and appears to have some job skills that could be transferable to jobs in the light duty catagory. We also find the Referee's reliance on Looper to be misplaced. Although the claimant in Looper does appear similar from a social/vocational standpoint to the claimant in the current case, there is a significant difference in physical capabilities. Following his injury, the claimant in Looper was left with the following problems:

> "Claimant's rib cage area healed abnormally, causing grating sensations with movement; he has constant pain, which is intensified by sitting for more than one-half hour, by any lifting or by walking more than a block. His left arm is clumsy and very weak; his hand cannot be used effectively for manipulation, and merely holding an object requires concentration. His left leg is 1-3/4 inches shorter than his right one, requiring claimant to wear a built-up left shoe; he suffers constant pain in his leg. claimant's tolerance level for standing is from one-half to one hour. He is unable to bend, squat, crawl or climb. His leg problems have caused several falls. He also has nodules around his knee, which are exquisitely tender and easily irritated. His left hip is painful when he walks.
>
> "Because of an enlarged kidney, claimant's medication was reduced, but even the reduced dosage causes some dizziness and ringing in his ears. * * * Since the accident, claimant has experienced frequent memory loss and finds it difficult to concentrate. * * *." 56 Or App at 439, 440.

We do not mean to imply that a claimant must necessarily be a "basket case" to receive an award of permanent total disability. Although we find that claimant does suffer from some detrimental social/vocational obstacles to employability, we do not believe that they are serious enough, when combined with his fairly moderate impairment (moderate enough that no physician has felt surgery to be necessary) that permanent total disability is warranted. See Allison v. SAIF, 65 Or App 134 (1983). Although Dr. Kovachevich is of the opinion that claimant is permanently and totally disabled, it appears that the doctor is giving an opinion based more on social/vocational considerations than on medical considerations. As we stated in Keith K Evans, 34 Van Natta 1035 (1982), aff'd mem., 63 Or App 255 (1983), we decline to substitute physician's judgments in such matters for our own.

Despite the fact that there was a finding that claimant sustained an aggravation in 1981, it is clear that there has been no permanent change in claimant's condition since the time of the 1979 hearing. Examining the transcript of the 1979 hearing, and comparing it with the transcript from the current hearing reveals that all of claimant's current complaints are virtually identical with the complaints he voiced at the time of the first hearing. The Orthopaedic Consultants, who performed closing examinations of claimant in 1979 and again in December 1982, expressed the opinion that claimant's condition in 1982 remained unchanged from his condition in 1979. A comparison of the two reports indicates this to be correct.

Although it is true that claimant is entitled to have his disability reexamined, in view of the fact that there have been no permanent changes in his condition since 1979 and, in view of the fact that claimant's disability was determined to be 60% at that time, it would be difficult to justify a current award of permanent total disability. Claimant's disability was previously reduced from permanent total to 60% on the basis that claimant failed to comply with the requirements of ORS 656.206(3). In other words, claimant had exhibited a pronounced lack of motivation to return to work, and had made virtually no efforts in that direction. As noted in SAIF's brief, the only thing that has changed currently is that four more years have passed and claimant has still exhibited no motivation to return to work and has still made no efforts or less than reasonable efforts to find employment suitable with his restrictions.

With regard to the question of the extent of claimant's permanent partial disability, considering the record as a whole, we cannot conclude that claimant is entitled to an award of permanent partial disability greater than that which he has previously received. We, therefore, reinstate the February 14, 1983 Determination Order.

ORDER

The Referee's order dated June 14, 1983 is reversed. The February 14, 1983 Determination Order is reinstated and affirmed.

HAROLD M. MILLER, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-02346
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Galton's order which: (1) upheld the SAIF Corporation's de facto denial of his aggravation claim for a left hip injury; and (2) awarded a $350 attorney fee for SAIF's failure to deny the claim. On review, claimant contends that: (1) the Referee abused his discretion in failing to admit interrogatory responses from an attending physician or to permit claimant's counsel an opportunity to cross-examine the attending physician; (2) he has established a worsening of his compensable condition; and (3) his attorney's fee award should be increased. SAIF contends the attorney fee should be eliminated or, at a minimum, reduced.

Claimant has moved for an order of remand for the taking of further evidence. We deny the motion. We do not conclude from our review of the record that this case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5).

The Board affirms that portion of the Referee's order which found that claimant had failed to establish a compensable aggravation claim with the following comment. In Garbutt v. SAIF, 297 Or 148, 151 (1984), the Supreme Court stated that a physician's report is not indispensable in a workers' compensation claim. The worker's or other lay testimony may or may not carry the burden of proving the claim. After conducting our de novo review of the record, including claimant's and his daughter's credible testimony, we find that the preponderance of the persuasive evidence fails to establish a compensable aggravation claim.

We further find that claimant is not entitled to an attorney's fee. In Ray A. Whitman, 36 Van Natta 160 (1984), the Board interpreted EBI Companies v. Thomas, 66 Or App 105 (1983), and held that neither penalties nor attorney fees could be assessed where there were no amounts "then due" upon which a penalty for unreasonably delaying acceptance or denial could be assessed pursuant to ORS 656.262(10).

Here, as in Whitman, there were no amounts "then due" upon which to assess a penalty and attorney fees for an unreasonable delay in denying the aggravation claim. Consequently, that portion of the Referee's order which awarded claimant an attorney's fee is reversed.

ORDER

The Referee's order dated June 15, 1984 is affirmed in part and reversed in part. That portion of the order which awarded an attorney's fee is reversed. The remainder of the order is affirmed.

RONALD S. MILLER, Claimant
Flaxel, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 83-11683
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order which affirmed the April 15, 1983 Determination Order that awarded him no permanent partial disability for a left shoulder injury. On review, claimant contends that his permanent disability and loss of earning capacity is greater, as a result of his 1982 injury, than it was following his 1978 injury to the same part of his body.

The Board affirms the order of the Referee with the following comment. The provisions of ORS 656.222, which require that an award of compensation for a subsequent disability shall be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities, refers only to previous compensation paid a worker under the Oregon workers' compensation system. American Bldg. Maint. v. McLees, 296 Or 772, 777 (1984). While we consider the previous determinations of claimant's extent of disability arising from injuries to the same part of the body, we do not necessarily engage in a strict mathematical computation. Cascade Steel Rolling Mills v. Madril, 57 Or App 398 (1982); R. L. Matthews, 35 Van Natta 52, 53 (1983).

In conducting our de novo review of the record, 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). We conclude that claimant has failed to establish a permanent disability and loss of earning capacity as a result of his 1982 left shoulder injury.

ORDER

The Referee's order dated July 3, 1984 is affirmed.

BENJAMIN G. PARKER, Claimant
Dean Heiling, Claimant's Attorney
Rod R. Johnson, Defense Attorney

WCB 82-09534
January 30, 1985
Order on Reconsideration

The employer has moved for an order of the Board setting a new hearing in this matter. We issued an Order on Remand on January 15, 1985 in which we remanded the claim to the employer for acceptance and payment of benefits in accordance with law. We infer that the motion to order a new hearing is a motion for reconsideration of our January 15, 1985 order. The motion for an order setting a new hearing is denied.

This case is before the Board on remand from the Court of Appeals. The court in its opinion discussed the burden of proof in backup denial cases in which the employer/insurer alleges fraud. The court stated in its opinion:

> "On de novo review ORS 656.298(6), we are not persuaded that employer proved, by a preponderance of the evidence, 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." Parker v. D.R. Johnson Lumber Co., 70 Or App 683, 688 (1984).

Thus, the Court of Appeals has applied the burden of proof standard which it enunciated in this case in its de novo review of the record. It would be inappropriate for the Board to now remand the case for a new hearing on the same issue decided by the court.

ORDER

The employer's motion for a new hearing is denied.

DUANE L. PETERSON, Claimant
McNutt, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 84-02551
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Seymour's order that partially set aside its denial of claimant's medical services claim for his right arm condition and awarded a penalty of 15% of unpaid medical bills. The issues are compensability and penalty.

Claimant is a 56-year-old former lumber faller who sustained a compensable back injury on August 6, 1973 when hit by a "widow maker" while falling a tree. Although his principal injury was an avulsion-type fracture of the transverse process of the L4 vertebra, he sustained trauma to his entire back. Claimant's claim was closed by a Determination Order issued November 13, 1973 that awarded no permanent disability. No appeal was taken from the Determination Order, and claimant returned to work in the woods at his former employment.

Claimant's treating orthopedist, Dr. Bert, saw claimant on December 13, 1982 for neck and right arm symptomatology. Dr. Bert had in the past treated claimant for a compensable right knee injury that is not involved in this claim. He reported that claimant had cervical spondylosis at the C4-5 level that was localized and "probably post traumatic." One year later, on December 13, 1983, claimant's attorney wrote to SAIF, initiating a claim for medical services.

On January 4, 1984 Dr. Bert opined to the claimant's attorney that claimant's arm problems were directly related to claimant's woods injury in 1973. Claimant was examined by a panel of the Orthopaedic Consultants on February 14, 1984. The panel report noted a history of a shaking sensation in claimant's right arm dating back to at least 1981 and further noted by examination that claimant exhibited a resting tremor of his right upper extremity. The panel opined that claimant had Parkinson's disease, which was responsible for his right arm condition, and which was not in any way related to claimant's 1973 industrial injury.

Dr. Bernstein, neurologist, unequivocally confirmed that claimant had Parkinson's disease on February 21, 1984. SAIF denied claimant's claim for medical services on February 29, 1984,

on the basis that claimant's right arm condition was caused by his noncompensable Parkinson's disease.

Dr. Bert opined on July 2, 1984, in a brief, conclusory fashion, that he was treating claimant for cervical spondylosis, which he felt was independent of the Parkinson's disease and related to the 1973 injury.

The Referee set aside SAIF's denial to the extent that it denied right arm treatment referable to the 1973 injury. We find Dr. Bert's opinions regarding the cause of claimant's symptoms unpersuasive, largely because he failed to diagnose what was apparently a very obvious condition of Parkinson's disease. On de novo review of the record we find no persuasive evidence that claimant's right arm symptomatology arises from anything other than his Parkinson's disease. Accordingly, we reverse the Referee's order on the compensability issue.

We find that SAIF was approximately two weeks late in denying claimant's claim. In penalty situations, the goal is to have the punishment fit the offense. See Zelda M. Bahler, 33 Van Natta 478 (1981), rev'd on other grounds sub nom, Bahler v. Mail-Well Envelope Co., 60 Or App 90 (1982). Claimant's treating physician failed to diagnose claimant's noncompensable Parkinson's disease, or, at least, to mention it in any of his reports. SAIF took reasonable and quite prompt steps to confirm the true state of claimant's medical condition, and issued its denial promptly thereafter. On these facts, we decline to assess a penalty.

ORDER

The Referee's order dated July 24, 1984 is reversed. The SAIF Corporation's denial of claimant's claim for medical services for his right arm condition dated February 29, 1984 is reinstated and affirmed.

CLAUDE L. RAINWATER, Claimant
Velure, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-11974
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Fink's order which: (1) set aside its "de facto" denial of claimant's aggravation claim; and (2) awarded claimant 50% (160°) unscheduled permanent partial disability for a "right side" injury. On review, the employer contends that claimant's swallowing difficulties have not worsened or, alternatively, that the award should be reduced.

The Board affirms that portion of the Referee's order which found that claimant had established a compensable aggravation claim. That portion of the Referee's order which awarded claimant 50% unscheduled permanent disability is modified.

Claimant was 66 years of age at the time of hearing. In September 1979 claimant fell across a walkway, striking his right side on a railing. It was eventually diagnosed that claimant had multiple rib fractures and a soft tissue injury of the chest. A chest x-ray indicated claimant suffered from chronic obstructive pulmonary disease. Claimant returned to regular work in January

1980. A February 1980 Determination Order did not award him permanent disability. Claimant requested a hearing, but subsequently withdrew the request. The matter was dismissed by a Referee's order in April 1981.

Following his compensable injury, claimant noticed breathing and swallowing difficulties. He also experienced problems with fatigue. Claimant's symptoms arose not only when he swallowed, but also when he bent over. After his return to work, these difficulties persisted, occurring approximately every two or three days. When experiencing these difficulties, claimant was basically incapacitated. Due to these problems, claimant was accorded special assistance while performing his job duties. He retired in February 1982 at age 64, approximately one year before he had originally planned.

In November 1980 Dr. Seeley, claimant's treating internist, referred claimant to Dr. Walta, gastroenterologist. Dr. Walta noted that claimant had a hiatal hernia, in addition to his esophageal spasm. Based on a negative regurgitation test, the doctor opined that the spasm was not related to the hernia. In addition, Dr. Walta doubted that claimant's industrial injury "had anything to do with the hiatal hernia specifically."

Dr. Wichser examined claimant in April 1981. Dr. Wichser opined that "the most appropriate diagnosis for both [claimant's] lethargy and esophageal spasm is that of a traumatic neurosis, directly precipitated by his work related injury."

In October 1982 Dr. Seeley noted that claimant had symptomatically noticed some further swallowing difficulties. However, Dr. Seeley concluded that there was no objective evidence of any further change in his "industrially acquired esophageal problems."

At the June 1984 hearing Dr. Seeley opined that claimant suffers from a traumatic hiatal hernia, which is basically a weakness of the lower end of the swallowing tube, and a motor disorder of his swallowing mechanism. Both of these conditions were related to the compensable injury. The doctor conceded that there were no objective findings to support a worsening. However, Dr. Seeley concluded that claimant's condition had worsened in that his swallowing difficulties had increased, requiring additional esophageal dilation procedures. Dr. Seeley noted that these dilation treatments had become "noticeably more frequent over the past two years, for certain." Prior to 1983, these treatments had occurred rarely. Currently, claimant receives a series of three dilations approximately every four months.

In 1980, Dr. Seeley felt there would be no permanent swallowing difficulties. However, he now felt that claimant's swallowing difficulties were a permanent residual of his compensable injury. Dr. Seeley acknowledged Dr. Walta's expertise, but felt he was more familiar with claimant's condition. Dr. Walta had examined claimant only on the one occasion, approximately three and a half years prior to the hearing. Dr. Seeley had been claimant's treating physician since 1979.

Dr. Seeley felt claimant's fatigability was the result of a number of factors, direct and indirect. Besides the compensable injury, Dr. Seeley noted claimant's: (1) dyspnea from his long term emphysema; (2) chronic obstructive pulmonary disease; (3) long term smoking; and (4) retirement.

Claimant has a high school education. He is a retired master sergeant in the Army. His work experience includes carpentry and forklift driving, in addition to his 10 years of experience as a general sawmill laborer for the employer. His esophageal spasms are permanent and have worsened since February 1980. He now experiences severe, disabling pain in the mid-chest area approximately four to five times a week. These painful episodes generally last five hours and are incapacitating. Claimant now undergoes dilation procedures every fourth month to treat the condition. In addition, he is restricted to a bland diet and avoids bending over.

We are persuaded that claimant's condition resulting from his compensable injury has worsened since February 1980, the last arrangement of compensation. ORS 656.273(1). Therefore, he is entitled to a redetermination of his permanent disability. Johnson v. Industrial Indemnity, 66 Or App 640 (1984). However, we find a 50% 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 disabling 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 20% unscheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated June 22, 1984 is affirmed in part and modified in part. In lieu of the Referee's award of 50% (160°) unscheduled permanent partial disability, claimant is awarded 20% (64°) unscheduled permanent disability. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's award is affirmed. Claimant's attorney is awarded $400 for services on Board review in regards to the compensability issue, to be paid by the employer.

JAMES S. THOMPSON, Claimant
Joseph T. McNaught, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-12052
January 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Leahy's order that set aside its denial of claimant's low back claim. SAIF contends that an occupational disease analysis rather than an injury analysis should have been applied by the Referee, and that claimant's work is not the major contributing cause of his low back condition.

Claimant, a 29-year-old diesel mechanic, first strained his back in mid 1977. This occurrence resolved promptly. Claimant experienced low back pain again in late 1980 after pulling hard on

a wrench to loosen a large nut while lying under a truck on a creeper. He recovered promptly from this incident as well.

Claimant began working as a heavy duty truck mechanic with his current employer in mid 1981. In a typical week he would do some engine work, probably some front end work involving king pins or springs and possibly a clutch, transmission or rear end job. The work was heavier on some days than on others, with front end spring and clutch jobs being particularly heavy and awkward. Although claimant's off work activities included summer softball, jogging, rope jumping and swimming, we find that his work activities were far heavier and more strenuous.

Claimant experienced low back pain in late March 1982, after a long drive and having played softball. Dr. Ramirez diagnosed lumbosacral strain and released claimant from work for a week. Symptoms persisted over the next few months, but resolved by early September, 1982.

In late March or early April 1983, claimant began experiencing a noticeably different pain in his back, with radiation down his right leg. He does not recall any single traumatic triggering incident, but testified that on a heavy day after lifting he would go home and be sore. About a week after the leg pain began, on April 6, 1983, claimant saw Dr. Ramirez, whose analysis was questionable lumbosacral strain, sciatica and rule out disc pathology. Conservative treatment was undertaken. Claimant's symptoms failed to resolve.

Claimant began treating with Dr. Smith on August 16, 1983. A herniated disc was diagnosed and a laminectomy and discectomy at L5-S1 right was performed on September 26, 1983. Claimant filed his first workers' compensation claim in late November 1983.

Dr. Smith reported on June 11, 1984, that the final rupture of the disc occurred when claimant started to develop radiating pain in the right leg, and that this was a very definite worsening of his underlying condition. Based upon a substantially accurate description of claimant's work activities, Dr. Smith stated that the work could very well have caused the final act in the rupture of the disc with subsequent herniation. Comparing claimant's job activities with his nonjob activities, Dr. Smith believed that the job activities were the major contributing cause of the herniation.

After reviewing the recent medical file but without examining claimant, SAIF's medical administrator, Dr. Norton, opined that claimant's employment with SAIF's insured did not initiate the degenerative disease of claimant's lower spine, and probably was not the major contributor to its progression nor the cause of the disc herniation. He explained that degenerative disc disease is an idiopathic, naturally occurring disease process governed by multiple factors which are not well understood. He noted that the contribution of mechanical stresses is commonly over-emphasized as the most significant factor in the disease process, and most obviously so in liability claims.

We believe that it is most appropriate to analyze this claim in an occupational disease context. An occupational disease differs from an injury in that it arises gradually and not unexpectedly as an inherent hazard of continued exposure to the particular work conditions. See e.g., Valtinson v. SAIF, 56 Or App 184 (1982). We find that claimant's back condition progressed

gradually during his employment with SAIF's insured, and that back problems like claimant's ought not to be unexpected considering the heavy and awkward straining and lifting inherent in the work.

We agree with Dr. Smith, the treating doctor, that claimant's work activities more likely than not were the major contributing cause of the disc herniation and subsequent need for treatment. We accord Dr. Norton's opinion less weight because he has never examined claimant, basing his opinion upon information in claimant's file. See Weiland v. SAIF, 64 Or App 810 (1983). Accordingly, we find claimant's back claim compensable.

ORDER

The Referee's order dated July 23, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

NORMA N. WINKELMAN, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-10010
January 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Daron's order which awarded claimant 176° for 55% unscheduled disability for injury to the low back on review of a Determination Order which awarded no compensation for permanent disability. The extent of disability issue on review is two-fold: whether claimant's industrial injury materially contributed to her post-injury low back impairment; and, if it did, the extent of permanent disability attributable to her injury.

On our de novo review, we agree with the Referee's determination that, as a result of her injury, claimant has sustained permanent impairment and consequent permanent partial disability. We also conclude, however, that the Referee's award of permanent disability was excessive, taking into consideration the apparent extent of claimant's physical impairment and relevant social/vocational factors.

At the time of hearing claimant was 54 years of age. She has a twelfth grade education with some adult education classes in office/clerical work. Claimant sustained this back injury while working for a nursery, employment she had performed off and on for the preceding seven years. It appears this employment involved horticultural skills generally associated with greenhouse work and, in addition, retail sales work. Some of claimant's work activities involved heavy physical labor, as well as repetitive stooping and bending. Claimant is precluded from this type of activity. She has been essentially relegated to work in the light category. In the fall of 1983 she attempted to perform seasonal work for a wreath manufacturing company; however, she was unable to perform this production work in view of the sustained standing and walking demanded by that job. Claimant's previous work experience includes part time work as a motel maid, which we find claimant is not capable of performing.

Based upon our review of the physicians' reports stating their findings on examination of claimant, and considering claimant's description of her pain and physical limitations, we find that claimant's physical impairment is in the mild category. In terms

of her residual physical endurance, one of her physicians indicated that she was capable of sitting, standing and walking for two hour periods, and in an eight hour day, she would be capable of sitting for a total of five hours, standing four hours and walking four hours.

Claimant has experience in retail sales in connection with her work for nurseries. Claimant appears to have had some prior clerical experience, which naturally would be enhanced by the adult education class or classes in office work which she has taken.

We believe that claimant possesses skills and training which make a broader range of employment opportunities available to her than supposed by the Referee. Comparing claimant's pre-injury ability to obtain and hold gainful employment in the broad field of general occupations, with her post-injury ability to do so, ORS 656.214(5), we find that she has sustained a loss of earning capacity equivalent to 96° for 30% unscheduled disability. We modify the Referee's order accordingly.

ORDER

The Referee's order dated July 23, 1984 is modified. In lieu of the Referee's award of 176° for 55% unscheduled disability, claimant is awarded 96° for 30% unscheduled disability for injury to her low back.

MARILYN J. CLEMONS, Claimant
Bischoff & Strooband, Claimant's Attorneys
Gilah Tenenbaum, Defense Attorney
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-11229, 82-11493 & 83-08716
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Brown's order setting aside its denial of claimant's right arm condition. Claimant argues for affirmation, but asserts that should the Board overturn the Referee's responsibility finding, the insurer at risk on a prior employment, EBI, is responsible for her condition. Responsibility is the only issue on review.

Claimant sustained a right shoulder strain injury while offbearing on an edge gluer in a mill in 1971. The condition was subsequently diagnosed as thoracic outlet syndrome, and claimant received 35% unscheduled permanent partial disability. In 1980 she became employed as a bank teller. As a result of the bank employment, her thoracic outlet syndrome worsened, precipitating epicondylitis. Under the last injurious exposure rule, responsiblity for claimant's condition was shifted to EBI, the bank's insurer.

Claimant began working for SAIF's insured, Monte Kershner, in about May 1982. The work involved typing, writing, filing and bookkeeping. Claimant credibly testified that the work was not as heavy as the work at the bank. She testified that by August 1982 her arm was hurting badly, so she asked Dr. Dunn for a steroid injection. Although she had received such injections three to five times per year since 1980, Dr. Dunn denied her request. Claimant's symptoms subsequently increased.

In October 1982 claimant decreased her work hours due to increased symptoms, and eventually quit. She testified that after she stopped working for Kershner, her symptoms went back to their level before that employment.

Dr. Dunn's reports are inconsistent. On November 5, 1982 he stated that the Kershner employment was aggravating her preexisting epicondylitis from her job as a bank teller. He stated on December 8, 1982 that, based on claimant's statements regarding her work, he "would assume that her current work did aggravate her condition and cause a 'pathological worsening.'" On May 5, 1983 he wrote:

> "Mrs. Clemons' original injury at Roseburg Lumber was temporarily worsened by her job at the South Umpqua State Bank and, more recently, by her work with a Mr. Monty Kerschner [sic]. Both of these represent a temporary worsening and, in my opinion, have not resulted in any increase in her permanent disability."

Where a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability, but which did not contribute to the disability, the prior employer is liable. Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1984). In Bill B. Dameron, 36 Van Natta 592 (1984), we held that where symptoms experienced during a latter employment continue to be causally related to a compensable condition arising as a result of an earlier employment, where there is no identifiable traumatic incident during the latter employment, and where the work during the latter employment may have contributed to claimant's disability, responsibility will not be shifted to the latter employer absent persuasive evidence of an actual, material contribution to claimant's underlying condition. A mere recurrence or exacerbation of symptoms is insufficient

In our review of the record, we assign little weight to Dr. Dunn's inconsistent and conclusory reports. We are persuaded that claimant's underlying condition did not worsen during or following her work for Kershner. Accordingly, we reverse the Referee and hold that EBI continues to be responsible for claimant's arm and shoulder condition. See CECO Corp. v. Bailey, 71 Or App 782 (1985).

ORDER

The Referee's order dated March 7, 1984 is affirmed in part and reversed in part. The SAIF Corporation's denial is reinstated and approved. EBI's denial is disapproved and set aside. The matter is remanded to EBI for acceptance and payment of compensation according to law. The remainder of Referee's order is affirmed.

WILMA FORNEY, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 80-07538
January 31, 1985
Order on Remand

This case is before the Board on remand from the appellate courts. On August 23, 1982 the Board issued an order on review in which it affirmed Referee Baker's order approving the employer's unilateral offset of overpaid permanent partial disability against

temporary total disability payments payable pursuant to an aggravation claim. The Court of Appeals reversed the Board and remanded "for an order requiring employer to repay the amount deducted as an offset." The Supreme Court affirmed the Court of Appeals.

ORDER

The employer is ordered to repay to claimant the amount deducted as an offset.

BRAD T. GRIBBLE, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-05126
January 31, 1985
Order on Review (Remanding)

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Shebley's order which set aside a May 6, 1983 Determination Order as premature; set aside SAIF's denial of chiropractic treatment; and imposed a penalty and associated attorney's fee for SAIF's unreasonable denial of claimant's chiropractic treatment. The Referee declined to impose an additional penalty for SAIF's allegedly improper submission of this claim for closure, and in his respondent's brief, claimant argues that this portion of the Referee's order should be reversed and a penalty/attorney's fee imposed.

On our de novo review, we reverse that portion of the Referee's order which set aside the Determination Order as premature and modify the penalty imposed. In all other respects, we affirm the Referee's order.

I

Claimant is a welder. He sustained an injury to his neck and mid back when he was lifting a heavy steel plate with another worker and the coworker let go. Claimant experienced pain in his neck and back but continued to work. The pain did not resolve and claimant sought treatment with Dr. Mayer, a chiropractic physician in Vancouver, Washington. Dr. Mayer completed a Form 827 stating the diagnosis of acute cervical and thoracic spinal strain with myositis and radiculitis, complicated by subluxations of the C1, C7 and T12 vertebrae. He indicated in the spaces provided on the form that claimant's condition was work related, and that claimant was released for regular work as of October 13, 1982 (two days after Dr. Mayer's first treatment). Dr. Mayer further indicated that the treatment he was providing, "specific spinal adjustment," would be expected to continue for another two months, that claimant's condition was not medically stationary and that the injury would not cause permanent impairment.

Claimant returned to work and apparently performed his regular work until October 25, 1982, at which time it apparently became necessary for him to stop working as a result of his injured neck. Dr. Mayer authorized time loss as of that date. Claimant was laid off on November 3, 1982 due to a lack of work.

On November 30, 1982, Dr. Mayer reported to SAIF that claimant was continuing to treat on a regular basis (i.e. three times weekly) for acute cervical and thoracic spinal strain, and

that his progress was normal for the degree of injury sustained. Dr. Mayer stated that claimant's mid back pain had disappeared and that:

> "We expect to have [claimant] under care another 60 days. He needs to be seen 2 times a week in December and once a week in January 1983. At the end of January he will quite likely be released. Also, he should not return to work before 01/15/83 in either regular or modified capacity. He is not medically stationary and we do not expect him to be so for another sixty days."

Dr. Mayer referred claimant for a neurological evaluation. Claimant was examined by Dr. Bell, a Vancouver, Washington neurologist, on January 7, 1983. The report of this medical examination states a history of pain in claimant's neck, mid back and low back resulting from claimant's industrial injury and persisting since that time. This report recites that claimant experienced "some improvement" with his chiropractic adjustments but continued to experience neck, mid back and low back pain. It was also reported that claimant was developing intermittent numbness and pain down his right leg. Dr. Bell diagnosed a "soft tissue injury."

SAIF referred claimant for examination by Dr. Gatterman, a "qualified chiropractic orthopedist," in the latter portion of December 1982. Dr. Gatterman's report, dated January 8, 1983, indicates that claimant's complaints consisted of headaches and neck pain. Dr. Gatterman found the cervical range of motion within normal limits, with no loss of motor function on muscle testing of the cervical region. She found no objective orthopedic or neurological findings to suggest that claimant continued to have a problem as a result of his industrial injury. Her report states:

> "Based on the patient's history and examination findings, it is my considered opinion that [claimant] suffered a cervical strain with joint locking at the time of the 10-8-82 injury. I feel that the patient is presently medically stationary and that he is capable of returning to work with no restrictions. It is recommended, however, that he seek palliative chiropractic care not to exceed two times a month for the next two to three months while he resumes his normal working pattern. Beyond this time, I feel that no further chiropractic care should be necessary."

Claimant returned to Dr. Bell for a follow-up examination on or about January 20, 1983. X-rays of claimant's cervical spine were normal, and Dr. Bell's office note entry indicates that claimant was "coming along well." Because claimant felt that he was getting some improvement from his chiropractic manipulations, Dr. Bell suggested that claimant continue with that form of treatment. He stated, "He is to see me back on a p.r.n. [as needed] basis." In a letter to Dr. Mayer of that same date, Dr. Bell stated, "These patients usually improve, and hopefully he

will continue to do the same." Dr. Bell encouraged claimant to continue with conservative treatment.

SAIF referred claimant's medical file to its chiropractic consultant, Dr. Fechtel, who, like Dr. Gatterman, is a "chiropractic orthopedist." SAIF apparently requested an opinion concerning claimant's ongoing chiropractic treatment. Dr. Fechtel stated that limited objective findings reflected in the medical records made available to him did not substantiate treatment in excess of the "compensation guidelines," i.e. the administrative guidelines promulgated by the director of the Workers' Compensation Department. See generally OAR 436-69-201(2)(a). Dr. Fechtel also indicated that there was "some question regarding the appropriate diagnosis" for claimant's injury.

Dr. Mayer reported to SAIF on January 28, 1983, stating his disagreements with Dr. Gatterman's conclusions. He indicated his impression that claimant should not yet return to work. Dr. Mayer also indicated that, although not mentioned in his report, Dr. Bell had also advised claimant not to return to work. He indicated that claimant continued to need treatment twice a week and to remain off work. In another report approximately one month later, Dr. Mayer stated his disagreement with Dr. Fechtel's "attitude and opinion." He stated that as of the date of his report, claimant's injury-produced vertebral subluxations remained unstable, as a result of which claimant continued to need chiropractic adjustment.

Claimant was examined by the Orthopaedic Consultants on March 3, 1983. At this time, claimant was five months post-injury. The Consultants reported, "Basically, this man feels that he is essentially unimproved at this time. There has been no significant improvement since the time of his injury." The report also indicates, however, that claimant felt "considerably improve[d]" after his chiropractic treatments, although only for about four hours, after which his symptoms would return and persist until he received another treatment. Their report states that claimant had been treating with Dr. Mayer three times a week since his injury. Their examination revealed 100% neck flexion with some pain in the extremes; extension and right/left rotation which were 100% of normal; lateral bending to the right and left which was 80% of normal, associated with some pain; and a full range of motion of claimant's shoulders, elbows and wrists. Tenderness was found over the spinous processes of all cervical vertebrae but not in the dorsal, or thoracic, spine. No interference was noted from a functional disturbance.

The Consultants diagnosed cervical pain by history and stated:

> "It is felt that this patient is stationary, and his claim can be closed now. His symptoms should improve spontaneously, and he should be able to return to the same occupation, with limitations at first, and, then, he should be able to graduate to his full occupation. Should he continue to be somewhat symptomatic, a judicious short-range program of physical therapy directed towards the cervical spine would be indicated, but it is felt that this

patient's loss of function as it exists today and due to this injury is zero."

Dr. Mayer was provided with a copy of the Orthopaedic Consultants report. In a letter dated April 4, 1983, addressed to SAIF, he stated, "They have rendered a medical opinion based on their training and philosophical approach to this man's problem." He stated his disagreement with the Consultants' conclusions and questioned the objectivity of their report. He indicated that claimant continued to need chiropractic care on a weekly basis.

In late April of 1983, SAIF requested clarification from the Orthopaedic Consultants with regard to claimant's need for further chiropractic care, whether their recommendation for physical therapy was "curative or palliative," and whether they anticipated further material improvement with additional treatment or the passage of time. In response, Dr. Kohlheim, for the Consultants, stated, "It is felt his current chiropractic treatments are palliative. Should it become necessary a 'short range program of physical therapy' hopefully would be curative."

By letter dated April 27, 1983, SAIF denied responsibility for "any further chiropractic treatment . . . ." The basis of the denial was that, "medical information . . . shows this type of treatment is not necessary for your industrial injury recovery." SAIF also denied out of state medical treatment and advised that treatment in the state of Washington would only be approved if obtained with the Vancouver Orthopedic Group. This latter portion of SAIF's denial, however, is not in issue before us.

A Determination Order closed the claim on May 6, 1983, with an award for temporary total disability from October 11, 1982 through October 13, 1982, and further from October 25, 1982 through March 3, 1983. The Determination Order states that claimant was found medically stationary on March 3, 1983.

Claimant changed attending physicians after SAIF's denial. Apparently, Dr. Mayer referred claimant for treatment to Dr. Gill, a chiropractic physician in Portland, Oregon. In a June 20, 1983 report to SAIF, Dr. Gill stated several conclusions based upon his report of x-rays taken that month, including "reversal of cervical lordosis," "sprain of the posterior longitudinal ligament" and "multiple static intersegmental disrelations." Apparently upon being informed that claimant had initiated treatment with Dr. Gill, SAIF advised Dr. Gill of its denial of chiropractic treatment. The record reflects that claimant was examined and treated by Dr. Gill on three occasions during June of 1983. Because of SAIF's refusal to pay for any such treatment, claimant discontinued treatment with Dr. Gill.

Claimant was called back to regular work by the employer during June of 1983. He worked for only four and a half days and was then laid off again. Claimant never returned to work for this employer. Apparently during August of 1983 claimant went to work for Fabrication Plus as a welder. He worked regularly for this employer for almost two months. He was terminated for poor production. Claimant attributed his inability to work at full capacity to his neck pain and to an additional problem that began to develop around that time, symptoms of carpal tunnel syndrome.

In late August of 1983, claimant was referred by Dr. Gill to Dr. Markham, a neurosurgeon, for evaluation of his neck and arm

symptoms. Dr. Markham examined claimant on August 30, 1983. His consultation report of that date states that at that time claimant's "major complaint" was aching and numbness in his hands and arms. It refers to claimant's return to work three and one-half weeks before, and that claimant's work aggravated his neck and arm symptoms. Dr. Markham's report also states:

> "His treatment in the past has consisted of nine to ten months of chiropractic treatment. On some occasions this relieves his pain but on other occasions it actually aggravates it. He has noticed no total relief from his chiropractic treatments. * * * Overall, he does not feel that he is improving even though he is eleven months from the time of injury."

Dr. Markham ordered nerve conduction studies in order to rule out bilateral carpal tunnel syndrome. With regard to claimant's neck, Dr. Markham diagnosed chronic cervical spine strain without evidence of cervical radiculopathy. The electrical studies revealed evidence of severe bilateral carpal tunnel syndrome, believed to be related to claimant's employment as a welder.

In a letter dated October 11, 1983, addressed to claimant's attorney, Dr. Markham stated that in his opinion the prognosis for full recovery of claimant's neck condition was "quite good."

> "It would be my opinion that he will probably be considered medically stationary as of 1 January 1984 in that that would be almost 14 months from the time of his injury. At that point in time with no abnormal neurologic findings with regard to his neck or disc disease, I do not feel he would have to require any limitations on bending, stooping, lifting, twisting or turning. I also do not feel that chiropractic treatments would be of any further value to Mr. Gribble in that they have not allowed any relief of his symptoms even though he has been treating now for almost a year. I can only comment that chiropractic treatment would be of no value for him from the date I first saw him which was August 30th, 1983. I do not feel qualified to comment on his chiropractic treatments between April of 1983 and August 30, 1983 in that I had not seen him during that period of time."

Claimant was examined by Dr. Nathan on October 12, 1983, on referral by SAIF. This examination was primarily for the purpose of evaluating claimant's upper extemities and for an opinion concerning the diagnosis of bilateral carpal tunnel syndrome. Dr. Nathan did examine claimant's neck, however, and found a normal range of motion of the cervical spine. In addition to stating the diagnosis of bilateral severe carpal tunnel syndrome, Dr. Nathan diagnosed a resolved cervical sprain.

In a November 1, 1983 report to claimant's attorney, Dr. Gill

stated a working diagnosis of cervical sprain with hypolordosis, subluxations, radiculitis, myofascitis, myalgia and compensatory thoracic strain. He recommended chiropractic treatment three times a week for at least one month. He stated his belief that, when claimant was last seen on June 20, 1983, his condition was not stationary, and that without conservative chiropractic care, the prognosis for claimant's "condition" was poor.

SAIF provided Dr. Tilden, an Oregon chiropractor, with x-rays previously taken by Dr. Mayer and Dr. Gill. With regard to x-ray films from Dr. Mayer's office, Dr. Tilden found that they were of poor quality. Of the three standard cervical films, C1 was visible on only one, and there was no evidence of C1 subluxation on that film. On Dr. Gill's x-ray films, C2 was not visible on the AP view and C7 was not visible on the lateral film. After viewing Dr. Gill's AP cervical film and Dr. Mayer's full spine view, Dr. Tilden stated, "The possibility of subluxation is highly questionable." With regard to Dr. Gill's x-ray report of June 20, 1983, Dr. Tilden stated that Dr. Gill's conclusion of "sprain of posterior longitudinal ligament" was "flummery," and that it was entirely inappropriate to have made a clinical diagnosis on an x-ray report of static films. Dr. Tilden concluded by stating, "It cannot be shown in the chiropractic or medical literature that the diagnosis of subluxation by x-ray is alone justification for manipulative treatment."

II

An injured worker is considered medically stationary when "[N]o further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). The question of whether claimant's condition was medically stationary on May 6, 1983, when his claim was closed, is primarily a medical question, resolution of which is a matter of competent medical evidence. Harmon v. SAIF, 54 Or App 121, 125 (1981); Austin v. SAIF, 48 Or App 7, 12 (1980); Dennis Kurovsky, 35 Van Natta 58, 60 (1983). It is claimant's burden to establish, by a preponderance of the evidence, that he was not medically stationary when the claim was closed. The medical/chiropractic opinions are conflicting. We generally defer to a treating physician's opinion on the medically stationary question. Lavona Hatmaker, 34 Van Natta 950 (1982); see also Berliner v. Weyerhaeuser, 54 Or App 624 (1981). Deference to a treating physician's opinion, however, is only appropriate to the extent that the opinion is found persuasive. Lavona Hatmaker, supra; see Richard L. Schoennoehl, 31 Van Natta 25, (1981) aff'd mem 51 Or App 998 (1981) ("'Treating physician' is not a talismanic phrase that is a substitute for weighing the evidence.")

When Dr. Mayer originally examined claimant, he indicated that claimant was released for regular work. Claimant returned to regular work, but only for approximately one and a half weeks, when it became necessary for him to stop working, apparently because of his neck pain. Claimant was laid off the following week for reasons unrelated to his industrial injury. In late November of 1982, Dr. Mayer anticipated an additional 60 days of treatment before claimant would be capable of returning to work. Approximately 60 days later, however, Dr. Mayer remained of the opinion that claimant was not capable of returning to work. Although Dr. Mayer suggests that Dr. Bell shared his views concerning claimant's inability to return to work, Dr. Bell's

statements which are a matter of record express no such opinion and, in our view, suggest that claimant was medically stationary as early as January 20, 1983. This is indicated by his office note entry of that date that claimant could return on a p.r.n. basis. Dr. Bell's statement that "these patients usually improve, and hopefully he will continue to do the same," is not inconsistent with the statutory definition of medically stationary, which contemplates material improvement from medical treatment or the passage of time. Dr. Bell's statements are consistent with Dr. Gatterman's earlier report that claimant's condition was medically stationary toward the end of December 1982.

When the Orthopaedic Consultants examined claimant in early March of 1983, they found claimant's condition stationary. Although their reference to spontaneous improvement of claimant's symptoms is a somewhat cryptic remark, the remaining portions of their opinion, as well as the subsequent clarification, clearly indicate their impression that no further material improvement in claimant's condition could be expected from either medical treatment or the passage of time. Like Dr. Bell, the Consultants were of the opinion that, from a medical perspective, claimant had attained maximal recovery and further medical or chiropractic care would not materially change claimant's condition. We consider Dr. Kohlheim's statement that "should it become necessary" a program of physical therapy might be of some curative value as a statement of his personal belief that, if the nature or frequency of claimant's symptoms were to change for the worse, a program of physical therapy would be more beneficial than continuing chiropractic care. This statement is not inconsistent with the Consultants' earlier conclusion that claimant's condition was medically stationary.

When Dr. Gill examined claimant in June of 1983, he did not consider claimant's condition stationary; however, claimant had been capable of performing regular work for the employer during that same month, and it appears as though he worked at full capacity during that period until he was laid off again. A return to regular work is by no means synonymous with a medically stationary condition; however, in some instances, the former may be some evidence of the latter. Claimant was able to return to work as a welder for a different employer during the summer of 1983, and he was able to work regularly for almost two months. Although claimant attributed his inability to continue this employment to his neck pain and hand/arm pain and numbness, contemporaneous medical examinations establish that claimant's major medical problem at that time was his hand/arm pain and numbness.

Claimant testified that, during the four and a half days of work for the employer in the summer of 1983, he continued to experience neck pain. Dr. Markham's report in August of 1983 indicates that claimant's preceding work activity had aggravated his neck symptoms. We believe that these are indicators of a possible permanent disability resulting from claimant's industrial injury; however, this is not persuasive evidence that claimant's condition was anything other than stationary during the summer of 1983.

Dr. Markham's prognostication in October of 1983 that claimant would probably be medically stationary as of the first of 1984 is simply not persuasive evidence in support of claimant's position. In addition, during the same time frame, Dr. Nathan

diagnosed a resolved cervical sprain and found a normal range of motion of claimant's cervical spine.

Claimant sustained a relatively minor injury as a result of his industrial accident. Several independent medical or chiropractic examiners have found that claimant's cervical strain or sprain has essentially resolved. Claimant nevertheless continues to experience symptoms, which may be indicative of residual impairment. Continuing symptomatology, however, does not necessarily indicate that a worker's condition is other than medically stationary. See, e. g. Maarefi v. SAIF, 69 Or App 527 (1984). Dr. Tilden indicated his belief that claimant's treating physicians were tending to "overstate" claimant's diagnosis. We tend to agree with this assessment of Dr. Mayer's and Dr. Gill's opinions, particularly as they relate to claimant's medically stationary status.

Claimant has failed to establish that his condition was other than medically stationary at the time of claim closure. Therefore, we reverse that portion of the Referee's order which set aside the Determination Order as premature. The record does not provide an adequate basis for our evaluation of claimant's permanent disability, if any; therefore, we remand to the Referee for further proceedings on this issue. ORS 656.295(5).

III

We agree with and affirm that portion of the Referee's order which set aside SAIF's denial of "any further chiropractic treatment."

Claimant's chiropractic treatment is palliative, as opposed to curative. Claimant is entitled to compensation for purely palliative chiropractic treatment where such treatment is reasonably and necessarily incurred as a result of an industrial injury. Milbradt v. SAIF, 62 Or App 530 (1983); Wetzel v. Goodwin Brothers, 50 Or App 101 (1981) ORS 656.245. The preponderance of medical and chiropractic opinion is that claimant should receive chiropractic care within the guidelines established by the Workers' Compensation Department administrative rules. Dr. Gatterman anticipated that claimant would need palliative chiropractic care twice a month for two to three months as claimant resumed his "normal working pattern." Dr. Bell believed that claimant's chiropractic treatment was appropriate. Dr. Fechtel stated only that treatment in excess of the administrative guidelines was not warranted. Dr. Kohlheim of the Orthopaedic Consultants stated that claimant's chiropractic treatment was palliative; however, he did not state that claimant should not be receiving chiropractic care. Dr. Markham stated that claimant's chiropractic treatment as of August 30, 1983, was of no value; however, we believe that he was considering its value as a form of long term curative treatment.

Claimant testified that chiropractic treatments do afford some relief of his continuing symptoms, although the relief is only temporary in nature. Whether claimant is entitled to chiropractic care in the future may depend upon whether he receives an award for permanent disability. Based on the record presently before us, however, we find that claimant has established his entitlement to the chiropractic treatment in issue.

IV

With regard to the issue of penalties, it is necessary to modify the relevant portions of the Referee's order. Although the Referee decided that SAIF did not act improperly in submitting the claim for closure, he inexplicably imposed a penalty equivalent to 15% of all temporary total disability compensation due claimant between the date of SAIF's denial and the date of hearing. This penalty presumably was imposed based upon his conclusion that SAIF acted unreasonably in refusing to pay for ongoing chiropractic treatment, i.e. on the basis of an unreasonable denial of chiropractic care. Although we agree that SAIF's denial was unreasonable, as stated more fully below, the only compensation which could provide the basis for a penalty was unpaid billings for chiropractic treatment. The Referee should have imposed a penalty as a percentage of unpaid chiropractic expenses rather than temporary disability benefits that claimant would receive by virtue of the order setting aside the Determination Order. Although it is unnecessary to reach the issue in view of our conclusion that the Determination Order did not prematurely close the claim, we wish to clarify that where it is found that an employer/insurer has unreasonably denied payment of medical expenses, any resulting penalty should be imposed as a percentage of the medical expenses that are "then due." In this case, there were unpaid billings for chiropractic treatment at the time of SAIF's denial, and this compensation forms the basis for imposition of a penalty.

We find a penalty is warranted because SAIF's denial was over-broad and obviously intended to limit the treatment modalities available to claimant in connection with his industrial injury. The information available to SAIF at the time of its denial did not warrant a denial of any chiropractic treatment at all. As indicated, Dr. Fechtel, SAIF's consultant, stated only that treatment in excess of the administrative guidelines was not warranted, and Dr. Gatterman indicated that chiropractic care of at least limited duration was appropriate in order to assist claimant in a return to regular work. No medical or chiropractic opinion stated that chiropractic care was neither reasonable nor necessary in connection with treatment of claimant's industrial injury. Indeed, all of the opinions available to SAIF at the time it issued its denial were to the contrary. We recognize that Dr. Gatterman expressed her opinion in January of 1983, and that SAIF issued its denial in April of 1983, more than three months later; the fact remains, however, that during the interim claimant had not returned to regular work, and it was in the context of a return to regular work that Dr. Gatterman expressed the need for palliative chiropractic care. Under these circumstances, we conclude that SAIF's denial was unreasonable and that a penalty is warranted.

V

At the hearing SAIF raised an issue concerning its entitlement to claim a credit or offset in the event that claimant received any additional compensation. Because the Referee determined that the claim was prematurely closed, the credit/offset issue became moot. In view of our contrary finding on the premature closure issue, it is necessary to address SAIF's request that it be authorized to recover its overpayment of

temporary disability compensation, which arose from payment of temporary disability beyond the medically stationary date established by the Determination Order. See ORS 656.268(2). There appears to be no issue concerning the amount of the overpayment claimed. Neither is there an issue concerning SAIF's entitlement to recover this overpaid temporary disability compensation. SAIF, therefore, is hereby authorized to recover the claimed overpayment by offsetting it against additional compensation to which claimant is or may become entitled.

ORDER

The Referee's order dated December 20, 1983 is reversed in part, modified in part, affirmed in part and remanded in part. That portion of the order which set aside the May 6, 1983 Determination Order as premature is reversed, and that Determination Order is reinstated and affirmed. That portion of the Referee's order which imposed a penalty equal to 15% of temporary total disability compensation due claimant between the date of SAIF's denial and the date of hearing is modified to provide that SAIF shall pay claimant a penalty equal to 15% of the unpaid billings for chiropractic treatment which are in issue. That portion of the Referee's order which ordered payment of $250 to claimant's attorney in association with the penalty is modified to provide that SAIF shall pay claimant's attorney $75 as an attorney's fee in association with the above-referenced penalty. SAIF is authorized to recover its overpayment of temporary total disability compensation by way of an offset against additional compensation to which claimant is or may become entitled. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $250 for services on Board review, to be paid by the SAIF Corporation, for successfully defending that portion of the Referee's order which set aside the denial of claimant's chiropractic treatment. The issue of extent of claimant's permanent disability, if any, is remanded for further proceedings.

EDITH GRIMSHAW, Claimant
Myrick, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-03319
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order which upheld EBI Companies' denial that her present low back symptoms are related to her employment. The issue on review is medical causation. We agree with the Referee that Dr. Weinman's opinion, stating that the changes in claimant's back condition were not5caused by her employment, is the more persuasive opinion.

Dr. Weinman was claimant's treating doctor at the time of the initial injury, August 21, 1978, and his report of low back symptoms on October 29, 1981, was the basis of this aggravation claim. He opined that her low back symptoms were due to the natural aging process and that there was no contribution to her disability by her injury. He examined claimant before and after the claimed aggravation and was in the best position to form an informed opinion based on personal observations.

Dr. Morrison, in contrast, became claimant's treating physician in March 1983, five months after the Determination Order award of no permanent disability was affirmed by Referee Brown in

his Opinion and Order of October 13, 1982. Dr. Morrison relied entirely on claimant's recollection, in 1983, to make the causal connection between claimant's 1978 injury and claimant's current symptoms. Dr. Morrison concluded that claimant had no problems before the 1978 injury, therefore the injury must have caused the subsequent problems. A mere temporal relationship is insufficient to prove causation unless all other possible causes of the condition have been ruled out. See Bradshaw v. SAIF, 69 Or App 587 (1984).

Dr. Schwartz performed a laminectomy on November 4, 1983. His reports did not confirm either theory of causation. Dr. Rosenbaum reviewed the medical records and the surgical report and opined that claimant did not need the surgery and that the condition for which the surgery was performed was congenital. Further support for the opinion of natural aging processes as opposed to injury causation was given by Dr. Emori, a rheumatologist.

We find that claimant has failed to carry her burden of proof that her employment injury caused her back symptoms as either an aggravation or as an occupational disease which led to surgery. The opinion of the doctor who observed and examined claimant at the time of injury is more persuasive than the opinion of the doctor who first examined claimant more than four years after the injury. See, Walker A. Wright, Jr., 34 Van Natta 1208 (1982).

ORDER

The Referee's order dated May 21, 1984, is affirmed.

JAMES A. GUSE, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 81-06833 & 81-11397
January 31, 1985
Order on Remand

On review of the Board's order dated September 30, 1983, the court reversed the Board's order.

Now, therefore, 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.

LEONARD B. LEHANE, Claimant
Wolf, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06585
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Podnar's order which affirmed the Determination Order dated June 9, 1983 that awarded claimant 9.6° scheduled disability for 5% loss of use of his right arm, and the Determination Order dated September 15, 1983 that awarded claimant 32° for 10% unscheduled disability to his right shoulder. The issues are: (1) extent of claimant's disability; and (2) premature claim closure.

On June 23, 1982 claimant was employed as a mucker at a rock quarry. While shoveling rock away from a conveyor, he tripped over a concealed cable and fell on his right shoulder and arm. He sought emergency treatment the same day.

Claimant was initially treated conservatively by Drs. Scheinberg and Arbene. On July 6, 1982 Dr. Arbene referred claimant to Dr. LaFrance, a neurologist. Dr. LaFrance's diagnosis was right brachial neuritis secondary to trauma resulting in intermittent pain in claimant's right shoulder and arm and loss of sensation in his right arm and hand. Dr. LaFrance noted that claimant had been using excessive amounts of prescription pain medication together with alcohol to attempt to alleviate his pain, with little or no relief. His approach was to continue treating claimant conservatively, however, without addictive pain medication on account of claimant's past history of substance abuse.

Claimant was referred to Northwest Pain Center in September 1982. In the psychological screening report of October 5, 1982 Dr. Yospe's principal findings were underlying personality problems expressed through substance abuse and criminal behavior, moderate depression, an inability to deal with frustration, a strong tendency toward substance abuse and extreme difficulty in dealing with his physical limitations. Claimant was accepted into the pain center program and completed it on October 22, 1982. Claimant's pain center discharge prognosis was guarded. Vocational rehabilitation was strongly recommended.

On October 27, 1982 claimant contacted the Field Services Division to begin a vocational assistance program. For various reasons apparently not attributable to claimant, his initial interview with a service coordinator did not take place until March 11, 1983.

On March 10, 1983 Dr. LaFrance noted slowing across claimant's right thoracic outlet. Nerve conduction studies showed reduced voltage on the right by about one-half.

From January through June 1983 claimant reported monthly to Northwest Pain Center for psychological, and occasionally medical, rechecks. The recheck reports reflect a waxing and waning both of claimant's pain symptoms and his ability to cope with them. On or about March 22, 1983, for example, claimant was treated by Dr. Bald for a comminuted fracture of his right hand that resulted from claimant slamming his hand into a wall in an effort to relieve his shoulder pain. The April and June psychological recheck reports describe claimant's situation as "tenuous."

On May 3, 1983 claimant was examined by Orthopaedic Consultants. The medical panel concluded that claimant had contusion and sprain of his right shoulder with functional overlay. In a separate opinion, Dr. Quan, psychiatrist, opined that claimant had no psychiatric disorder directly related to his injury.

On May 13, 1983 Dr. LaFrance declared claimant to be medically stationary. On June 9, 1983 a Determination Order granted claimant an award of 9.6° scheduled disability for 5% loss of use of his right arm.

Field Services Division sent claimant to Doctors Calistro and Schmahl for a psychological evaluation in connection with the vocational assistance program. Claimant was examined on May 30, 1983. In their June 17, 1983 report to FSD, Doctors Calistro and Schmahl stated:

"[Claimant] suffers from agitated depression exacerbated by chronic right arm pain of fluctuating intensity. The pain has been diagnosed as being consistent with [claimant's] brachial stress injury documented by nerve conduction and other medical procedures . . . . The symptoms of [claimant's] depression consist of reported appetite loss, sleep disturbance, feelings of inadequacy, social withdrawal, and impaired vocational independence . . . .

"[Claimant's] emotional disturbance is the direct result of stresses associated with coping with the pain and discomfort derived from his work-related injury. [Claimant] also presents personality traits symptomatic of a sociopathic character disorder having its etiology in his adverse and chaotic developmental experiences. While such traits, such as projected anger and poor identification with accepted social values, imply poor coping resources to use in adapting to his current problems, they are not causative factors of his depression. . . . [Claimant] was poorly prepared to deal with chronic pain and disability, but it cannot be said that such vulnerability caused his present condition.

". . . . .

"The effects of [claimant's] injury apparently have overwhelmed some of his gains. . . . He recognizes his need for retraining and counseling, but unless such assistance is forthcoming, it is probable that [claimant's] psychological problems will significantly interfere with his capacity to benefit from vocational rehabilitation assistance."

Doctors Colistro and Schmahl noted that claimant's highest level of adaptive functioning during the previous year was fair.

The SAIF Corporation had claimant examined by Dr. Colbach on August 11, 1983. Dr. Colbach's diagnosis was psychogenic pain disorder, by which he meant that claimant was overfocusing on his right arm. He stated that claimant's subjective complaints of pain were not fully accounted for on the basis of the medical records he reviewed. Dr. Colbach also assigned a rating of fair to claimant's level of adaptive functioning.

On September 15, 1983 a second Determination Order awarded claimant 32° for 10% unscheduled disability for his right shoulder. Claimant's medically stationary date was established as August 11, 1983. The evaluator's worksheet has no entry for the emotional and psychological factor, OAR 436-65-607.

Claimant's vocational retraining finally began in October 1983. His progress over the first two months was good. However,

in December of 1983 claimant's mother died and he contracted pneumonia. These events caused him to miss his training sessions and his program was placed in an interrupted status.

Claimant reacted to these events in a violent manner. He was abusive to and made threats against his vocational counselors, psychologist and attorney. His vocational training program was transferred from one provider to another due to the former counselor's fear of being harmed by claimant. Dr. Schmahl testified that claimant's behavior became erratic and at times violent. On March 6, 1984 Dr. Schmahl wrote to SAIF that, "[Claimant's] chronic discomfort from his injury combined with the stressful emotional experiences that he experienced in December that were beyond his control have led to a deterioration in his emotional stability. These stressors have currently been resolved and it is felt that he is ready to return to the training programs that have been designated for him."

Dr. Schmahl testified at the hearing that claimant reacts irrationally and often violently when he experiences pain. Claimant testified that the pain is intermittent and that it comes and goes without warning. Claimant admits that he behaves inappropriately when in pain. Dr. Schmahl testified that after each of claimant's outbursts he is apologetic and contrite. Dr. Schmahl was unable to separate the effects of claimant's arm injury and his psychological condition.

At the hearing, claimant contended that the previous disability awards were inadequate. Claimant urged that he is either permanently and totally disabled or that he is entitled to an award of unscheduled disability equal to 100% of the maximum allowable. The Referee found that claimant was not entitled to any increase in disability. Claimant also contends that his claim was prematurely closed as of August 11, 1983 by the September 15, 1983 Determination Order.

We agree with the Referee that claimant's claim closure as of August 11, 1983 was not improper. Based on the available medical evidence, claimant was medically stationary as of that date. Further evidence furnished at a later date indicating that claimant was no longer medically stationary does not "relate back" to make the closure improper. Claimant's claim was reopened to account for the later report. The Referee's disposition of this issue was correct.

We do not agree with the Referee that claimant has been appropriately compensated; however, neither do we agree with claimant that he is permanently and totally disabled. The evidence as a whole is persuasive that claimant suffers from disabling pain. The evidence is also persuasive that claimant is unable to adjust to his pain. Claimant's violent reaction to intermittent pain clearly interferes with his earning capacity. Considering all of the evidence, and the guidelines established in OAR 436-65-600 et seq., we conclude that claimant would be most appropriately compensated by an award of 80° for 25% unscheduled disability for injury to his right shoulder, in lieu of all other prior awards for unscheduled disability.

Claimant does not raise the issue of scheduled disability on Board review. The Referee affirmed the Determination Order that awarded claimant 9.6° scheduled disability for 5% loss of his right arm. That portion of the Referee's order is affirmed.

ORDER

The Referee's order dated April 25, 1984 is affirmed in part and modified in part. That portion of the Referee's order affirming the Determination Order of June 9, 1983 is affirmed. That portion of the Referee's order affirming the Determination Order of September 15, 1983 is modified to grant claimant an award of 80° for 25% unscheduled disability for injury to his right shoulder, in lieu of and not in addition to the previous award of unscheduled disability. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3,000 as a reasonable attorney's fee.

MARION L. MABOU, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-09126
January 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of those portions of Referee Daron's order awarding claimant permanent total disability and ordering SAIF to pay for claimant's chiropractic treatments. The issues on review are extent of disability and whether claimant is entitled to chiropractic treatments under ORS 656.245.

Claimant is a 33-year-old former mill worker who compensably injured his low back on October 3, 1976 while pulling lumber on a mill chain. He initially complained of low back pain and left leg pain. He was diagnosed as having a herniated nucleus pulposis with left S1 radiculopathy. A myelogram revealed a large defect at L4-5 on the left. A laminectomy and discectomy was performed on November 30, 1976.

Six weeks after the operation he reported to his then treating physician that he was no better than he had been prior to the surgery. The physician, Dr. Corson, suggested hospitalization at that time which the claimant refused. Shortly thereafter the claimant again saw Dr. Corson and reported that his pain had significantly worsened. Dr. Corson noted at that time that physical findings suggested involvement at L5-S1 with S1 nerve root irritation. Claimant entered the hospital shortly after this evaluation. A myelogram was performed which revealed only a narrowing of the canal posterior to the L4-5 disc interspace.

Dr. Corson contemplated a second surgery, but first requested the claimant see a psychiatrist. Claimant refused to see the psychiatrist. Dr. Corson reports as follows:

> " At this point the patient became very defensive and hostile.
>
> "I explained to him that his was a difficult situation to assess since he had continued pain which was out of proportion to his physical findings following his surgery. He essentially refused to consider the fact that psychiatric evaluation would be of any use. I told him I did not feel that I could make any recommendations regarding surgery without this assessment, and at this point I think

he became disillusioned with me as a physician. . . ."

In May 1977 his then treating physician, Dr. McGee, performed nerve root blocks in an attempt to localize the source of claimant's pain. These were unsuccessful in locating the source of the pain. In June 1977 EMG and nerve conduction tests were performed which indicated an irritative rather than a destructive lesion.

In July 1977 claimant declined to participate in a Disability Prevention Center program, preferring instead to attend the Northwest Pain Center in Portland at the recommendation of Dr. McGee. The record indicates that at this time claimant was consuming significant amounts of pain medication which he was obtaining from various sources. In April 1978 Dr. McGee wrote to SAIF:

> "I certainly would share your concern for continued narcotics prescriptions to this patient who has not followed through in a timely manner with referral to a pain and rehab program. . . ."

On June 6, 1978 claimant finally reported to the Northwest Pain Center for an evaluation prior to admission to the center. The opening evaluation was completed and the center staff made the decision to admit the claimant, however, claimant declined admission. In the evaluation reports Dr. Seres, the pain center director, notes:

> "[I]t would appear clear that there is a significant degree of ambivalence here. In many ways, the patient sees his pain as a solution to many of his problems. . . .
>
> "In many ways both he and his wife are quite satisfied with his present situation, it would seem. Based upon our observations today, it would appear that the patient is considerably more active physically than he suggests. . . .
>
> "It would appear that the patient is an abuser of medications. He presently is taking somewhat over 20 gr. of codeine a day, even though, as he points out, it does very little to relieve his pain."

Following the claimant's refusal to enter the Pain Center, Dr. Seres observed:

> "It would appear that the patient is not interested in rehabilitation at this time.
>
> "The prognosis for this man's future is poor. It is highly likely that he will continue to use his physical complaints as a means of keeping his claim open and will continue to overuse medical care resources as a way of justifying maintaining the status quo. Unless he is willing to make

> some strong efforts toward his own rehabilitation, it is not felt that any care would be effective in helping this man's symptoms."

In June 1978 claimant saw Dr. Cronk complaining of pain. Dr. Cronk noted chronic pain, no evidence of radiculopathy and strong functional overlay. A Determination Order issued on July 12, 1978 awarding claimant 10% permanent disability. In July 1978 Dr. Martens diagnosed chronic strain, and no neurological deficit. He said claimant was an abuser of pain medications and recommended no additional testing or treatment. He felt claimant was medically stationary at that point. Claimant refused the services of the Vocational Rehabilitation Division in July 1978 because he felt his pain was too severe to participate. In August 1978 claimant saw Dr. Hockey complaining of right leg pain as well as the previously noted left leg and low back pain. Dr. Hockey was unable to find objective findings of a herniated disc.

In September 1978 Dr. Fleshman saw the claimant and opined that the claimant's claim should be reopened because he was unable to work due to his "acute low back disability." Dr. Fleshman noted that there were contradictions in the physical findings. In October 1978 Dr. Hockey reviewed claimant's file at SAIF's request and opined "It is my feeling that this patient could do many jobs which do not entail heavy lifting or repetitive bending." Later in October Dr. Fleshman reported to SAIF that claimant's pain is purely subjective. He opined that claimant should be retrained and given help in finding appropriate employment.

In January 1979 claimant finally consented to a psychiatric evaluation at the suggestion of his attorney. Dr. Parvaresh evaluated him and opined:

> "Aside from underlying tension and basic personality disorder I do not find any significant degree of psychiatric impairment in Mr. Mabou. . . .I would feel any professional counseling in all likelihood would not help this gentleman. . . .[H]e may very well benefit from relaxation therapy and biofeedback. . . .From my standpoint he does not have sufficient degree of psychiatric impairment to preclude him from any type of employment. . . .[W]ithin reason his psychiatric impairment in the form of tension is not accident related."

Claimant entered an authorized on the job training program in February 1979. On April 23, 1979 he injured his back while lifting the front end of a vehicle at his on-the-job training. A final order of a Referee has determined that claimant suffered a new injury to his back which is attributable to his original employer.

In November 1979 Orthopaedic Consultants evaluated the claimant. They noted that interference from functional disturbance was severe and marked by inconsistencies and refusals. They rated claimant's overall disability as mildly moderate and that attributable to his injury of April 1979 as mild. They said "This man's motivation is poor. His attitude is

belligerant [sic] and nothing can be gained by any further treatment. . . ."

In November 1979 claimant terminated vocational rehabilitation efforts because he felt his medical difficulties precluded participation. A Determination Order of November 15, 1979 found claimant not entitled to any additional permanent partial disability for his April 1979 injury. In February 1980 claimant saw Dr. Case who opined that there was a moderate increase in the lumbar lordotic curve with no other significant abnormality. Dr. Case felt that claimant's principal problem was an anxiety tension.

In March 1980 claimant's chiropractor, Dr. Clibborn, opined that claimant was unable to do work of any kind. The same month, Dr. Tsai evaluated the claimant and opined that he could not do any work at that time. He diagnosed a right radicular compression probably related to the April 1979 injury. Dr. Tsai performed a myelogram which revealed a slight defect at L5-S1 on the left. Dr. Tsai strongly recommended further evaluation by Orthopaedic Consultants.

A different panel from Orthopaedic Consultants examined claimant on July 14, 1980. They concluded that his impairment was the same as in his previous examination by them. This panel also noted severe functional overlay. They stated "The patient does not appear to have motivation for returning to work."

In September 1980 Dr. Tsai reported that claimant's left L5 radicular irritation was resolving. He recommended no further diagnostic or therapeutic procedures.

In October 1980 claimant's then treating physician, Dr. Brink, reported chronic pain with hysterical and functional overlay contributing to the severity of claimant's symptoms. He opined that claimant is precluded from work but suggested that a pain center approach would help claimant to become employable again. He recommended a pain center in Eugene operated by psychiatric social worker, Dr. Ronald Lechnyr.

A letter from Dr. Clibborn, dated November 19, 1980 indicates that claimant's repeated visits to emergency rooms to obtain pain medication had been suggested by Dr. Clibborn. In March 1981 Dr. Clibborn again opined that claimant was permanently and totally disabled.

In April 1981 Dr. Brook reviewed claimant's medical records at the request of SAIF's attorney. He opined that the claim should be closed at that time with no increase in permanent partial disability.

> "An enormous amount of effort has been already expended in a vain effort to restore this patient to his pre-injury status, and his problems at the moment do not appear to be related to the initial injury. The patient has fixed on this episode as a socially acceptable excuse for the emotional turmoil which obviously besets him, and I believe that any further subsidized treatment efforts will be

harmful to him by seeming to affirm that he is as grievously injured as he thinks he is."

In August 1981 claimant reported to the pain clinic in Eugene. Dr. Lechnyr planned to emphasize biofeedback to teach claimant to control his pain.

In October 1981 Dr. Erkkila placed claimant in a body cast which claimant testified was the only medical treatment that ever helped him during the entire course of his claim. Dr. Lechnyr felt that the body casting was an interference with his pain program, but consented to attempting to integrate it into his program. In November Dr. Lechnyr opined that claimant's ability to deal with pain had improved so that he felt it appropriate to retrain claimant for some employment.

In December Dr. Erkkila reported that he had removed the body cast and that claimant's discomfort had returned. He noted that claimant "is truly a dilemma. He does, I believe, have low back discomfort. I think this is somewhat exaggerated."

In February 1982 claimant began seeing Dr. Thompson who prescribed another body cast. This one did not help, according to claimant. In March 1982 Dr. Lechnyr reported claimant much improved and again reiterated that he thought claimant should be retrained. In April 1982 Dr. Lechnyr reported severe regression.

In April 1982 Dr. Thompson reported "The more I see this patient the more reluctant I would be to consider another surgical procedure." Dr. Thompson expressed a desire to see psychiatric reports before considering surgery.

In May 1982 Dr. Lechnyr reported to SAIF's counsel that claimant had stopped searching for "magical solutions." He reported that claimant had made significant progress in the pain center and stated "I do think it is time that arrangements be made for a rehabilitation firm to sit down with him and to review the potentials for retraining."

Claimant testified that his physical limitations vary from day to day. Some days he can lift as much as 30 pounds without hurting his back and other days he cannot lift a gallon of milk. He testified that if he could wear a body cast he would be able to drive a truck or even work in a mill. He testified that he cuts the lawn at home and has helped to cut firewood. He continues to fish, to road hunt and to set animal traps for recreation.

He testified that he has been to emergency rooms for his pain between 30 and 40 times. The most recent visit was the day prior to the hearing when he had reported to the emergency room with severe pain. He also testified that he has leg giveway periodically. Claimant testified that he is better able to control his pain since seeing Dr. Lechnyr.

The only attempt at work search he has made was a six hour attempt at driving truck. He indicated that he thought he might be able to work doing motel management, but that he had not yet attempted to find a job doing so.

Based on this record the claimant has failed to prove that he

is permanently and totally disabled. ORS 656.206(3). There is scant medical evidence which supports the claim of permanent total disability.

In September 1978 Dr. Fleshman opined that claimant was unable to work at that time. However, in October 1978 his opinion was that claimant should be considered for vocational rehabilitation.

In March 1980 Dr. Tsai felt that claimant could not work. However, by September 1980 he notes that claimant's condition was resolving. The logical inference is that by September 1980 Dr. Tsai no longer felt that claimant was permanently and totally disabled.

Only Drs. Clibborn and Brink unequivocally assert that claimant is unable to return to any type of work. Even Dr. Brink indicated that the claimant might become employable following training at a pain center. There is no report from Dr. Brink following claimant's training at the pain center so we do not know whether Dr. Brink believed that claimant could or could not work following his treatment at the pain center.

On the other hand, several experts have stated or implied that claimant is not permanently and totally disabled. Dr. Parvaresh felt that claimant is not disabled by his psychological problems. Orthopaedic Consultants twice placed claimant's entire physical impairment in the mildly moderate category. Dr. Brook felt that a 10% disability rating adequately compensated the claimant. Dr. Lechnyr stated at the conclusion of the pain center treatment that he thought claimant could now be retrained. We conclude that claimant is not permanently and totally disabled.

Not only has claimant failed to prove that he is permanently and totally disabled, he has also failed to satisfy the work search requirements of ORS 656.206(3). We find that he has failed to make reasonable efforts to seek regular gainful employment. He has participated in vocational rehabilitation efforts only once despite several attempts to get him to do so. That effort was terminated due to an injury. He testified that he had only attempted one job which was truck driving, however, he felt he could drive truck or work in a mill if he wore a body cast and he felt he could do motel management but had never tried to do so.

Finally, we note that claimant has twice refused treatment which might have helped him with his problems. See Clemons v. Roseburg Lumber Co., 34 Or App 135 (1978). He refused psychiatric evaluation and was, therefore, precluded from contemplated surgery. He also refused to enter the Northwest Pain Clinic. We do not reduce claimant's award of permanent disability because of these refusals because claimant did subsequently submit to both a psychiatric evaluation and to a pain center approach. However, we note that these refusals are characteristic of the claimant's attitude. He has been hostile and uncooperative at nearly every turn. There are strong indications that he is unmotivated to improve. He has seen countless physicians and visited countless emergency rooms in an attempt at finding a magic cure and to obtain pain medications.

We agree with Dr. Brooks who stated: "The patient is a relatively young man amd certainly could not have derived much

enjoyment from the past few years of medical dependency. It is time now that he weaned himself from this. . . ." Accordingly, we reverse the Referee's award of permanent total disability and proceed to rate the extent of claimant's permanent disability.

We [apply] the regulations for rating disability found at OAR 436-65-600 et seq. as a guideline. Claimant's age yields a -2 factor. Claimant's eighth grade education yields a +10 factor. There is no impact attributable to his adaptability or his mental capacity. We assign a -15 factor for the emotional/psychological factor because we find that there is evidence which indicates that claimant is unwilling to adjust to his impairment. Labor market findings yield a +15 factor. We assign an impairment rating of +40 based primarily on Orthopaedic Consultants' rating of his entire impairment because we conclude that his entire impairment was caused by the combination of his two injuries attributable to this employer. Combining these factors results in a finding that claimant is entitled to an increased permanent disability award of 35% or a total disability award of 45%.

On the question of medical services, we affirm the Referee because we conclude there is sufficient evidence that his treatments by Dr. Clibborn are palliative treatments for claimant's compensable injuries.

ORDER

The Referee's order of October 15, 1982 is affirmed in part and reversed in part. Claimant is awarded 112° for 35% unscheduled disability for a total award of 144° for 45% unscheduled disability in lieu of the award for permanent total disability granted by the Referee's order. The balance of the Referee's order is affirmed. Claimant's attorney is awarded $150 for services on Board review, to be paid by the SAIF Corporation.

DALE A. MIKOLAS, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00698
January 31, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seymour's order which upheld a Determination Order granting no award for permanent disability and approving an offset.

The Board affirms and adopts those portions of the Referee's order concerning extent of disability.

Concerning the offset issue, the relevant facts are as follows. As a result of prematurely paid permanent disability and overpaid temporary disability an overpayment exists of $2,535.50. Of that amount the SAIF Corporation, apparently relying on the administrative rule invalidated in Forney v. Western States Plywood, 66 Or App 155 (1983), has unilaterall5 offset $397.89. That amount must now be repaid to claimant. Sandra J. Jaeger, 36 Van Natta 375 (1984).

However, the Referee also authorized SAIF to offset the entire overpayment of $2,535.50 against future compensation. We find that authorization to be appropriate.

ORDER

The Referee's order dated June 19, 1984 is affirmed in part and modified in part. Those portions of the Referee's order concerning extent of disability are affirmed. Those portions of the Referee's order concerning an overpayment are modified. The SAIF Corporation is ordered to repay claimant the sums it unilaterally offset. SAIF is authorized to offset its entire overpayment against future disability benefits.

LYNN O. NELSON, Claimant
Velure & Bruce, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-02707
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Daron's order that ordered it to consider as wages contributions made by the employer on claimant's behalf to the Public Employee's Retirement System (PERS) and to claimant's medical and dental insurers. The sole issue on review is whether these employer paid benefits are "wages" within the definition found in ORS 656.005(27). We conclude that they are not and reverse.

Claimant was an employe of the University of Oregon for several years. Beginning in 1979, pursuant to a contract between the State of Oregon and claimant's labor union, the State made contributions to PERS on claimant's behalf in lieu of a salary increase. Pursuant to the same contract, the State paid fixed amounts on behalf of claimant for medical and dental insurance. Claimant was injured on the job in October 1983. SAIF did not consider the employer-paid benefits as wages in computing the rate claimant was paid for temporary total disability.

ORS 656.210 provides that temporary total disability benefits are calculated based on a percentage of claimant's wages. ORS 656.005(27) defines wages:

> "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer."

The Referee stated:

> "The use of the language 'or similar advantage' was clearly intended to provide a comprehensive phrase to encompass other benefits of equal or similar intent within those employment contract agreements between employee and employer. It is my opinion that the specific items in dispute here are of similar benefit in the normal contemplation of ordinary living which equally result in helping maintain the worker's financial responsibility for himself and his family. Therefore, I conclude that claimant is entitled to have his contributions for Public Employee's Retirement System and medical and dental

> insurance premiums included within his salary for purposes of temporary disability computation."

SAIF argues that under general principles of statutory construction, these employer paid benefits are not wages as that word is used in the statute. It also relies on Morrison-Knudson Construction Company v. Hillyer, 461 US ___, 103 SCt 2045, 76 LEd 2d 194 (1983) in which the U.S. Supreme Court construed a similar provision and concluded that employer-paid pension benefits are not wages. Claimant argues that Morrison-Knudson is without precedential value. He cites cases from other states in which such employer paid benefits were found to be wages. E.g., City of Tampa v. Bartley, 413 So 2d 1380 (Fla 1982). He also cites Oregon cases decided under other statutes in which wages has been given a broader definition than SAIF urges here. E.g., State ex rel Nilsen v. Oregon Motor Association, 248 Or 133 (1967).

Because "wages" is specifically defined in the Oregon Workers' Compensation statutes, cases decided under other Oregon statutes have no precedential value in construing "wages" under the Workers' Compensation statute. Naturally, workers' compensation decisions from other jurisdictions, including the federal government, are not binding upon us. However, these cases are useful for their reasoning.

A general principle of statutory construction states that where general words follow an enumeration of specific items or classes, the general words will be construed as restricted by the specific designation so that they include only items of the same kind or class as those specifically enumerated. State v. Brantley, 201 Or 637 (1954). In ORS 656.005(27) the general phrase "or similar advantage received from the employer" follows a specific enumeration of "board, rent, housing [or] lodging." Thus, "similar advantages received from the employer" must be of the same class as the specifically enumerated items. In Morrison-Knudson, supra, the court applied this principle to pension contributions.

> "[T]he narrow question is whether these contributions are a 'similar advantage' to board, rent, housing [or] lodging.' We hold that they are not. Board, rent, housing or lodging are benefits with a present value that can be readily converted into a cash equivalent on the basis of market values." Morrison-Knudson, supra 76 L Ed 2d at 199.

The court concluded that pension benefits are of a different class because they cannot readily be converted into a cash equivalent on the basis of market values. We agree with that analysis and find that contributions to PERS are not "similar advantages" under ORS 656.005(27) and are, therefore, not "wages" under the workers' compensation statutes.

Further, the enumerated items in the statute are all benefits received by the employe from the employer. In other words, the employe has an immediate right to use and control them as soon as the employer makes them available. The PERS payments as well as the medical and dental premiums are benefits which are paid by the

employer on the employe's behalf. The employe does not immediately receive them because there is no immediate right to use and control these employer paid benefits. Accordingly, we conclude that neither the PERS contributions nor the medical and dental premiums are "similar advantages" under ORS 656.005(27). Therefore, these employer paid benefits should not be considered as wages in computing claimant's temporary disability rate.

ORDER

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

LYRIS J. REAM, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 79-10330
January 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Pferdner's order which; (1) declined to set aside Determination Orders dated January 22, 1980 and July 29, 1980 as prematurely issued; (2) upheld the SAIF Corporation's denial of an aggravation claim relative to claimant's brief hospitalization in May of 1981; (3) declined to award claimant compensation for permanent total disability, instead awarding an additional 96° (30%) unscheduled disability, thereby granting claimant a total award of 128° (40%) unscheduled disability for injury to her low back; (4) and made a finding that the evidence seemed to indicate "there isn't any causal relationship between claimant's psychological problems and the compensable injury of September 10, 1977."

On review claimant contends that her claim was prematurely closed by the January and July 1980 Determination Orders; in the alternative, that her claim should be reopened for a worsened condition in May of 1981; in the alternative, that she is entitled to an award for permanent total disability. In addition, claimant contends that the issue of the compensability of a psychological or psychiatric condition was not before the Referee, and, therefore, the Referee's finding was inappropriate.

We affirm the Referee's order with the following additional comments. On the issue of claim reopening for a worsened condition in May of 1981, we are in complete agreement with the Referee's conclusion that this hospitalization represents a temporary exacerbation which did not require reopening of the claim pursuant to ORS 656.273. See Jeffrey Barnett, 36 Van Natta 1636 (1984); Billy Joe Jones, 36 Van Natta 1230, 1235 (1984); Kenneth L. Elliott, 36 Van Natta 1141 (1984); see also Hutchinson v. Louisiana-Pacific, 67 Or App 577 (1984); Van M. Brown, 36 Van Natta 1109 (1984). The fact that SAIF paid claimant temporary total disability for the period during which she was hospitalized contributes nothing to the analysis of whether claimant's condition, in fact, worsened to a degree requiring claim reopening. See ORS 656.018(4); 656.262(9).

We agree with claimant with regard to her contention that the Referee gratuitously found that claimant's psychological or psychiatric condition was not compensable. As claimant correctly notes, there has been no "claim" for a psychological or psychiatric condition in this case, nor has SAIF accepted or denied a "claim" for any such condition. Therefore, the Referee's "finding" is of no effect. See e.g. John Losinger, 36 Van Natta 239 (1984); Kevin McCallister, 34 Van Natta 158 (1982); Samuel Weimorts, 32 Van Natta 198 (1981).

On the other hand, as the Referee correctly noted, it is very difficult to accurately determine the nature and extent of physical impairment attributable to claimant's injury in view of claimant's apparent psychological, or "functional," problem. It was incumbent upon the Referee, as it is upon the Board, to award compensation only for disability that is due to the compensable injury. ORS 656.214(5). Thus, to the extent that a portion of claimant's overall impairment might be attributable to a condition other than one which is injury-related, it was necessary for the Referee to ascertain how much of claimant's overall impairment is attributable to her industrial injury. See also OAR 436-65-607.

The compensability of claimant's apparent psychological or psychiatric condition, separate and apart from the issue of extent of permanent disability, was not a question before the Referee. It was appropriate, however, for the Referee to consider the evidence of record indicating that claimant presently suffers from the effects of such a condition. Like the Referee, we find that the record does not warrant taking this condition into consideration in awarding compensation for claimant's injury-related lost earning capacity. On the question of the extent of claimant's injury-related impairment and consequent disability, we agree with the Referee's assessment and, therefore, affirm his order in this regard.

We agree with the Referee's analysis of the premature claim closure issue(s), and we affirm and adopt the relevant portions of his order.

ORDER

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

JIM D. SHIPLEY, Claimant
Ringle, et al., Claimant's Attorneys
Richardson, et al., Attorneys
SAIF Corp Legal, Defense Attorney

Third Party TP-84013
January 31, 1985
Third Party Order

The SAIF Corporation has moved the Board for an order pursuant to ORS 656.593(1)(d) ordering distribution of the proceeds from claimant's recovery in a civil action. Claimant argues that the recovery was not against a third person who caused a compensable injury to claimant and is, therefore, not subject to statutory distribution under the third party statute.

Claimant was employed as a correctional officer for Clackamas County on May 2, 1978 when he was struck in the throat by an inmate. Claimant filed a workers' compensation claim against SAIF as the insurer for Clackamas County. He also filed a civil action against the inmate. Claimant obtained a judgment against the inmate for $98,000. Following entry of judgment, the inmate's liability insurer denied responsibility for the judgment on the grounds that it insured the inmate for negligence, not for intentional acts.

Claimant then filed a civil action against the inmate's insurer to recover on the inmate's liability policy. Claimant obtained a jury verdict against the insurer. Claimant has received the proceeds from the insurer which includes the original $98,000 judgment plus accrued interest for a total of

approximately $122,000. Claimant now argues that the $122,000 is not subject to SAIF's lien under ORS 656.593(1) because that recovery is against the third party's insurer rather than against the third party who actually caused claimant's injury. We disagree.

ORS 656.593(1) provides in pertinent part:

> "If the worker...elects[s] to recover damages from the employer or third person, notice of such election shall be given the paying agency.... The proceeds of any damages recovered from an employer or third person by the worker...shall be subject to a lien of the paying agency...."

ORS 656.578 provides in pertinent part:

> "[I]f a worker receives a compensable injury due to the negligence or wrong of a third person...entitling him under ORS 656.154 to seek a remedy against such third person, such worker...shall elect whether to to recover damages against such ...third person."

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...may elect to seek a remedy against such third person."

Claimant apparently reads these statutes together to stand for the proposition that a recovery is not subject to SAIF's statutory lien if it is against the third party's liability insurer rather than the third party himself because the liability insurer was not the party culpable of negligence or wrong to the claimant. We disagree because, in this case it was the third party's negligence which gave rise to his insurer's duty to pay. See, Lamb-Weston v. Ore. Auto Ins. Co., 219 Or 110, 113 (1959); State Farm Mutual Auto Ins. Co. v. Brewer, 406 F 2d 610 (9th Cir 1968).

The action against the liability insurer was founded on the underlying liability of its insured, the third party who caused claimant's injury. To allow claimant to keep the entire judgment obtained against the liability insurer without allowing SAIF its statutory lien would, in effect, allow claimant to obtain both worker's compensation benefits and his third party recovery for the same incident. That would defeat the obvious purpose of the third party statutes. Accordingly, we find that claimant's recovery against the liability insurer is subject to SAIF's statutory lien.

Claimant's attorney also argues that he is entitled to attorney's fees of 40% of the recovery in the original action against the third party. Because that judgment is not before us, we take no position as to how it might be distributed were it before us. SAIF takes the position that claimant's attorney is entitled to 33 1/3% of the judgment against the liability insurer. We agree with SAIF that an attorney's fee of 33 1/3% of

the judgment against the liability insurer is appropriate. Accordingly, the judgment against the liability insurer shall be distributed according to the statutory formula as outlined at page two of SAIF's November 7, 1984 letter.

$122,000.00	Judgment (plus accrued interest)
1,000.00	Costs and disbursements
$123,000.00	
- 40,959.00	Attorney fees (33 1/3 %)
$ 82,041.00	
- 4,000.00	Legal Costs
$ 78,041.00	
- 19,510.25	Claimant's share (25 %)
$ 58,530.75	SAIF's share

IT IS SO ORDERED.

ANDREW SIMER, Claimant
Schouboe, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 81-06740
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of those portions of Referee Galton's order which: (1) set aside its denial of claimant's aggravation claim; (2) set aside its partial denials of claimant's current low back condition and left tardy ulnar condition; and (3) awarded claimant attorney fees totalling $2500 for setting aside the aggravation denial and $1250 for setting aside the partial denials. The employer contends the denials should be reinstated and the attorney fee awards reduced, if not eliminated. Claimant cross-requests review contending: (1) he should be found permanently and totally disabled as of the date of his compensable injury; (2) the employer should be assessed a penalty for allegedly improper contact with an attending physician; and (3) he is entitled to an increase in his award of attorney fees.

Enclosing an additional medical report from one of claimant's attending physicians, claimant has requested that the record be reopened. The report concerns a change in claimant's condition since the date of the hearing. We treat this request as a motion to remand for the taking of further evidence.

We deny the motion for remand. We conclude from our review of the record that this case has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5).

We find that claimant has failed to establish the compensability of his left tardy ulnar condition. Therefore, we reverse that portion of the Referee's order which set aside the employer's denial of this condition.

Claimant was 50 years of age at the time of hearing. In April 1977, while working as a heavy construction worker, claimant fell approximately 16 feet off a ladder. The calcaneus bone in his right foot was fractured when he landed on a rock. Surgery was performed and the foot was placed in a cast. Since the injury claimant has experienced frequent swelling and discomfort in the foot and ankle. Although claimant testified that he "popped" his left elbow during his landing and subsequent somersault, there is no medical history corroborating his testimony.

The claim has been closed and reopened several times. As of the most recent claim closure, in November 1982, claimant had received 40% scheduled right foot disability and 30% unscheduled low back disability.

The first report of left ulnar problems appears in a March 1979 medical report from Dr. Bocek, an attending orthopedist. Dr. Bocek reported that claimant complained that since his hospitalization, claimant had experienced some ulnar nerve paresthethesias in the left arm. Dr. Bocek opined that this problem "could have come from bad position." Noting that claimant was using a cane which had resulted in increasing low back problems, the doctor stated that he saw this "bad position" problem in his patients "every so often in spite of trying to brace them and pad them."

In May 1979 claimant advised the Orthopaedic Consultants that the left ulnar nerve problem was a complication of his ankle operation in that he had developed a habit of leaning on the elbow. The Consultants suspected a left tardy ulnar palsy problem, but issued no opinion as to causation.

A second panel of the Orthopaedic Consultants examined claimant in July 1980. Claimant advised the Consultants that "sometime following" the April 1977 injury he had developed numbness in the left ring and little finger. According to the Consultants' report, claimant had suffered no direct injury to the left elbow or hand in the April 1977 fall. The Consultants diagnosed left sensory tardy ulnar nerve palsy. However, they felt the condition was unrelated to the compensable injury.

Another panel of the Orthopaedic Consultants examined claimant in September 1983. No further history concerning the left elbow problem was taken, presumably because the majority of claimant's current symptoms pertained to his right ankle and low back. The Consultants diagnosed "possible left tardy ulnar palsy, unrelated to injury by history."

Soon after receiving the Orthopaedic Consultant's latest report, the employer issued its partial denial of claimant's left tardy ulnar palsy condition.

The Referee concluded that claimant's credible testimony regarding the mechanics of the 1977 injury and the medical evidence, "on balance", slightly preponderated to establish compensability of the left tardy ulnar palsy condition. The Referee who decided this case, Referee Galton, was not the Referee who was present at the hearing at which testimony was taken. Referee Williams was present at that hearing, but retired before a final decision in the case could be rendered. However, Referee Williams issued an interim order concerning credibility. The Referee stated as follows:

> "[M]y findings are that there was nothing in the demeanor of the witnesses or the manner of testifying that affords me special insight into the credibility of the witnesses. An examination of the testimony as it will be transcribed along with a comparison of the exhibits will afford any referee as good an opportunity of determining credibility as I have."

A Referee's finding on credibility is generally entitled to great deference. Humphrey v. SAIF, 58 Or App 360 (1982). However, where that finding or conclusion is based on an objective evaluation of the substance of the witness' testimony the Referee has no greater advantage in making that assessment than we do on de novo review. Davies v. Hanel Lbr. Co., 67 Or App 35, 38 (1984).

In the present case Referee Galton did not have the opportunity to observe the claimant testify. The Referee who observed the claimant at hearing expressly found that an examination of the transcript and record would afford any Referee as good an opportunity to determine credibility. We assume that such a finding would extend to our examination of the record on de novo review. Therefore, we accord no deference to the Referee's finding on claimant's credibility.

The alleged relationship between claimant's fall and his elbow condition presents a complex medical question of causation. Accordingly, this issue must be resolved by competent medical evidence. Uris v. Compensation Department, 247 Or 420 (1967). The medical evidence in support of compensability is contained in Dr. Bocek's March 1979 report. Dr. Bocek concluded that claimant's left arm numbness "could have come from bad position" since claimant's hospitalization. We interpret Dr. Bocek's opinion as one couched in terms of possibility that the 1977 ankle injury materially contributed to claimant's left elbow condition. Such an opinion is insufficient to sustain claimant's burden of proof. Gormley v. SAIF, 52 Or App 1055, 1060 (1981).

Furthermore, Dr. Bocek's history of the onset of claimant's left arm problems is inconsistent with claimant's testimony that he injured the elbow during his 1977 fall. Medical evidence on causation is only as competent as the medical history upon which it is based. Charlene Devereaux, 36 Van Natta 911 (1984). Consequently, we find Dr. Bocek's opinion to be unpersuasive.

Neither the lay testimony nor the medical evidence persuasively preponderates toward a finding that the left tardy ulnar condition is compensable. Therefore, we conclude that claimant has failed to carry his burden of proof.

We also modify that portion of the order concerning the awards of attorney fees. We find the awards to be excessive.

Claimant's attorney was awarded $2500 for services rendered in setting aside the denial of claimant's aggravation claim. Attorney fee awards are based on efforts expended and results obtained. OAR 438-47-010(2). Although this case did involve three hearing appearances, the majority of the time and all of the testimony was compiled at one hearing. Unquestionably, the aggravation issue involved a complicated set of circumstances; procedural, factual and medical. However, we find that an attorney's fee of $1800 would be more appropriate.

Claimant's attorney was also awarded $1250 for services rendered in setting aside the partial denials of claimant's back condition and left ulnar condition. Not only do we find this award overly generous, but it must be further reduced due to our reinstatement of the "left ulnar" denial. However, the record does suggest that the "back" denial presented a complex issue for

which the efforts of claimant's attorney are amply documented. In addition, the results obtained from these efforts were of significant importance to claimant. Applying the general principles of OAR 438-47-010(2), we find that an attorney's fee of $700 would be more appropriate.

We affirm the remaining portions of the Referee's order.

ORDER

The Referee's order dated March 21, 1984 is affirmed in part, modified in part and reversed in part. That portion which set aside the self-insured employer's partial denial of claimant's left tardy ulnar palsy condition is reversed. The employer's partial denial of claimant's left tardy ulnar palsy condition, issued September 20, 1983, is reinstated and affirmed. Those portions of the order which awarded claimant attorney's fees are modified. Claimant's attorney is awarded $1800 for services at hearing for prevailing on the denied aggravation claim. Claimant's attorney is awarded $700 for services at hearing for prevailing on the partially denied low back condition. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $600 for services on Board review pertaining to the compensability issues for claimant's aggravation claim and current low back condition.

ROLAND F. SKOGLIE, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-12239
January 31, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 9, 1985.

The request is granted. At issue in this case is claimant's entitlement to a penalty and attorney fee for the SAIF Corporation's alleged unreasonable failure to pay temporary total disability for the period from December 20, 1983 through January 22, 1984 in connection with claimant's alleged aggravation. Pursuant to ORS 656.273(6), interim compensation must be paid within 14 days of receipt of notice or knowledge of medically verified inability to work resulting from a worsened condition, unless the aggravation claim is earlier denied. Upon a finding of unreasonable delay or refusal of compensation, penalties of up to 25% of amounts then due, plus attorney's fees may be assessed. ORS 656.262(10); ORS 656.382.

The Referee found that Dr. Samuel's December 22, 1983 report did not constitute a medically verified inability to work due to a worsened condition, but that Dr. Samuel's January 13, 1984 letter did satisfy the statutory notice requirement. Claimant's brief on review urged that we base our decision on a finding that the January 13, 1984 letter was sufficient. Claimant did not challenge the Referee's finding with reference to the December 22, 1983 report. As neither party in its brief questioned the Referee's finding with respect to Dr. Samuel's December 22, 1983 report, we did not reexamine it. See Michael R. Petkovich, 34 Van Natta 98 (1982). We decline claimant's belated invitation to do so on reconsideration.

SAIF paid interim compensation from January 23, 1984, the date it received Dr. Samuel's January 13, 1984 letter. In our Order on Review we reversed that portion of the Referee's order awarding a penalty and attorney's fee for failure to timely pay

temporary total disability compensation, finding that SAIF had not acted unreasonably. On reconsideration, the Board adheres to its former order.

IT IS SO ORDERED.

BARBARA A. WHEELER, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 80-04710 & 81-03519
January 31, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of those portions of Referee Galton's order which: (1) set aside its defacto denial of claimant's aggravation claim, remanding the claim to SAIF for payment of benefits provided by law, specifically including temporary total disability benefits commencing September 2, 1980, less amounts previously paid; (2) awarded a 25% penalty on all temporary disability benefits delayed, denied and payable through the date of the order; and (3) awarded claimant's attorney total fees of $3,000 for prevailing on the defacto denial and securing penalties for claimant.

The Board affirms and adopts the order of the Referee as it relates to the compensability of the aggravation claim and claimant's entitlement to temporary disability compensation. We modify the Referee's awards of penalties and attorney's fees, however.

ORS 656.273(6) provides:

> "A claim submitted in accordance with this section shall be processed by the insurer or self-insured employer in accordance with the provisions of ORS 656.262, except that the first installment of compensation due under ORS 656.262(4) shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition."

In determining when the period for which interim compensation should have been paid commenced we look not to when the worsened condition rendered claimant unable to work, but to when SAIF learned that claimant was unable to work due to a worsening. Claimant was hospitalized for traction by Dr. Lowry on September 2, 1980. In his admitting notes he reported that she had been unable to walk well and had experienced leg cramps. As noted above, we affirm the Referee's finding that these symptoms demonstrate a worsening of claimant's condition since the issuance of the May 5, 1980 Determination Order. SAIF did not receive Dr. Lowry's September 2, 1980 admitting notes until December 26, 1980, however.

SAIF learned of the hospitalization from claimant's attorney on September 16, 1980. Dr. Lowry's office verified by telephone on September 17, 1980 time loss from September 2 through 9. On October 8, 1980, SAIF first received written notice of the hospitalization, with Dr. Lowry's discharge notes indicating that the traction had been of minimal benefit. The fact of hospital confinement is sufficient to show an inability to work, but in and

of itself is insufficient to prove a worsening. Cf. Theresa L. Welch, 35 Van Natta 1724 (1984) (worsening not inferred from outpatient surgery to remove cysts).

Dr. Lowry's October 22, 1980 letter, received by SAIF on October 24, 1980, noted the hospitalization and that claimant had been released to light duty work on September 24, 1980. On November 13, 1980 SAIF received a supplemental report from Dr. Clibborn, a chiropractor involved in claimant's care, stating that claimant was not released for work, not medically stationary and should be receiving compensation benefits in connection with her low back condition.

We find that from December 26, 1980, SAIF had legally sufficient notice or knowledge of medically verified inability to work resulting from the worsened condition. SAIF's failure to commence interim compensation within 14 days of that date and its failure to accept or deny the claim within 60 days were unreasonable, justifying a 25% penalty on interim compensation due from that date forward.

The Referee awarded claimant's attorney a total of $3,000 for services at hearing; $2,250 for prevailing on the denial plus $750 for prevailing on the issues of unreasonable resistance and delay and securing penalties. In determining the reasonableness of attorney's fees, several factors must be considered: (1) time devoted to the case; (2) complexity of the issues involved; (3) value of the interest involved; (4) skill and standing of counsel; (5) nature of the proceedings; and (6) results secured. Muncy v. SAIF, 19 Or App 783, 787-788 (1974). Absent an affidavit from claimant's attorney setting forth detailed time and service records, we cannot justify such an extraordinary fee in this case. Our review of the record in light of the pertinent considerations suggests that $2,000 would be a more appropriate total attorney fee award; $1,500 for prevailing on the denial plus $500 for prevailing on the issues of unreasonable resistance and delay and securing penalties. We modify the Referee's order accordingly.

ORDER

The Referee's order dated May 3, 1982 is affirmed in part and modified in part. The Referee's order is modified to award a 25% penalty only on interim compensation due for the period from December 26, 1980 through the date of the Referee's order. The Referee's order is also modified to award claimant's attorney a total sum of $2,000 for services at hearing. The Referee's order is affirmed in all other respects. Claimant's attorney is awarded $450 for services on Board review, to be paid by the SAIF Corporation.

JOHN E. CAIN, Claimant
Evohl F. Malagon, Claimant's Attorney
John L. Svoboda, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-10108
February 1, 1985
Order on Reconsideration

The Board declines to consider claimant's additional evidence because we have no authority to do so under ORS 656.295(5). The Board also denies the motion to remand. The evidence claimant seeks to have admitted concerns reports of a surgery which occurred after the hearing. In our Order on Review we only considered whether claimant had proven an aggravation as of the time of hearing. A majority of the Board concluded that he had not. As we noted in our order:

> "We take no position on whether claimant should have surgery because the record does not reveal that authorization has been requested for surgery. Dr. Smith merely states that claimant 'should be offered surgical exploration.' If surgery is requested and the surgery is found reasonable and necessary, then claimant may be entitled to have his claim reopened at the time he actually submits to surgery."

Thus, Dr. Smith's surgery reports are properly the subject of another claim for aggravation.

On reconsideration of our order, we adhere to our original order.

ORDER

Claimant's motion for the Board to consider additional evidence or in the alternative to remand to the hearings division is denied. The Board's Order on Review dated January 9, 1985 is adhered to and republished.

DOUGLAS N. RAY, Claimant
Eder & Schmidt, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-84002
February 5, 1985
Third Party Distribution Order

This matter is before the Board on the SAIF Corporation's petition for an order distributing the proceeds of a third party recovery obtained by settlement of a civil action initiated by claimant. ORS 656.593(1)(d); 656.593(3).

The underlying facts are not in dispute. Claimant sustained injuries as a result of a motor vehicle accident in June of 1981, which occurred while he was acting in the course of his employment. Claimant filed a workers' compensation claim, which was accepted, and benefits were paid in accordance with law. In addition to filing a workers' compensation claim, claimant elected to pursue a civil action for damages against an allegedly negligent third party. ORS 656.154; 656.578.

The claim was initially accepted as nondisabling; however, claimant's physician, Dr. Fisher, certified in September of 1981 that claimant had been totally incapacitated from June 16, 1981 to July 13, 1981. Apparently on the basis of this physician's

In October 1982, Dr. Fix, who was then claimant's attending physician, advised SAIF that he was continuing to treat claimant for the effects of his compensable injury. Dr. Fix stated that he was "amazed" that the claim had been closed in 1981. He reported that claimant's treatment in the interim had been progressive and uninterrupted. He also indicated that, unfortunately, claimant's condition had not changed and was continuing to plague him. SAIF then reopened the claim for payment of additional temporary disability and thereafter submitted the claim for reclosure. A Determination Order dated December 6, 1982, reclosed the claim with an additional award for temporary total disability from August 10, 1982 through August 23, 1982. Claimant requested a hearing contesting this Determination Order, claiming entitlement to an award for permanent partial disability.

In January 1984, claimant settled his third party action for the approximate sum of $29,700, with SAIF's approval. See ORS 656.587. A dispute arose concerning the extent of SAIF's lien for accrued claim costs, and the matter was submitted to the Board for resolution. SAIF advised that litigation was pending concerning the extent of claimant's permanent disability. Therefore, the Board held this proceeding in abeyance pending final resolution of the extent of disability litigation. See generally John J. O'Halloran, 34 Van Natta 1101, 34 Van Natta 1504, 34 Van Natta 1196 (1982). On September 21, 1984, the Board affirmed a Referee's order which awarded claimant 48° for 15% unscheduled disability in connection with claimant's industrial injury. Douglas N. Ray, 36 Van Natta 1466 (1984). In November of 1984, SAIF advised the Board that it had paid the permanent disability awarded by the Referee, and that this compensation was claimed as part of its lien against claimant's third party recovery. SAIF also advised that it was not making any claim for reasonably to be expected future claim costs. See ORS 656.593(1)(c).

SAIF contends that it is entitled to be reimbursed for all of its accrued claim costs in connection with claimant's industrial injury. Claimant argues that SAIF is only entitled to be reimbursed for medical expenses paid while the claim was classified as nondisabling. If claimant is correct, SAIF is entitled to reimbursement in the approximate sum of $840. If SAIF's position is correct, it is entitled to reimbursement in the approximate amount of $10,700.

In support of his argument, claimant relies upon ORS 656.593(1)(c), which states:

> "The paying agency shall be paid and retain the balance of the recovery [after payment of claimant's litigation costs and attorney fees and claimant's statutory minimum percentage], but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the worker's claim under ORS 656.001 to 656.794. Such other costs include assessments for reserves in the

> Administrative Fund and any reimbursements made pursuant to ORS 656.728(3), but do not include any compensation which may become payable under ORS 656.273 or 656.278." (Emphasis supplied.)

Paragraph (d) provides that, to the extent there is any balance remaining after satisfaction of the paying agency's lien, the balance is to be paid to the worker or the worker's beneficiaries.

Claimant argues that the record presently before us substantiates the conclusion that during the interval between July and September of 1981, his condition worsened. Claimant argues, therefore, that the compensation paid by SAIF on and after October 12, 1981 (when the claim was reclassified as one for a disabling injury) was paid for a worsened condition under the provisions of the aggravation statute, ORS 656.273. Ergo, all of the compensation paid by SAIF after reclassification of the claim to disabling status was paid under ORS 656.273 and is expressly exempted from SAIF's lien by operation of ORS 656.593(1)(c).

Even if we were to conclude that claimant's condition in fact worsened, and that this worsening prompted SAIF's reclassification of the claim, we would nevertheless reject claimant's argument. We understand the statute generally to provide for reimbursement of all of the paying agency's accrued claim costs as of the time of a third party recovery, SAIF v. Parker, 61 Or App 47, 53 (1982); Henry Kochen, 9 Van Natta 95, 97 (1972), and the present value of its anticipated future claim costs, to the extent that the paying agency is able to establish such expenditures to a reasonable certainty, Larry Campuzano, 34 Van Natta 734 (1982). The reference to ORS 656.273 and 656.278 is a limitation upon the paying agency's lien for anticipated future expenditures; it in no way limits the paying agency's lien for claim costs actually incurred as of the time of the third party recovery. Thus, in this case, where claimant was injured in 1981, the claim was processed and benefits paid up to and including the time that claimant's third party action was resolved, all of the compensation paid to claimant as of the time of the third party recovery in January 1984 is properly considered as part of SAIF's lien for accrued claim costs. This would be so even if claimant's workers' compensation claim was reopened and reclosed several times, pursuant to the provisions of ORS 656.273, prior to resolution of the third party action.

Claimant's permanent disability award was not an accrued claim cost in January of 1984 when the third party action was settled; and it might be considered that it was a "future expenditure" as of that time. This award, however, is not compensation payable under ORS 656.273 within the meaning of ORS 656.593(1)(c) because it was awarded pursuant to a hearing request contesting a Determination Order which closed the claim prior to resolution of claimant's third party action. Claimant does not contend that his condition worsened after January 1984, nor is there any evidence to support such a contention. Under the circumstances, it is entirely appropriate to consider the permanent disability award as part of SAIF's lien.

For the foregoing reasons, we reject claimant's contention that SAIF's lien is limited to that compensation paid while the claim was classified as nondisabling, and we hold that SAIF is entitled to reimbursement for all of its expenditures for compensation, including the Referee's award of 15% unscheduled disability.

ORDER

Out of the proceeds of claimant's third party recovery, SAIF shall be paid and retain a sum equal to all of its accrued claim costs, including compensation paid for permanent partial disability, in full and final satisfaction of its lien. Any balance remaining shall be paid to and retained by claimant.

GUADALUPE RIVERA, Claimant
Raul Soto-Seelig, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 82-02812
February 5, 1985
Order on Remand

On judicial review of the Board's Order on Review, the Court of Appeals reversed on the issue of whether claimant is entitled to have a new check issued as payment for a disability award. The court remanded with instructions to order the disability award paid.

Now, therefore, the case is remanded to the insurer for payment of benefits consistent with the court's order.

IT IS SO ORDERED.

JEFFERY R. ROWE, Claimant
Emmons, et al., Claimant's Attorneys
Gilah Tenenbaum, Defense Attorney

WCB 82-08757
February 5, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Podnar's order which granted claimant an award of 48° for 15% unscheduled disability in addition to the 48° for 15% previously awarded by Determination Order and stipulation. Extent of disability is the issue on review.

Claimant compensably injured his left shoulder on September 21, 1978. The claim was accepted as disabling and closed by Determination Order on April 4, 1980 with an award of 16° for 5% unscheduled disability. Claimant requested a hearing on the issue of extent of disability. On August 15, 1980 a Referee approved a stipulation granting claimant an additional 32° for 10% unscheduled disability. The medical report closest to the time of the stipulation is Orthopaedic Consultant's report of February 27, 1980. That report indicates that there was no evidence of gross atrophy of the shoulder. Claimant was able to abduct both shoulder to 120 degrees bilateral. There is no evidence of catch in this position. He can adduct both shoulders fully crossing his elbow in front of his mouth, being an area of 30 degrees. He could extend both shoulder 60 degrees. External rotation of both shoulders was 90 degrees and internal rotation of both shoulder was 40 degrees. At 90 degrees of abduction when claimant rotated his left shoulder internally a slight click was noticed. Both arms measured 11 inches in circumference. The only tenderness found was in the margin of the left deltoid. Severe functional interference was noted. A fifty pound lifting limitation was imposed. Dr. Shaw, the treating doctor, agreed with the panel, except that he noted a definite catch in the subacromial area suggestive of a subacromial impingement.

The shoulder claim was reopened as an aggravation on March 17,

1982. A Determination Order issued on October 19, 1982 closing the aggravation claim with no additional award for permanent disability. Claimant requested a hearing on the issue of extent of disability. At hearing he testified that his condition was worse at the time of hearing than it had been at the time of the stipulation. Although the Referee noted that he regarded claimant as credible, he gave his testimony no weight as claimant's credibility was called into question by some of the documentary evidence. Such a credibility finding gives us no guidance as to claimant's actual credibility. Based on the documentary evidence, however, we conclude that claimant is not wholly credible. Accordingly, we also give his testimony no weight.

An Orthopaedic Consultants examination was performed on July 16, 1982. The panel noted full ranges of motion with the exception of a slight limitation in range of motion on external rotation of the left shoulder. Claimant's arm circumference measured 10 inches on the left and 10.5 inches on the right. The panel concluded that claimant's condition was stationary and that he had been adequately compensated by his previous award.

Based on this record, we find that claimant's condition has changed only minimally since the stipulation in 1980. We find that claimant is entitled to no award for permanent disability in addition to the 15% unscheduled disability granted by the earlier Determination Order and stipulation.

ORDER

The Referee's order dated May 30, 1984 is reversed. The Determination Order of October 19, 1982 is reinstated.

WARREN C. BAGLIEN, Claimant
Bischoff & Strooband, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-00983
February 8, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Seymour's order which ordered the insurer to pay interim compensation from October 1, 1983, to January 12, 1984 and assessed a penalty and associated attorney's fee for late payment of a medical bill.

We reverse the award of interim compensation. Claimant was working full-time during the period of the award, therefore he is not entitled to interim compensation. Bono v. SAIF, 298 Or 405 (1984).

On the penalty and associated attorney's fee issue, we reverse. The insurer arranged an independent medical examination by Dr. Bardana. Dr. Bardana ordered some laboratory tests at Oregon Health Sciences University (OHSU). OHSU billed claimant for the tests on December 30, 1983. Claimant did not pay the bill and was dunned by a collection agency in March 1984. We have no information about the circumstances of claimant's lab tests on which to find that OHSU was notified that the insurer was the proper party to be billed or that claimant took any steps to notify either OHSU or the insurer of the situation until April 19, 1984. The insurer was first notified of the bill on April 19 and paid it in full on May 21, 1984. The insurer's handling of the bill was reasonable, therefore claimant was not entitled to a penalty nor to an associated attorney's fee.

ORDER

The Referee's order dated July 20, 1984 is affirmed in part and reversed in part. Those portions of the Referee's order which found the insurer liable for interim compensation and which assessed a penalty and associated attorney's fee are reversed. The balance of the Referee's order is affirmed.

FRANCES M. DAY, Claimant
Alan H. Tuhy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Schwenn, et al., Defense Attorneys

WCB 82-07180 & 83-09080
February 8, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee Galton's order which found that the compensability of claimant's right hip condition had been previously established and, therefore, set aside SAIF's June 14, 1982 back up denial of that condition. SAIF also requests remand for further development of various other issues.

The Board affirms and adopts the order of the Referee.

At hearing the compensability issue was considered first. Before testimony was taken on that issue, SAIF indicated that it wished to preserve other issues. After hearing testimony, the Referee indicated that he would be ruling that SAIF was barred from denying compensability of the right hip condition under the rule announced in Bauman v. SAIF, 295 Or 788 (1983). Testimony was then received on other issues. If SAIF intended to pursue other issues, its failure to do so at that time is unexplained. We deny remand.

ORDER

The Referee's order dated December 15, 1983 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

JAMES H. ROBERTS, Claimant
Velure & Bruce, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 80-04810
February 8, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Siefert's order which upheld the insurer's denial of mileage expenses for chiropractic treatment in Portland when claimant lived in Oakridge. See OAR 436-54-245(4).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 22, 1984 is affirmed.

KENNETH L. ROFF, Claimant
Starr & Vinson, Claimant's Attorneys
Cummins, et al., Defense Attorneys
John Snarskis, Defense Attorney

WCB 83-03697, 83-07319 & 83-11827
February 8, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Georgia Pacific Corporation, as a self-insured employer, requests review of Referee McCullough's order that set aside its denial of claimant's claim for aggravation of his low back condition. The issue is responsibility. Georgia Pacific contends that Industrial Indemnity Company, insurer for a later employer, is responsible for claimant's present back condition.

Claimant injured his low back in 1977 while employed as a lift truck driver for Georgia Pacific. After conservative treatment, claimant's claim was closed by a Determination Order that granted an award of 32° for 10% unscheduled permanent partial disability. Claimant's disability award was increased to 27.5% by a later stipulation executed in July of 1979.

Claimant changed vocations on the advice of his treating physician and began working as a bartender for a fraternal lodge. On August 19, 1980 claimant sustained another back injury while employed by the lodge, which was insured by Industrial Indemnity. Claimant lost only three weeks from work and his claim was closed with no additional disability awarded on December 8, 1980. After the 1980 back injury, claimant began working as a card dealer for the lodge, a position that required no lifting and was sedentary in nature.

Claimant sought treatment from Dr. Phifer, orthopedist, on November 23, 1981 for a painful condition in his right wrist. Dr. Phifer diagnosed de Quervain's disease and possible carpal tunnel syndrome, which he related to claimant's card dealing. Claimant's claim was accepted by Industrial Indemnity and claimant had surgery on his wrist in January 1982.

Claimant was sent to the Callahan Center on January 26, 1983. The screening evaluations indicate that claimant was overweight and in poor physical condition. His previous low back condition was noted. Claimant did not complain of back pain, although he did state that on occasion he had backaches. On physical examination no back tenderness was found. In order to improve claimant's overall well-being and assist with weight loss, claimant was placed on a regimen that included nonstop one mile walks. After the second of such walks, claimant's low back began to become painful, eventually causing claimant to be unable to continue work evaluation because of back pain. Claimant was discharged from the Callahan Center two days ahead of schedule, and sought medical treatment for his back.

Much effort was expended on review by Georgia Pacific and Industrial Indemnity on the question whether claimant had proved a worsening of his condition since the last award or arrangement of compensation in July 1979, or whether he had sustained a new injury while at the Callahan Center. The Referee found Georgia Pacific responsible for claimant's back condition on an aggravation theory, expressly finding that claimant had proven a worsening of his condition and that the 1980 back injury did not independently contribute to the worsened condition. See

Industrial Indem. v. Kearns, 70 Or App 583 (1984). On de novo review, we agree that claimant has proven a worsening of his 1977 low back condition.

Georgia Pacific argues that under the reasoning and holdings of Wood v. SAIF, 30 Or App 1103 (1977), rev den 282 Or 189 (1978) and Firkus v. Alder Cr. Lbr., 48 Or App 251 (1980), rev den 292 Or 302 (1981), Industrial Indemnity is responsible for claimant's back condition because claimant became symptomatic while engaged in rehabilitation activities arranged as a result of his compensable wrist injury, which was the responsibility of Industrial Indemnity. Industrial Indemnity argues that the doctrine of Wood v. SAIF, supra, does not automatically make it responsible, and that Wood only serves to expand its insured's premises such that what happened to claimant at the Callahan Center is viewed as having happened on its insured's premises in the course of claimant's employment. Industrial Indemnity contends that the next step is to apply a conventional aggravation versus new injury analysis, see, e.g., Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984), and that under that analysis Georgia Pacific is responsible on the facts of this case.

In Wood v. SAIF, supra, the claimant sustained a compensable back injury while employed by Chappell-Spears. As a result of the disability caused by the back injury, claimant was placed in a vocational retraining program provided through the Vocational Rehabilitation Division of the Department of Human Resources. While in the retraining program, the claimant slipped in some oil and injured his back again. The court held that Chappell-Spears was not responsible for the claimant's new back problems on an aggravation theory because the facts established that the claimant had suffered a new injury. Under "conventional aggravation versus new injury analysis" either VRD's carrier (see ORS 655.615; but see Firkus v. Alder Cr. Lbr, supra, 48 Or App at 254) or the carrier for the entity on whose premises the retraining was conducted would have been responsible for the claimant's new injury. The court held that, "[T]he Workers' Compensation Act concept of compensability for injuries sustained in the course of and arising out of employment includes injuries during activities which are a direct and natural consequence of the original injury." Wood v. SAIF, supra, 30 Or App at 1108. The court ultimately held Chappell-Spears responsible for the claimant's reinjury because, "It follows the vocational retraining in which claimant was involved when he sustained the new injury is a natural and direct consequence of the primary injury." Id at 1109-10.

In Firkus v. Alder Cr. Lbr., supra, the claimant suffered an injury to his elbow that resulted in his being retrained as a service station attendant. While undergoing the retraining he reinjured the same elbow. The court found that claimant could seek compensation from the original employer, even though he had suffered a new injury, rather than an aggravation, under the holding of Wood v. SAIF. The court went on to hold that ORS 655.615, which requires the Vocational Rehabilitation Division to provide Workers' Compensation coverage for its clients, does not apply to clients being rehabilitated on account of industrial injuries subject to the Workers' Compensation Act.

Neither Wood nor Firkus involved successive employers and insurers. Also, both cases involved new injuries, not aggravations. In this case, Industrial Indemnity's position is

that it should not have to compensate claimant for his back condition because the evidence shows that there was an aggravation, not a new injury. Further, Industrial Indemnity argues that the back condition is not a natural and direct consequence of the wrist injury, and, therefore, Wood does not apply. See Smith v. Brooks-Scanlon, 54 Or App 730 (1981), rev den 292 Or 450 (1982); Eber v. Royal Globe Insurance Co., 54 Or App 940 (1981).

We decline to go so far as Industrial Indemnity suggests, that is to find that Wood and Firkus do not apply at all in situations such as exist in this claim. The "natural and direct consequences test" of Wood we find simply has not been satisfied in this claim. The one mile walks that precipitated the aggravation of claimant's back condition only fortuitously happened to occur while claimant was at the Callahan Center. The walks had nothing to do with treatment, testing, training or rehabilitation related to claimant's wrist condition. We find that there is no connection, much less a "natural and direct" connection, between claimant's wrist injury and the aggravation of his back condition. Whether claimant's back condition worsened while he was at work at the lodge or being evaluated at the Callahan Center, the result was an aggravation, not a new injury. The Referee correctly held Georgia-Pacific responsible.

Georgia Pacific also contests that portion of the Referee's order requiring it to pay a fee to claimant's attorney. We agree with the Referee's attorney fee award. We note that on Board review claimant's attorney's participation was minimal and the fee on review will be awarded accordingly. See Robert Heilman, 34 Van Natta 1487 (1982).

ORDER

The Referee's order dated June 4, 1984 is affirmed. Claimant's attorney is awarded $150 for services on Board review, to be paid by Georgia Pacific.

MARY K. COBURN, Claimant
Gatti & Gatti, Claimant's Attorneys
Schwabe, et al., Defense Attorneys
Reviewed by Board Members McMurdo and Ferris.

WCB 83-06608
February 11, 1985
Order on Review

The insurer requests review of Referee Foster's order which set aside its denial of claimant's occupational disease claim for her right shoulder condition. On review, claimant argues for a penalty and associated attorney's fee for the insurer's allegedly unreasonable denial.

The Board does not consider claimant's argument for a penalty because the issue was not raised below.

Claimant is a 26-year-old former bank teller who alleges that her work activities caused her right shoulder problems. Claimant reported to the emergency room on December 1, 1982 complaining of back and right shoulder pain. The history recorded by a nurse states that: (1) claimant works with a tally machine; (2) she had been refinishing furniture the previous weekend; and (3) chiropractic manipulation had not helped. Claimant had previously visited the emergency room in December 1981 with symptoms which included "pressure on shoulders." Bursitis was suspected.

On April 19, 1983 Dr. Lawton examined claimant at her family physician's request and opined:

> "I think this patient has continuing, acute inflammatory changes of her rotator cuff and subacromial bursa. This is likely related to her work. The patient being quite short has to raise her arm that much higher to carry on her business in the bank leaving her more pre-disposed to this kind of problem."

On July 7, 1983 Dr. Poulson examined claimant at the insurer's request. He opined:

> "My diagnosis is that of chronic shoulder and probably a cervical spine strain. Your second question regarding continued pain relating it to the job injury is only by history, in that it has been continuous since the onset and relating it, by history, to her work.
>
> * * * *
>
> "Your fourth question was answered by the patient in that she was short and reaching up most of the day to do her work, which brought on these complaints. This is not the usual method of developing this problem. The more usual situations are more traumatic or the forces are greater than this, particularly doing repetitive heavy lifting; also rear end collisions, as you well know. Also, as far as the shoulder pain is concerned, it usually takes something more than working in and reaching, in the light of type of work she was doing."

The insurer prepared a videotape of a teller of similar stature to claimant doing claimant's job. Dr. Lawton observed the videotape and stated:

> "To state that this patient's problem was or was not caused by this work based on this video tape alone involves more than strict medical judgements.
>
> "I can state, however, in general relatively precise terms what kind of work is likely to cause this type of problem. Inflammatory changes about the shoulder are typically caused by repetitive stresses or impingement between the arm bone (humerus) and the roof of the shoulder (acromium/scapula). This impingement or pressure occurs only through the range of 60 to 120° of abduction. 0° of abduction is when a person stands with their arms straight to the side. 180° would be with the patient standing and the arm extended

fully pointing straight up to the sky. It is through this mid-range (so-called 'painful arc') in which this problem can develop or be aggravated by repetitive motion and use. If it can be proven that this patient's job did not involve repetitive motion through this range, then I would not indict the job itself as a cause. Based on this patient's prior history, motion through this arc was felt to be present and therefore deemed causally related."

Thus, according to Dr. Lawton, claimant's shoulder problems could be causally related to her work only if she actually did repeatedly abduct her right shoulder through the "painful arc." Although claimant testified concerning the type of motions she made while at work, we are unable to determine from the testimony whether she, in fact, abducted her arm through the "painful arc." Thus, we find that claimant has failed to sustain her burden of proving the compensability of her claim.

ORDER

The Referee's orders dated January 17, 1984 and January 31, 1984 are reversed. The insurer's denial is reinstated and affirmed.

THOMAS J. STOKES, Claimant
Roll, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-12156
February 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Quillinan's order which granted claimant an award for permanent total disability. Extent of disability is the sole issue on review.

Claimant is a 69 year old former fuel truck driver who fell and compensably injured both knees in February 1976. Claimant had previous knee problems dating back to the early 1970s. Claimant had received awards totalling 8° for 5.33% of each leg prior to the 1976 injury. Claimant had received awards for 40% loss of his right leg and 35% of his left leg based on the 1976 injury. The persuasive medical evidence indicates that as a result of his compensable injury, claimant is limited to sedentary work. The treating physician, Dr. Fagan stated in March 1983:

"I felt that he could return to some type of restricted activity approximately seven days after his meniscectomy. He does not feel that he could have. He came in on March 11, 1983 and he was told that he could return to work at any time."

Claimant has pain after walking any distance. Dr. Fagan states:

"He is totally disabled as far as any work on his feet is concerned but he could do work for a few hours a day in a sitting position."

Claimant is, in fact, working as a bookkeeper two to four hours per day, five days per week. The Referee nevertheless concluded that it is unlikely that claimant will ever again be employable on a competitive basis.

The insurer argues that claimant is capable of working full time in a sedentary capacity and that his failure to find full time sedentary work is due to lack of motivation rather than lack of ability. Claimant counters arguing that his injury caused depression which interferes with his self-image and, therefore, his adaptability to work. Claimant argues that working two to four hours per day is not regular gainful employment. Finally, claimant argues that any work search would be futile.

There is no evidence, either in the form of expert medical opinion, or lay testimony, that claimant is physically unable to work a full eight hour day at a sedentary activity such as bookkeeping. In fact, in March 1983 the treating doctor opined that claimant could do some kind of modified work. Furthermore, claimant himself states that he will continue in his part-time job because it "fits with the program." Although there is evidence in the record that claimant is depressed, there is no evidence that the depression contributes to any inability to work.

Claimant has obtained and kept a part time position doing bookkeeping. We are not persuaded that a search for a full time job doing similar sedentary work would be futile.

We find that claimant has failed to prove by a preponderance of the evidence that he is precluded from doing regular gainful work at a suitable occupation. See Hill v. SAIF, 25 Or App 697 (1976). Accordingly, we reverse the Referee's award of permanent total disability.

On the question of the extent of claimant's scheduled permanent partial disability, we are not persuaded that the loss of use or function of claimant's legs is any greater than it was at the time of the last award for permanent disability. Accordingly, we decline to grant any additional award for scheduled disability.

ORDER

The Referee's order dated April 25, 1984 is reversed.

JOHN B. BRUCE, Claimant
Roll, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-10033
February 13, 1985
Order on Reconsideration

Argonaut Insurance Company has moved for reconsideration of the Board's Order on Review dated November 30, 1984, which affirmed without expressly adopting Referee Quillinan's April 26, 1984 order. On December 26, 1984, we abated our order, that we might provide claimant an opportunity to respond to Argonaut's motion.

The motion for reconsideration is granted. In its motion, the insurer reviews its prior arguments and asks that we demonstrate in our order on reconsideration that we have correctly applied the law to the facts.

This case turns significantly upon the factual question of

whether the January 13, 1982 work injury materially contributed to claimant's preexisting neuromuscular condition. The Referee concluded that it did. She approached the issue of extent of permanent disability in a manner consistent with that finding. Properly considering claimant's residual disability from the injury, his preexisting back and ankle problems and his neuromuscular disorder, she found him severely disabled. In support of her award of permanent and total disability, she stated:

> "Claimant might be able to work on a part-time basis or to perform certain aspects of body shop work. However, neither part-time work nor part production establishes that claimant would be competitively employable in the general labor market."

After carefully considering this case we summarily affirmed the Referee's order. Had we been writing in the first instance, our order might have employed different phraseology and organization at some points, at a minimum our affirmation indicates agreement with the Referee's key findings and ultimate decision.

In Bowman v. Oregon Transfer Company, 33 Or App 241 (1978), quoting from Sarty v. Forney, 12 Or App 251 (1973), the Oregon Court of Appeals listed three primary functions that a detailed opinion serves:

> "'(1) it tells the litigants why the court decides the appeal as it does;
>
> '(2) it demonstrates to the members of the court and to the litigants that the court has reviewed the record or those portions of it relevant to the issues raised by the litigants, and that it has considered the issues raised in light of relevant statutory and case law; and
>
> '(3) it provides guidance to bench and bar in their collective effort to resolve future problems of like nature.'" Id. at 243.

Noting that its work load would not permit the production of traditional written opinions in even a majority of the cases before it, the court in Bowman said:

> "Another factor not mentioned in Sarty is that the increase in the number of appeals filed in Oregon in the past few years has been so explosive that this court in its present size cannot produce written opinions in traditional form in even the majority of the appeals brought to it. And, arguably, if it could, the precedential value of the opinions would be weakened because the sheer volume would in most instances make it uneconomic for

lawyers to sift through them. We have come to the time when it is literally essential to dispose of an even larger percentage of appeals without detailed opinion."

Like the Court of Appeals, we also could not keep pace with the stream of cases coming before us were it necessary to include in every order a thorough explanation of our analysis. We thus prepare detailed opinions only in cases of apparent precedential value or where we are in fundamental disagreement with the order of the Referee.

As pointed out above, this case turns primarily on factual questions. We believe that a full opinion would be of little precedential value. As with the Court of Appeals, litigants before the Board in cases such as this must rely on the collegial structure of the Board and the integrity of its individual members for their assurance that the Board has made a thorough and careful effort to consider the issues raised in light of the relevant law. See Bowman, supra at 245.

On reconsideration the Board adheres to its former order.

IT IS SO ORDERED.

JAMES R. POPLIN, Claimant
Flaxel, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

Own Motion 84-0257M
February 13, 1985
Own Motion Order Awarding Attorney Fees

Claimant's attorney has requested the Board grant him a reasonable attorney fee for his efforts on claimant's behalf. Claimant's claim was originally opened by an order dated June 22, 1984 which allowed a fee of 25% of the increased compensation up to $200. Claimant's claim was later closed by order dated October 31, 1984. Claimant's attorney was instrumental in getting claimant's claim reopened subsequent to the closure order, and we conclude an additional fee would be appropriate.

Claimant's attorney is awarded 25% of the additional compensation granted by the November 21, 1984 order, not to exceed $250 as a reasonable attorney's fee. This fee is in addition to that awarded by the June 22, 1984 Own Motion Order, for total fees not to exceed $450.

IT IS SO ORDERED.

LEE E. SHORT, Claimant
Bloom, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-00025
February 13, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review, and claimant cross-requests review, of Referee Neal's order which set aside SAIF's aggravation claim denial, ordered that the claim be reopened as of September 29, 1982, and awarded a $2,000 attorney's fee for prevailing on the denial; and imposed a penalty and associated attorney's fee for SAIF's unreasonable delay in paying interim compensation and unreasonable delay in accepting or

denying claimant's aggravation claim. SAIF contends that the Referee's finding that claimant's recently diagnosed organic brain syndrome is compensable as a consequence of her February 1, 1977 injury, is not supported by a preponderance of the evidence; that even if claimant's organic brain syndrome is compensable, there is no persuasive evidence that it has worsened to a degree warranting claim reopening pursuant to ORS 656.273; and that penalties/attorney fees are not warranted because claimant's submissions to SAIF did not "establish a claim for aggravation." Claimant contends that her claim should be reopened as of March of 1981; and that the Referee's award of attorney fees for prevailing on this denied claim is inadequate.

On our de novo review of this lengthy record, we find it more likely than not that as a result of her 1977 slip and fall, claimant sustained a trauma to her head of sufficient magnitude to cause the brain injury which has been diagnosed by several neuropsychologists. In this regard, we find very persuasive the reports of Drs. Howieson and Matarazzo, particularly the depositional testimony of Dr. Matarazzo.

On the issue of claim reopening for a worsened condition, it is important to note, as did the Referee, that claimant suffers from two distinct mental problems: the organic brain syndrome, not diagnosed until September of 1982, characterized by cognitive deficits; and a psychological/emotional condition which has been previously established as a compensable consequence of claimant's industrial injury. Lee E. Short, 29 Van Natta 731 (1980). The evidence is persuasive that claimant's underlying organic brain syndrome has remained essentially unchanged since her industrial injury. However, it was not diagnosed at the time of the litigation in 1979, which ultimately resulted in an award for 35% unscheduled disability for claimant's neck and psychological conditions. Although Dr. Carter, a neurologist, had suspected a possible lesion affecting part of claimant's brain as early as August of 1979, it was not until Dr. Howieson's neuropsychological evaluation in September of 1982 that claimant was definitely diagnosed as being "brain injured."

There is an obviously complicated interrelationship of the two components of claimant's behavioral problem, i.e. the organic brain syndrome on the one hand and her separate yet related psychological/emotional disorder, which includes some element of hysteria. The treatment that is recommended for the organic brain syndrome is essentially the same, or at least similar to, the treatment claimant was receiving from her former counselor, Mr. Kruger, at the Providence Medical Center Day Treatment Program. This treatment was being directed toward what was considered a psychological or emotional disorder during a period that claimant's organic brain syndrome remained as yet undiagnosed. Claimant began treatment with Mr. Kruger during 1979; indeed, claimant's entitlement to ongoing treatment was a subject of the litigation in 1979 and 1980. In June of 1980, Mr. Kruger indicated his belief that claimant had achieved "maximum benefits" from the treatment program, and that she should begin the process of "disengaging."

It appears as though claimant and Mr. Kruger became "disengaged" during the spring of 1981, apparently in March. It also appears that without this supportive counseling, claimant's emotional condition began to deteriorate. Thus, in comparing

claimant's March 1981 MMPI Profile (Minnesota Multiphasic Personality Inventory) administered by Dr. Fleming, with the MMPI Profile administered by Dr. Matarazzo in March of 1983, Drs. Fleming and Binder both found evidence that claimant was more emotionally disturbed in 1983.

Dr. Turco, a psychiatrist who examined claimant and testified at hearing in behalf of SAIF, is of the opinion that claimant's psychological/emotional condition has not worsened, and that the discrepancies in the two MMPI profiles are evidence of exacerbations and remissions of claimant's psychogenic (i.e. what we have referred to as claimant's "psychological/emotional") condition. Dr. Turco also testified, however, that with appropriate treatment "the impairment of [her] daily functioning," could be improved.

Other physicians, including Dr. Matarazzo, have indicated their belief that supportive counseling will assist claimant in her ability to function on a daily basis. Dr. Howieson is further of the opinion that without appropriate intervention, claimant's "condition" will continue to deteriorate.

Claimant's psychological/emotional condition has deteriorated since the date of the last award or arrangement of compensation, the November 21, 1979 hearing in the above-referenced prior proceeding. This finding alone warrants claim reopening. In addition, however, since that time an additional diagnosis has emerged to explain a portion of claimant's continuing behavioral problems, that is, an organic brain syndrome. It appears as though the same type of supportive counseling is therapeutic for both components of claimant's condition and that, therefore, to a certain extent the treatment of one is necessarily effective in treating the other. Because the record establishes that claimant's organic brain syndrome has been essentially unchanged since the time of her injury, and because there is persuasive evidence of a worsening in the emotional/psychological component of claimant's overall mental condition, we believe it is appropriate to order that the claim be reopened as of the date that a worsening of claimant's psychological/emotional condition has been established. Although claimant's psychological/emotional condition may have started to worsen prior to the date of Dr. Matarazzo's MMPI Profile, it is that March 30, 1983 test which establishes a worsened condition. Therefore, we deem it appropriate to order claim reopening as of that date. When the claim is closed, it then will be appropriate to consider any additional permanent disability to which claimant may be entitled in connection with her psychological/emotional condition and organic brain syndrome.

On the issue of penalties, we modify the Referee's order as follows. The Referee found that claimant's attorney's letter of September 24, 1982, together with its enclosures, which were received by SAIF on September 29, 1982, constituted notice of a worsened condition sufficient to trigger SAIF's duties to pay interim compensation and accept/deny the aggravation claim. Although Dr. Howieson's reports state the new diagnosis of organic brain syndrome, and the conclusion that this condition is disabling, Dr. Howieson's September 23, 1982 report also states that claimant's underlying cognitive disorder (the organic brain

syndrome) has remained essentially unchanged since the time of the accident. It was not until November 15, 1982, that SAIF received Dr. Howieson's November 6, 1982 report stating her impressions that claimant's "condition" had worsened since the industrial injury, and that Dr. Howieson believed it was "reasonable to assume that her condition [had] worsened since at least March 1981." This report, in conjunction with Dr. Howieson's previous reports, is sufficient to constitute a claim for aggravation, although it might not be sufficient standing alone to prove a compensable aggravation claim. Thus, SAIF had an obligation to commence payment of interim compensation within 14 days in the absence of denial, and to accept or deny the claim within 60 days. SAIF did not make any interim compensation payment until March 1, 1983, when it paid interim compensation for the period September 29, 1982 through March 2, 1983. Furthermore, SAIF did not deny the request for reopening until May 12, 1983. In connection with SAIF's delay in issuing a denial, it is pertinent to note that claimant requested a hearing on or about December 30, 1982, contesting SAIF's de facto denial of the request for claim reopening. See generally Joyce A. Morgan, 36 Van Natta 114, aff'd. mem., 70 Or App 616 (1984). Thus, although a penalty is appropriate for SAIF's delay in paying interim compensation, no penalty is appropriate for its delayed denial since claimant requested a hearing contesting a de facto denial less than 60 days after what we consider to be the date of claimant's aggravation claim. SAIF makes no contention on review that claimant's hearing request is jurisdictionally deficient. See Thomas v. SAIF, 64 Or App 193 (1983).

We find it appropriate to impose a penalty for SAIF's unreasonable delay in payment of interim compensation in an amount equal to 25% of the interim compensation which SAIF should have paid but failed to pay in a timely fashion, for the period November 15, 1982 through and including March 1, 1983. No penalty is warranted for SAIF's delayed denial; therefore, we find it appropriate to reduce the associated attorney's fee.

On the issue of counsel's entitlement to an additional fee for prevailing on SAIF's denial, we find that the Referee's award does not adequately reflect the efforts expended and results obtained by claimant's attorney in this case. This is an unusually complicated case in terms of the medical issues involved. The record is voluminous. Several key exhibits were generated by claimant's attorney in an effort to establish that claimant's compensable condition had worsened since the last award of compensation. Claimant's attorney has submitted an affidavit detailing 76.8 hours of time in representing claimant since September of 1980. Considering the complexity of the issues involved, the efforts expended in claimant's behalf, as reflected in part by counsel's affidavit, and the successful result obtained, we find that an extraordinary attorney's fee is warranted. OAR 438-47-010(2). We modify the Referee's order accordingly.

ORDER

The Referee's order dated January 23, 1984 is modified in part. The claim shall be reopened as of March 30, 1983, rather than September 29, 1982, as ordered by the Referee. In lieu of the penalty and associated attorney's fee imposed by the Referee,

SAIF shall pay claimant and claimant's attorney respectively the following amounts as and for a penalty for SAIF's unreasonable delay in the payment of interim compensation: A sum equal to 25% of the interim compensation payable for the period November 15, 1982 through and including March 1, 1983; and $250 as an associated attorney's fee. In lieu of the attorney's fee awarded by the Referee, claimant's attorney is awarded $3,750 for services at hearing, for prevailing on this denied claim. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the SAIF Corporation.

WILLIAM S. GILLETTE, Claimant
Krause, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07352
February 14, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Leahy's order which: (1) found claimant medically stationary as of December 15, 1983 and allowed the SAIF Corporation a set off for temporary total disability compensation paid for periods after that date; (2) found claimant not permanently disabled from the compensable injury; and (3) found claimant not entitled to vocational assistance.

The Board affirms and adopts that portion of the Referee's order finding claimant medically stationary as of December 15, 1983 and allowing SAIF to offset temporary disability compensation paid for subsequent periods.

Claimant compensably injured his back on October 6, 1982. Dr. Zimmerman initially diagnosed lumbosacral strain with mild right shoulder strain. X-rays were negative. Claimant was released and returned to regular work on October 25, 1982. The mill where claimant worked was on a schedule of four days a week. Claimant seemed to improve over the next several weeks.

On February 11, 1983 Dr. Henderson reported that claimant was generally able to tolerate the four day schedule, being quite uncomfortable by the fourth day, but had been unable to handle a five day work week since instituted by the employer in January. Claimant had pain in the low back and occasionally in the lower cervical region, plus difficulties with his left leg, including burning and tingling in the foot. Dr. Henderson suggested that claimant work two or three days a week, gradually increasing to full time.

A myelogram was performed March 14, 1983, with normal results. Claimant returned to modified work with a 25 pound lifting limit in mid April 1983, but was shortly fired for allegedly exceeding his limitations.

Claimant's symptoms persisted, but without objective manifestations. Electrical studies performed by Dr. Podemski on October 24, 1983 were within normal limits, showing no evidence of radiculopathy. Dr. Henderson speculated that claimant's symptoms might be due to rheumatoid spondylitis. In his November 22, 1983 report, Dr. Richards, a consulting internist, noted that claimant stated that four or five weeks previous his entire spine from the cranium to the sacrum had become hot and sore. He stated that about a week later, when his wife was massaging his back in the mid dorsal area, he felt a pinch. Then, from the costal margin

down his muscles jumped somewhat uncontrollably for about 15 minutes. After examining claimant, Dr. Richards noted that although collagen disease was previously suggested as a diagnosis, no evidence of this or any other disease process was found. Dr. Richard stated:

> "The particular symptomatology the patient professes at this time or during the time, truly doesn't fit with our known diseases or syndromes, and there is no true objective findings or evidence of any abnormalities."

Dr. Henderson reviewed Dr. Richard's reports and agreed that it did not appear that claimant had acute inflammatory arthritis. He stated that claimant was medically stationary and recommended retraining. Dr. Zimmerman reported on March 8, 1984 that he had seen claimant five times since mid January for pain in the left low back, hip and groin, sensations of throbbing in the leg and a sensation of bone-on-bone grating in the hip. Claimant told him that he was nearly always in discomfort, but that on occasion it became severe enough to prohibit any type of activity. Dr. Zimmerman stated that claimant obviously would not be able to participate in physical labor as he had before his injury.

Dr. Zimmerman referred claimant to Dr. Schwartz, an orthopedist, who examined claimant on March 28, 1984. Claimant's biggest complaint at that time was relative to his hip, but he stated that when the hip pain was bad it generally triggered the lumbosacral area which triggered the thoracolumbar area and cervical spine as well. Claimant reported intermittent pain radiating down the left leg to the heel, tingling on the plantar surface of the foot, and that his left leg felt weaker than the right. Examination revealed marked tenderness to pressure in the lumbosacral area and a 50% reduction in lateral bending. Dr. Schwartz stated that claimant's condition appeared to be fixed with mild disability and recommended retraining. On April 6, 1984 Dr. Schwartz reported:

> "As I indicated in my evaluation his symptoms are somewhat neurological in origin yet also seem to indicate hip disease but in neither instance is any demonstrable organic pathology found. Nonetheless, his injury appears to be the etiology of his present difficulties. I doubt a psychological evaluation would lead to anything meaningful. He seems to be most interested in finding out what the cause of his problem is yet that seems unlikely given the fact that nobody can find anything wrong with him. Nonetheless, that doesn't mean that he doesn't have a problem. I have suggested retraining as it seems unlikely that he will return to his old occupation."

On April 9, 1984 Dr. Zimmerman reported that he continued to treat claimant and that claimant will probably always have limitations to the type and amount of work he can do.

The testimony of claimant and his wife regarding claimant's

activities, symptoms and limitations is largely consistent with the medical reports. Claimant testified that he was not physically impaired before the injury. He testified that at the time of the hearing he had problems bending, stooping and walking any significant distance. He testified that he can lift about ten pounds on a frequent basis. Claimant's wife related several occasions of total muscle spasms from the waist down.

Claimant's burden is to show by a preponderance of the evidence that he is permanently disabled as a result of the compensable injury. Although objective medical findings are persuasive evidence that a disability exists and although a physician's specific and well reasoned diagnostic explanation is persuasive evidence regarding causation, neither is essential provided that there is sufficient other evidence in the record to satisfy claimant's burden. Neither is present here, yet we are persuaded that claimant has carried his burden.

Claimant was symptom free before the injury. He has not recovered since. Numerous skilled physicians have labored to explain the cause of claimant's continuing symptoms, but all have failed. Several hypotheses of unrelated causes have been eliminated. We find that claimant is impaired as a result of the compensable injury.

Claimant is 35 years old and has a GED. He is trained as a barber and has sales experience. He has worked as the night manager in a convenience market and the assistant manager of a tire store. His skills include building, welding, fabricating, blueprint reading and mechanics. Considering the guidelines set forth in OAR 436-65-600 et seq., we assess claimant's permanent loss of earning capacity and award claimant 15% unscheduled disability for his low back condition.

ORDER

The Referee's order dated June 5, 1984 is affirmed in part and reversed in part. There being no prior award of permanent disability, claimant is awarded 48° for 15% unscheduled disability for injury to his low back. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3,000 as a reasonable attorney's fee. The Referee's order is affirmed in all other respects.

DAVID L. WOOD, Claimant
Evohl F. Malagon, Claimant's Attorney
Roberts, et al., Defense Attorneys
Velure & Bruce, Defense Attorneys

WCB 83-02697 & 83-02213
February 14, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Mission Insurance Co. requests review of Referee Baker's order which set aside its denial of claimant's aggravation claim for a low back injury, awarded penalties for unreasonable denial and upheld EBI's denial of claimant's new injury claim. The issues on review are responsibility and compensability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated April 26, 1984 is affirmed in part,

modified in part, and reversed in part. Only that portion of the order awarding penalties for time loss and medical bills incurred after denial is reversed. The attorney fee award associated with the unreasonableness issue is modified to $350. The remainder of the order is affirmed, including the 25% penalty for failure to pay interim compensation pending denial. Claimant's attorney is awarded $300 for services on Board review, to be paid by Mission Insurance Company.

TIMOTHY E. BARTON, Claimant
Pozzi, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 83-01011
February 15, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Danner's order that set aside its denials dated May 25, 1983 and July 1, 1983. The issues are: (1) whether the employer has established fraud, etc., sufficient to sustain its backup denial; (2) whether claimant has established entitlement to lumbar fusion surgery that was performed in June 1983 as a compensable medical service in connection with his September 1980 industrial back injury; (3) whether claimant has established entitlement to claim reopening on the basis of aggravation in connection with the June 1983 surgery; and (4) whether claimant has established that his urological problems are a compensable sequelae of his industrial injury.

The Referee resolved all four issues in claimant's favor. On the first three issues, we generally agree with the Referee's analysis and agree with the Referee's conclusions. See also Parker v. D. R. Johnson Lumbar Co., 70 Or App 683 (1984).

We disagree with the Referee's conclusion on the compensability of claimant's urological problems.

Following claimant's injury in September 1980, back surgery was performed in March 1981 and again in February 1982. Claimant apparently contends that his urological difficulty originates either from the injury itself (1980) or from the subsequent surgeries (1981 and 1982).

On October 31, 1980, about six weeks after claimant's injury, Dr. Bert noted that claimant had "bladder trouble" without further comment. There is no further mention of urological difficulty until August 30, 1982, when Orthopaedic Consultants reported claimant having said he had been having bladder control problems since August 1981. In September 1982 claimant advised Dr. McIntosh that his bladder problems dated back only one and a half months. By February 1983 claimant was telling Dr. Tank that his problems began about "three months after the second surgery," i.e., about May 1982.

Throughout this period there were situations in which it would be reasonable to expect mention of any existing bladder problem, such as when claimant was hospitalized in June 1982 after his second laminectomy. However, the reports generated during that hospital stay do not indicate any bladder control problems.

Claimant began seeing Dr. Collins, a urologist, in early 1983. On April 7, 1983 Dr. Collins opined:

"The relationship between the [1980] back

> injury and the neurologic bladder condition is that the back injury somehow injured the lower portion of the spinal tract -- resulting in this urinary tract problem."

Dr. Collins' only stated reason for this conclusion was "that the patient stated that he has been having progressive trouble consistent with neurogenic bladder since his [1980] injury." Dr. Collins also (and apparently alternatively) theorized that claimant's urological problems might orginiate from his back surgery, but no explanation at all was offered in support of this theory.

A contrary assessment is offered by Dr. Podemski, a neurologist, who diagnosed:

> "Uninhibited small capacity neurogenic bladder -- unrelated to work injury of September 18, 1980.
>
> * * *
>
> "As regards the neurogenic bladder, this by documentation and history would appear to be upper motor neuron rather than lower motor neuron in type and, therefore, I would be unable to implicate the on the job injury and resultant surgery as causal in this bladder dysfunction."

Dr. Podemski does not explain the distinction he draws between "upper motor neuron" and "lower motor neuron"; in context, we understand this distinction to be refutation of Dr. Collins' conclusion that "the [1980] back injury somehow injured the lower portion of the spinal tract." (Emphasis added.)

Claimant argues that Dr. Collins is his treating physician and thus his opinion is entitled to greater weight. So far as this record reflects, however, the only treatment for claimant's urological condition has been medication prescribed by Dr. Tank; there is no record of Dr. Collins rendering treatment. Moreover, Dr. Collins did not even see claimant until about two and a half years after his compensable injury; so any treatment rendered has been recent and brief. Under these circumstances, we are not willing to regard Dr. Collins' opinion as per se more persuasive solely because he is allegedly a "treating" physician.

We turn, then, to a consideration of the reasons given by the doctors for their respective positions. As previously stated, Dr. Collins believed that claimant's urological problems were caused by his September 1980 injury because, in Dr. Collins' words, claimant "stated he has been having progressive [bladder] trouble . . . since his [1980] injury."

This record raises serious doubts about that foundation for Dr. Collins' opinion. As previously stated, claimant reported a variety of histories at various times to various doctors about the onset of his bladder dysfunction; many of these histories are inconsistent with the notion of consistent trouble since September 1980. Moreover, and more importantly, claimant's sworn testimony at hearing was that he had no bladder dysfunction before his second back surgery in February 1982. It would thus appear that

Dr. Collins' opinion was based on an incorrect history and/or that there are so many conflicting histories about the onset of claimant's urological condition that no conclusion based on history would be cogent.

The ultimate question is whether claimant has proven his claim by a preponderance of the persuasive evidence. Considering the apparent weaknesses in Dr. Collins' position and the contrary evidence from Dr. Podemski, we are not persuaded that claimant has established that his urological condition is a compensable sequela of his industrial back injury.

ORDER

The Referee's order dated January 13, 1984 is affirmed in part and reversed in part. That portion of the Referee's order which found that claimant's urological condition was compensable is reversed and, in lieu thereof, the self-insured employer's partial denial of that condition is reinstated and affirmed. The balance of the Referee's order is affirmed.

PAULINE V. BOHNKE, Claimant
J. Rion Bourgeois, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 82-06426
February 15, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee St. Martin's order that disallowed credits of previously paid permanent partial and permanent total disability benefits against the Court of Appeals' award of 75% (240°) unscheduled permanent partial disability and awarded a carrier paid attorney fee for unreasonable resistance in payment of compensation.

The facts are undisputed. Claimant contracted chronic active serum hepatitis in November 1971 in the course of her employment as a medical laboratory assistant. On January 22, 1980 a Determination Order granted claimant an award of eight years of temporary total disability and 40% (128°) unscheduled permanent partial disability for injury to body systems (liver). Claimant appealed the Determination Order.

Referee Gemmell granted claimant an award of permanent total disability by Opinion and Order entered January 15, 1981. The Referee's order authorized the insurer to credit "payments made on the permanent disability award. . ." against the increased benefits awarded. At the time the Referee's order was entered, the insurer had paid $5,882.40 in permanent partial disability benefits pursuant to the Determination Order. The insurer requested Board review.

On July 29, 1981 the Board reversed the Referee's order granting permanent total disability and modified the Determination Order to grant claimant an award of 40% (128°) unscheduled psychological disability. At the time the Board's Order on Review was entered, the insurer had paid $4,174.97 in permanent total disability benefits pursuant to the Referee's order. Claimant petitioned for judicial review of the Board's decision.

The Court of Appeals reversed the Board's order on February 8, 1982 and remanded claimant's case to the Board with instructions to grant an award of 75% (240°) unscheduled permanent partial disability. The Board did so in its Order on Remand entered May 14, 1982.

The value of claimant's award was $16,800. On September 28, 1982 the insurer informed claimant that out of that sum it was withholding $5,882.40 as an adjustment for permanent partial disability benefits paid pending appeal of the Determination Order and $4,174.97 as an adjustment for permanent total disability benefits paid pending Board review of the Referee's decision. The insurer takes the position that these withheld sums were partial prepayment of the 75% award ultimately granted by the Court of Appeals.

The insurer concedes in its brief on review that it is foreclosed by existing law from recovering the $4,174.97 in permanent total disability benefits paid pursuant to the Referee's order pending Board review of that order. ORS 656.313(1), (2); Hutchinson v. Louisiana-Pacific, 67 Or App 577, 581, rev denied 297 Or 340 (1984); Harry C. Jordan, 35 Van Natta 282 (1983), aff'd per curiam Bekins Moving & Storage Co. v. Jordan, 68 Or App 57 (1984); Glenn O. Hall, 35 Van Natta 275 (1983).

The insurer advances two reasons why its deduction of the $5,882.40 in permanent partial disability benefits paid pending appeal of the Determination Order was proper. First, the insurer argues that, "[B]enefits already paid claimant to quantify a permanent loss need not be paid twice in compensating for that same loss. No special administrative permission should be required for what is a simple matter of arithmetic." We believe that the law is clear that no adjustment to compensation, no matter how simple, is permitted in the absence of approval by the Evaluation Division, a Referee, the Board or a court. Forney v. Western States Plywood, 66 Or App 155 (1983), aff'd 297 Or 628 (1984); Mesa v. Barker Mfg. Co., 66 Or App 161 (1983).

The insurer's second argument is that it was authorized by Referee Gemmell's order to credit the permanent partial disability benefits paid pursuant to the Determination Order against the permanent total disability benefits awarded by the Referee's order, and that this authorization is sufficient to authorize the adjustment made in September 1982, after the Court of Appeals ruled in claimant's case. We are unable to accept this reasoning.

Each of the entities, i.e. the Evaluation Division, a Referee, the Board and a court, identified in Forney and Mesa as having the authority to authorize adjustments to compensation has entered an order in this case, one of them, the Board, twice. Only once has any order entered in this case arguably allowed an adjustment in compensation. Referee Gemmell's order stated:

> "IT IS THEREFORE ORDERED that claimant shall be paid an award of permanent total disability commencing from the date of termination of temporary total disability with credit allowed for payments made on the permanent disability award."

The Board's Order on Review, however, stated:

"The Referee's order dated January 15, 1981 is reversed. The Determination Order of January 22, 1980 is modified to reflect claimant's entitlement to compensation equal to 128° for 40% unscheduled psychological disability."

Having not been reinstated by the Court of Appeals, the Referee's order became a nullity. Neither the Court of Appeals nor the Board in its Order on Remand authorized any adjustment in compensation. The insurer's adjustment of September 1982 was, therefore, a prohibited unilateral adjustment. Forney v. Western States Playwood, supra; Mesa v. Barker Mfg. Co., supra. It follows that the insurer is required to pay the sum wrongfully withheld to claimant.

The Referee declined to award a penalty against the insurer, but did award a carrier paid attorney fee on the theory that the permanent partial disability adjustment was an unreasonable resistance to the payment of compensation. We concur with the Referee's award of a $1,000 carrier paid attorney fee, however, we base that award upon a different ground. We believe that the reliance on Referee Gemmell's order, while incorrect, was not unreasonable. However, we believe that ORS 656.313(2) is sufficiently clear that attempting to recover benefits paid pending Board review of a Referee's order was unreasonable and is sufficient basis upon which to assess a carrier paid fee.

ORDER

The Referee's orders dated February 7, 1984 and July 9, 1984 are modified to base the carrier paid attorney fee upon the insurer's unreasonable withholding of permanent total disability benefits due pending Board review of Referee Gemmell's order. The Referee's orders are otherwise affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the insurer.

DONALD K. CHAMBERS, Claimant
Cowling & Heysell, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07354
February 15, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order which awarded 112° for 35% unscheduled permanent partial disability in lieu of a Determination Order award of 80° for 25% unscheduled disability for injury to claimant's low back and depression. On review, the SAIF Corporation contends that the 25% award should be reinstated. Claimant contends that because SAIF did not cross-request review, the Board is without jurisdiction to reduce the award and, that because SAIF has requested relief, an insurer paid attorney fee is in order.

We reject claimant's contention that we may not consider SAIF's request for reduction of the award because of its failure to formally cross-request review. See Jimmie Parkerson, 35 Van Natta 1247 (1983). Nonetheless, as we agree with the Referee's assessment of claimant's permanent loss of earning capacity due to the compensable injury, we affirm and adopt the order of the Referee. Since SAIF's request for reduction of the award raised

no issues that would not otherwise have been dealt with, we do not award claimant's attorney a fee. See Teel v. Weyerhaeuser Company, 294 Or 588 (1983); Gleason v. Rippey, 36 Van Natta 778 (1984).

ORDER

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

RAYMOND P. DAVIDSON, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-10512
February 15, 1985
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Quillinan's order that increased claimant's award of permanent partial disability from 184° for 57.5% unscheduled disability for injury to his groin to an award of permanent total disability. The issue is the extent of claimant's disability.

Claimant was 61 years old at the time of the hearing and had done heavy logging work for 40 years. On August 15, 1979 claimant suffered a compensable right inguinal hernia. Claimant had a prior history of surgical hernia repairs in 1968 and 1977. Dr. Johnson, claimant's treating physician, performed a surgical repair of the August 15, 1979 hernia on August 28, 1979.

On November 15, 1979 Dr. Johnson reported that the August surgery had failed. Another repair was done on November 20, 1979, this time using Marlex mesh in an attempt to strengthen the floor of claimant's inguinal canal. A right orchiectomy was also performed. During the procedure claimant suffered anaphylactic shock due to intravenous antibiotics, but recovered well. On January 10, 1980 Dr. Johnson projected that claimant would be released to work on February 1, 1980.

Claimant returned to work at his usual occupation as a logger as projected. As of March 31, 1980 claimant had a large bulge in his right groin, but was otherwise asymptomatic and without work restrictions. Dr. Johnson examined claimant on December 3, 1980 and April 8, 1981, noting each time that claimant's condition remained essentially unchanged. After the April 1981 examination Dr. Johnson noted that claimant would most likley continue to have problems leading to another hernia operation if he continued doing heavy logging work.

On April 29, 1981 claimant's claim was closed by a Determination Order that awarded no permanent disability.

Dr. Johnson's examination on April 1, 1982 showed a definite increase in the size of the bulge in claimant's groin and noted that claimant complained of increased pain and pressure. He noted that claimant had been continuing to do heavy logging work.

On April 14, 1982 Dr. Johnson performed surgery using a preperitoneal approach to avoid entering the abdominal wall and used a large sheet of Marlex mesh to attempt to strengthen claimant's lower abdominal wall to prevent further recurrences.

On April 30, 1982 Dr. Johnson notified SAIF of the most recent surgery, and concluded:

> "It is my feeling that despite the extensive repair recently performed, I doubt that this or any repair will hold up with [claimant's] work in the woods which requires carrying heavy chainsaws up and down hills and doing very heavy, strenuous work. I have advised him that I do not feel he should return to this type of work as it is almost certain to cause him more problems with his right groin."

In June 1982 Dr. Johnson approved claimant's entry into a Field Services Division vocational assistance program stating that claimant had a 20 pound lifting restriction and was to avoid straining. Claimant began a job search program with VERK Consultants in July 1982. His initial testing showed that he could work comfortably in sitting, standing, crouching, bending, stooping and kneeling positions. The job search appears to have been quite intensive, however, claimant did not become employed.

On September 2, 1982 a second Determination Order granted claimant an award of 112° for 35% unscheduled disability for his groin injury.

On January 31, 1983 Dr. Johnson informed SAIF that claimant was again symptomatic. He noted that claimant had been restricted to lifting no more than 20 pounds and concluded:

> "Despite following this regime [sic, regimen?] and carefully avoiding strenuous work, [claimant] has noted increased swelling in his right groin. In July of '82 he simply had a soft, diffuse prominence in this area and now he has a very prominent, obvious hernia defect located above his right groin medially at the level of the symphysis pubis."

Dr. Johnson opined that claimant would eventually require additional surgery.

Claimant and SAIF stipulated to an increased permanent disability award of 72° for 22.5% on March 18, 1983. This stipulation brought claimant's total award to 184° for 57.5% unscheduled permanent disability.

On April 26, 1983 claimant underwent his sixth hernia operation. He was released for modified work effective July 6, 1983 with the following restrictions: "No straining. No lifting of more that 20 pounds for the rest of his life."

On September 28, 1983 Dr. Johnson reported that claimant was asymptomatic and stationary. However, with respect to claimant's overall condition he stated:

> "[E]ach of his last recurrences have occurred just medial to the previous repair; i.e., the lower abdominal wall simply does not seem to hold up under the repairs. . . .

". . . I still feel very strongly that [claimant] cannot be allowed to have any type of physical work as even without physical work, he will probably recur now in the left side at the edge of his previous Marlex sheath."

A Determination Order dated October 24, 1983 granted claimant no additional permanent disability.

Dr. Johnson stated on December 23, 1983 that:

"As the hernia repairs and re-repairs have been performed, the right groin is now solid, but [claimant's] lower abdominal wall weakness has simply moved to the left, and it appears that no amount of surgical management will produce a solid lower abdomen, and therefore [claimant] has been advised against any type of heavy work. As [claimant's] only known occupation is logging and lumber related activities, he has been unable to be gainfully employed for some years. It is my opinion that [claimant] is not employable for any type of physical labor because of his abdominal wall weakness."

On Board review SAIF asserts that claimant is not entitled to any increased compensation because his condition has not worsened since the last arrangement of compensation.

In Ellis v. SAIF, 67 Or App 107, 109 (1984), the court said:

"[A] claimant is not entitled to additional compensation following a final determination of extent of disability except for medical services under ORS 656.245, unless he establishes that (1) his condition has worsened or (2) he has been terminated from an authorized vocational rehabilitation program."

See also Johnson v. Industrial Indem., 66 Or App 640, 642 (1984).

Claimant has not been involved in a vocational rehabilitation program, therefore, the only way claimant would be entitled to increased compensation is if his condition has worsened since the last arrangement of compensation, March 18, 1983.

Claimant's testimony, which we consider along with the other evidence, sheds no light on this question. The only medical evidence in the record consists of claimant's treating physician's reports. In June 1982 Dr. Johnson imposed a 20 pound lifting restriction and advised against straining. There is no evidence that claimant exceeded these restrictions. In January 1983 Dr. Johnson noted that despite the limited activity, claimant's hernia problems continued. Claimant received an increased award of compensation in March 1983, and had additional surgery in April 1983. In July 1983 Dr. Johnson released claimant for work with

exactly the same restrictions he had in June 1982. In September 1983 Dr. Johnson noted that progressive hernia repair failures were expected, but he did not change claimant's restrictions. Finally, in December 1983, Dr. Johnson opined that no amount of surgery would produce a solid abdomen, and still did not change claimant's work restrictions. We note that while Dr. Johnson's terminology changed slightly between July and December 1983, the context of his reports shows that he made no change in his assessment of claimant's condition.

On the evidence as a whole we conclude that claimant's condition, however bad it may have been, was the same at the time of the hearing as it was in March 1983 when he was last compensated. Therefore, claimant is not entitled to an increase in compensation. ORS 656.273(1); Ellis v. SAIF, supra; Johnson v. Industrial Indem., supra

ORDER

The order of the Referee dated May 9, 1984 is reversed.

Board Member Lewis Dissenting:

I respectfully dissent.

I would find that claimant's condition has worsened since March 18, 1983, the last arrangement of compensation. I conclude that the findings of Dr. Johnson, the treating surgeon, establish that claimant's condition has worsened.

Following his April 1983 operation, claimant's sixth hernia repair surgery, Dr. Johnson reported that he had used a second sheet of "Marlex mesh" in order to fortify claimant's abdominal wall and that the repair now extended to the left of claimant's midline. Dr. Johnson further advised that following each of claimant's prior surgeries the repair gradually weakened medially and to the left of the sutured area and the surrounding tissue became lax. Dr. Johnson reported that this softening and laxity was once again occurring. These references establish to my satisfaction a change in claimant's condition.

Moreover, prior to the last arrangement of compensation Dr. Johnson had felt that claimant's 20 pound modified work limitation could eventually be increased to approximately 30 pounds. Following the April 1983 surgery, Dr. Johnson did eventually release claimant for modified work, subject to the 20 pound limitation. However, unlike his prior optimistic prognosis, this time the doctor opined that claimant's limitation would exist "for the rest of [claimant's] life." Furthermore, Dr. Johnson eventually concluded that claimant should not do any type of heavy, physical work.

Claimant needs to show only a worsening of his condition, he is not required to show a substantial worsening. Mosqueda v. ESCO Corporation, 54 Or App 736, 739 (1981). Unlike my colleagues, I interpret Dr. Johnson's reports and opinions as support for concluding that claimant's condition has not only changed, but has worsened.

Since I am persuaded that claimant's condition has worsened,

claimant would be entitled to a redetermination of the extent of his permanent disability. Ellis v. SAIF, 67 Or App 107 (1984); Johnson v. Industrial Indemnity, 66 Or App 640 (1984). Following my review of the record, I agree with the Referee that claimant has established that he is permanently and totally disabled. Consequently, with the above supplementation, I would affirm the Referee's order.

TIMOTHY J. PURDUE, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05153 & 83-08538
February 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Menashe's order which: (1) awarded him 25% (80°) unscheduled permanent partial disability for his systemic contact dermatitis condition, that being an increase of 15% (48°) from an August 17, 1983 Determination Order which had awarded him 10% (32°); and (2) authorized the SAIF Corporation a credit for prematurely paid permanent partial disability.

The Board affirms the Referee's order with the following comment concerning the credit issue.

Claimant's 1979 claim was closed by a February 1980 Determination Order which did not award permanent disability. A Referee's order found that the claim was not prematurely closed and that claimant was entitled to 10% permanent disability. On appeal, the Board found that the claim had been prematurely closed and remanded to SAIF for further processing. Timothy J. Purdue, 34 Van Natta 1175 (1982). This claim was subsequently closed by a May 9, 1983 Determination Order without an award for permanent disability. A second claim for claimant's dermatitis condition was filed and eventually closed on August 17, 1983 with claimant receiving an award of 10% permanent disability. Both Determination Orders were appealed and the issues consolidated for hearing.

The Referee found that claimant was entitled to a total award of 25% permanent disability. The Referee concluded that the payments made pursuant to the prior Referee's order constituted an advance payment of compensation for which SAIF should be allowed a credit against the 25% award. We agree with the Referee's reasoning which follows:

> "The $817 claimed overpayment represents money paid pursuant to an Opinion and Order that was subsequently reversed. Under the facts of this case, a sensible construction is to view the $817 to be a premature payment of permanent disability compensation and consequently that amount constitutes an advance payment. ORS 656.313(2) is not applicable to the circumstances of this case. As will be discussed below, claimant is entitled to additional permanent compensation and an appropriate credit should be allowed for the premature payment."

This reasoning favorably compares with the language of ORS

656.268(4) which states that the Evaluation Division's determination may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made. In addition, ORS 656.313 apparently contemplates that compensation paid pending review of employers'/insurers' appeals shall not be repaid. See ORS 656.313(1). In the present case, the compensation was paid pending review of claimant's request for Board review. When the Board subsequently agreed with claimant's argument that his claim had been prematurely closed, the Board, in effect, found that the permanent disability compensation paid pending review of the Referee's order had been premature. Thus, SAIF is entitled to a necessary adjustment for this prematurely paid permanent disability. This adjustment takes the form of a credit against the Referee's 25% permanent disability award.

ORDER

The Referee's order dated November 29, 1983 is affirmed.

ANDREW SIMER, Claimant
Schouboe, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 81-06740
February 15, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 31, 1985. Claimant repeats his contention that the Referee was required to rate the extent of his permanent disability and if he had, would have found claimant was entitled to permanent total disability.

The Referee found that claimant had established a compensable aggravation. Consequently, he set aside the self-insured employer's denial and remanded the claim to the employer for processing. Because he had reopened the claim due to the aggravation, the Referee concluded that it would be premature to evaluate claimant's permanent disability. However, citing a footnote in Etchison v. SAIF, 8 Or App 395, 401 (1972), the Referee found that should he rate the extent of disability he would find claimant permanently and totally disabled.

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). A claim cannot be closed, and permanent disability rated, until a worker is medically stationary. ORS 656.268(1); Harmon v. SAIF, 54 Or App 121 (1981).

Although we did not discuss this issue in our Order on Review, we stated that we affirmed the remaining portions of the Referee's order which were not reversed or modified. To further clarify our order, we make the following conclusions. We agree with the Referee's finding that claimant has established a compensable aggravation. Thus, his claim is in open status. Moreover, the preponderance of persuasive evidence suggests that claimant was not medically stationary at the time of hearing. Since the claim was in open status and claimant was not medically stationary, it would be inappropriate to determine the extent of his permanent disability.

Claimant's request for reconsideration is granted. On reconsideration, with the above supplementation, the Board adheres to and republishes its former order.

IT IS SO ORDERED.

MARY N. SHEESLEY, Claimant
Bischoff & Strooband, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-12252
February 20, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee Danner's order which awarded claimant interim compensation pending acceptance or denial of her claim.

During the relevant period claimant was working full-time. The claim was denied in a timely fashion. Therefore, claimant was not entitled to interim compensation. Bono v. SAIF, 298 Or 405 (1984).

ORDER

That portion of the Referee's order dated July 6, 1984, which awarded claimant interim compensation from August 31 through October 14, 1983, is reversed. The remainder of the Referee's order is affirmed.

ANTONIO O. CASTANEDA, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Garrett, et al., Defense Attorneys

WCB 84-07875, 84-05334 & 84-02608
February 21, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order of Dismissal dated January 15, 1985. Reconsideration is granted. On reconsideration, the Board adheres to and republishes its Order of Dismissal with the following comment.

Claimant contends that the Referee erred in immediately dismissing his requests for hearing rather than issuing a 30 day show cause order. Although, the former practice was to issue a 30 day show cause order, the current rules do not require such a procedure. OAR 438-06-070 provides:

> "Failure of a party to appear at a hearing without good cause constitutes a waiver of appearance. If the party failing to appear is the party that requested the hearing, the request for hearing may be dismissed unless good cause is shown and the other party is not prejudiced thereby."

Thus, the Referee acted properly in dismissing the request for hearing even though no show cause order had issued. The jurisdictional problem in this case arose because the Referee did not abate his order or issue an Order on Reconsideration within 30 days of the Order of Dismissal. Despite what claimant characterizes as a "grave injustice," the Board is without jurisdiction because no request for review was filed within 30 days of a final order.

ORDER

The Board's Order of Dismissal dated January 15, 1985, as clarified by this order is adhered to and republished.

SANDY J. DEVEREAUX, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-02347
February 21, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Seymour's order which awarded claimant penalties and attorney fees for SAIF's failure to provide medical services and which set aside SAIF's rejection of "spa" membership on the basis of claimant's noncompliance with OAR 436-69-301(2). SAIF contends that OAR 436-69-301(2) should be applied retroactively and that no penalties and attorney fees are appropriate. We agree with SAIF and reverse.

Claimant suffered a compensable injury in November 1981. In February 1983 claimant's treating doctor, Dr. Tracy, recommended that claimant be given a spa membership for exercise and whirlpool. In response, SAIF's letter of February 17, 1983 stated that when Dr. Tracy can find a "spa" which meets the requirements of OAR 436-69-301(2) and when Dr. Tracy states in writing she will assume full responsibility for the services, SAIF will consider the request.

OAR 436-69-301(2) provides:

> "Attending physicians may prescribe treatment to be carried out by persons licensed to provide medical services, or by other persons who work under the direct supervision and control of the attending physician. If the attending physician prescribes services to be provided by persons not licensed to provide medical services for the relief of injury and not under the direct supervision and control of the attending physician, the physician shall state in writing that he or she assumes full responsibility for the performance of those services."

This administrative rule became effective March 1, 1982, after the date of claimant's injury. The Referee found that this rule was not to be applied retroactively to benefits arising out of injuries suffered prior to the effective date of the administrative rule, citing Barrett v. Union Oil Distributors, 60 Or App 483 (1982). Seeing that, the Referee found that SAIF could not reject the recommended services solely because the doctor did not comply with the administrative rule and awarded penalties and attorney fees.

SAIF argues that Barrett, supra, allows retroactive application of a statute or administrative rule when such application affects the procedure for receiving benefits, but not the entitlement to or the amount of those benefits. We generally agree with that analysis. Barrett distinguishes between statutes and rules that relate to "eligibility for coverage" and those that

relate to "whether and when a claim can be made in situations where coverage exists." Barrett states that the latter can be applied retroactively. See also Futrell v. United Airlines, 59 Or App 571, 573 (1982).

We find that the administrative rule at issue here is of the latter type discussed by Barrett, one that relates to whether and when a claim can be made in a situation where coverage exists. SAIF has not questioned claimant's eligibility to receive medical services. SAIF only stated that claimant's doctor would have to follow the requirements of OAR 436-69-301(2) before it would consider the request. Therefore, we retroactively apply OAR 436-69-301(2) to benefits related to injuries suffered prior to the effective date of the rule and find that claimant's doctor must follow the requirements of that rule in order for claimant to make a valid claim for the spa services claimant seeks.

Accordingly, we find that SAIF's letter asking claimant's doctor to follow the requirements of OAR 436-69-301(2) was not inappropriate and we reverse the imposition of penalties and attorney fees. Had we not found that the rule in issue was to be retroactively applied, however, we still would not find that SAIF's actions were so unreasonable to invoke penalties and attorney fees.

ORDER

The Referee's order dated September 8, 1983 is reversed.

ERWIN R. MUSTOE, Claimant
Emmons, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 76-00610 & 78-04474
February 21, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Pferdner's order which awarded claimant 256° for 80% unscheduled permanent disability in lieu of a Determination Order raising claimant's total award to 112° for 35% unscheduled permanent disability for injury to his low back. Claimant contends that he is permanently and totally disabled.

Claimant compensably injured his low back on August 12, 1974. A right L5-S1 laminectomy and diskectomy was performed that September. Claimant was released for light work in January 1975. Symptoms persisted, however, and claimant was rehospitalized in June and September 1975. Claimant returned to work briefly after the September hospitalization, but was unable to continue past October 4, 1975. Vocational assistance led to a two year course in real estate appraising. Despite the prodigious efforts of claimant and his vocational counselor, claimant was unable to find suitable employment in that field.

Claimant worked part time for friends in a sheltered setting for four months in late 1980 as a bookkeeper/purchasing agent/office manager. Claimant testified that the job was tailor-made to his physical condition. Claimant was permitted to adjust his schedule to accommodate his disability. He was permitted to take his work home, where he could lie down. Claimant's symptoms worsened in response to the work activity,

substantially interfering with his ability to function even in this most accommodating of work environments. Claimant testified that he understood that the employer terminated him out of fear that he would further injure himself.

Over several years claimant developed degenerative arthritis in his left hip, unrelated to the compensable condition. The hip condition was symptomatic before the 1980 employment. A total hip arthroplasty was performed on June 24, 1982 by Dr. Van Olst.

Based upon claimant's testimony, which we find credible, we find that before the injury claimant performed extremely heavy labor for long hours on a regular basis. At the time of hearing, he was experiencing headaches and constant back and leg pain, the back pain being frequently severe. Claimant also experienced electric-like impulses down his legs, as well as numbness in his back and legs and weakness of his right arch and ankles. Claimant was unable to sit more than 30 minutes without shifting. If he sat too long he developed numbness in his back and legs, extending into the ball of his right foot. Twenty minutes in a car produced numbness. He was unable to twist. Sometimes he could not even put on his own shoes. On a good day he was restricted to a recliner for eight of 16 hours, being only able to be up and about for 20 minutes at a time. On a bad day the pain disturbed claimant's thinking, he felt nauseated and was further restricted in his activities. Since the hip surgery, hip pain was greatly reduced and the manner in which claimant walked improved, but the time he could be up and around was not increased, as back spasms still limited such activity.

We also find quite persuasive the opinions and observations of Dr. Hofeldt and Dr. Van Olst. Dr. Hofeldt, a psychiatrist, diagnosed chronic pain syndrome and provided claimant biofeedback training in 1982. Dr. Hofeldt reported on January 26, 1983:

> "At this time, I would not consider him employable because of the Chronic Pain Syndrome. In response to your question whether or not in my opinion there is any question about the legitimacy of his Chronic Pain Syndrome, I am of the opinion that he certainly is experiencing a chronic, unrelenting pain that has dramatically affected his personal and professional life."

Dr. Van Olst, the orthopedic surgeon who performed the hip surgery, reported on December 7, 1982:

> ". . . [I]t is my opinion that the total hip replacement performed on Mr. Mustoe's left hip did not significantly alleviate any of the low back symptoms for this patient. Greater range of motion in the left hip joint would tend to reduce some of the stress on the lumbar spine and might relieve some of his problem in the future. . . . Mr. Mustoe's subjective complaints are consistent with having had previous lumbar laminectomy and developed post operative neural scarring. . . . Mr. Mustoe is unemployable directly as a result

> of his low back condition resulting from the injury and subsequent surgery. He would be employable only in part time sedentary work which would allow a shorter work day with frequent breaks. . . . Mr. Mustoe's right arm soreness is related to use of his cane and the extra stresses placed upon the extremity while ambulating. His low back condition does contribute to the arm and elbow pain however, he has been told that he should use the cane for partial protection and weight bearing in his left hip at least for the next month or two. . . . I believe that Mr. Mustoe's credibility in terms of his subjective complaints is good. I do feel that Mr. Mustoe has considerable anxiety to [sic] relationship to his back problem and resulting pain and spasm and that this tends to exaggerate the degree of his lower back disability. This is a common response seen in persons who must deal with chronic pain syndrome over long periods of time. . . . I do not doubt that Mr. Mustoe has a desire to return to work and to my knowledge he has carried out everything recommended from a medical standpoint."

On January 18, 1983 Dr. Van Olst was deposed and testified that the hip was no longer a limiting factor in regards to employability. He said that claimant's major problem was then disability as a result of the back and subsequent effects on the nerves in claimant's right leg. Dr. Van Olst noted that at the time of claimant's previous work trials, both the back and the hip restricted claimant. As the hip had been rendered relatively pain free and had good mobility, Dr. Van Olst thought there might be some difference in the length of time claimant could carry on activity, but he adhered to his December 7, 1982 opinions, including those regarding employability.

At hearing claimant was nearly 50 years old. He is a high school graduate with electrician training and training in real estate appraisal, accounting, bookkeeping and office management. He worked at various strenuous jobs for Teledyne Wah Chang from 1957 to 1975, when his compensable condition rendered him unable to continue. His last six or seven years there were as an electrician.

As stated in Pournelle v. SAIF, 70 Or App 56, 60 (1984):

> "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 p 2d 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 p 2d 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. . .
>
> ". . . [E]ven 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 P 2d 1215, 1218 (1973)."

We find that claimant's physical impairment as a result of the compensable back injury permanently incapacitates him from regular employment at any gainful and suitable occupation in the hypothetical normal labor market. Intellectual abilities and transferable skills are of no help to claimant, as his permanent physical impairments render the seeking of employment futile.

Were claimant not permanently and totally disabled from his physical impairments alone, we would find that he has made reasonable efforts to acquire new skills and to obtain employment, and has demonstrated his willingness to seek work at regular gainful employment. Claimant is entitled to permanent total disability compensation from August 22, 1977, the date claimant became medically stationary, less an adjustment for permanent partial disability benefits paid pursuant to the Referee's order.

ORDER

The Referee's order dated August 26, 1983 is reversed. Claimant is awarded permanent total disability effective August 22, 1977, less an adjustment for permanent partial disability paid pursuant to the Referee's order. Claimant's attorney is awarded 25% of the additional compensation granted by this order, total fees in the proceeding not to exceed $3,000, as a reasonable attorney's fee.

ROBERT F. SHUCK, Claimant
Cowling & Heysell, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-11786
February 21, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Mongrain's order which affirmed the November 23, 1982 Determination Order, which awarded no additional unscheduled permanent disability for his neck and low back injury. Claimant had previously received awards totalling 86% (265.2°) permanent disability. Claimant contends he is entitled to permanent total disability. We agree and reverse the Referee's order.

Claimant was 45 years of age at the time of hearing. In September 1974, while working as a carpenter, he compensably injured his low back. Prior to his compensable injury, claimant had undergone a lumbar laminectomy in approximately 1962 and a laminectomy-fusion in approximately 1968. His compensable injury

had apparently broken the fusion. Since his compensable injury claimant has been subjected to a November 1974 fusion, a March 1976 rib resection and an October 1978 cervical decompression with discectomy. All of these surgeries were related to his compensable injury.

By virtue of an October 2, 1981 stipulation, the last arrangement of compensation, claimant had received a total award of 86% unscheduled permanent disability for his low back and neck conditions. Between the time of his compensable injury and October 1981, claimant had attempted to return to carpentry work and to participate in vocational rehabilitation programs. However, his attempts were short-lived, primarily due to his pain and physical problems.

During the summer of 1981 claimant performed caretaker duties at a fishing resort. His duties were light in nature, consisting of cleaning bathrooms, renting boats, providing minor maintenance duties and selling fishing tackle. Claimant returned to the resort in the spring of 1982, but his pain increased to the point where he was unable to continue. His claim was reopened in July 1982 and eventually closed by a November 23, 1982 Determination Order, which found him medically stationary as of September 17, 1982. Claimant was awarded no additional permanent disability.

On September 17, 1982 claimant was examined by the Orthopaedic Consultants. The Consultants had previously examined him in January 1981. Dr. Noall, orthopedist, was a member of both panels and authored the September 1982 report. Although they noted mild interference during the examination, the Consultants opined that claimant's reactions were indicative of more discomfort than during his previous examination. Claimant's low back impairment was evaluated as moderately severe and his neck impairment was considered in the mild category. The Consultants foresaw little chance of claimant returning to any type of physical labor, considering his cervical and back impairment.

Dr. Colwell and Dr. Bamforth, claimant's treating chiropractors, reported that claimant continued to suffer severe, constant and incapacitating pain. The chiropractors saw no indication that his condition would significantly improve. In the chiropractors' opinion claimant's condition would deteriorate if he returned to work.

Claimant testified that his low back and leg numbness has increased since October 1981. These problems increase upon exertion and have affected his ability to sit, stand, walk, bend and perform other similar activities. Claimant's neck pain, as well as "very severe and sharp" radiating left arm pain have worsened. Claimant takes pain medication, some of which is prescribed.

Claimant did not graduate from high school, but obtained his GED while serving in the Army. His work experience consists of primarily physically demanding duties, such as construction labor and carpentry. He participated in a vocational rehabilitation program in accounting. However, he was unable to complete the program due to his physical problems.

The Referee observed that he did not feel that claimant was a reliable witness. The basis for this observation rested upon 1977

and 1979 reports from the Northwest Pain Center. The reports indicated to the Referee that claimant appeared to be unmotivated, uncooperative, and primarily interested in advancing his claim for financial benefit. The Referee did not discuss claimant's demeanor or appearance as a witness.

A Referee's finding on credibility is generally entitled to great deference. Humphrey v. SAIF, 58 Or App 360 (1982). However, where a Referee's finding on credibility is based on an objective evaluation of the substance of the witness' testimony the Referee has no greater advantage in making that assessment than does the Board or a reviewing court. Davies v. Hanel Lbr. Co., 67 Or App 35, 38 (1984).

Without a credibility finding based on claimant's demeanor or appearance as a witness, we consider this principle to be no less applicable when evaluating a medical report. Standing alone, the Northwest Pain Center reports do not establish that claimant was an unreliable witness. The reports are outdated and primarily demonstrate claimant's frustrations at the time concerning his injury, his residuals and the entire compensation process. When those 1977 and 1979 reports are evaluated along with the entire record, particularly those more recent portions which contradict claimant's alleged lack of motivation (such as claimant's 1981 caretaker work and his 1982 attempt to return to those duties), the evidence fails to persuade us that claimant's testimony should be considered unreliable.

The Referee was not persuaded that claimant had established a measurable increase in his disability since the October 1981 stipulation. Consequently, the Referee declined to increase claimant's permanent disability award.

Claimant is not entitled to additional compensation following a final determination of extent of disability unless he establishes that: (1) his condition has worsened or (2) he has been terminated from an authorized vocational rehabilitation program. Ellis v. SAIF, 67 Or App 107 (1984); Johnson v. Industrial Indem., 66 Or App 640 (1984).

We find that claimant's condition had worsened since the October 2, 1981 stipulation, the last arrangement of compensation. In reaching this conclusion a comparison of the Orthopaedic Consultants' reports before and after the 1981 stipulation is particularly helpful. Dr. Noall, orthopedist, was a member of both panels and authored the most recent opinion. In their most recent report the Consultants noted claimant's reactions were indicative of more discomfort than during his prior examination. Further, the Consultants foresaw little chance of claimant returning to any physical type of work, while in their earlier report they had felt claimant was capable of some type of sedentary work.

Finally, we conclude that claimant has met his burden of proving that he is permanently totally disabled. Claimant has undergone four back surgeries and one rib resection, all related to his compensable injury. His permanent low back impairment has been described as moderately severe and his permanent neck impairment has been described as mild. His treating chiropractors conclude that his condition would further deteriorate if he returned to work. The Orthopaedic Consultants foresaw little chance of claimant returning to any physical type of work. Claimant's work experience has involved manual labor, which requires physical capabilities that are now beyond claimant's limitations.

Considering claimant's medical disabilities, including disabling pain, and his social/vocational factors such as his age, education, adaptability to nonphysical labor, mental and emotional conditions, and labor market conditions, we conclude that claimant has established permanent total disability. We further find that claimant has made reasonable efforts to obtain employment under ORS 656.206(3).

Accordingly, we find that claimant was permanently totally disabled as of September 17, 1982, the date of the Orthopaedic Consultants' examination. See Morris v. Denny's, 53 Or App 863 (1981).

ORDER

The Referee's order dated August 12, 1983 is reversed. Claimant is awarded permanent total disability as of September 17, 1982. Claimant's attorney is awarded 25% of claimant's compensation as an attorney fee, not to exceed $3,000, said sum to be paid out of claimant's compensation.

HOWARD E. JOHNSON, Claimant
Francesconi & Cash, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-03590
February 22, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seifert's order which decreased his total award of scheduled permanent disability for a left knee injury from 15% (22.5°), as awarded by a June 1, 1983 Determination Order and prior orders, to 5% (7.5°). On review, claimant contends he is entitled to a larger award. In its response, the self-insured employer requests authorization to recover an overpayment of permanent disability, created by the Referee's order, against future compensation claimant may receive.

The Board affirms the order of the Referee with the following comment. Since neither party has had an opportunity to litigate the merits of the overpayment issue, we shall neither affirm nor deny the employer's request. Instead, we shall leave the matter to the employer to assert at its discretion in a proper manner should claimant become entitled to a future permanent disability award. Milton O. Burson, 36 Van Natta 282, 284 (1984). This decision conforms favorably to the recovery of overpayment procedure outlined in OAR 436-54-320.

ORDER

The Referee's order dated August 20, 1984 is affirmed.

DELFINA P. LOPEZ, Claimant
Allen, et al., Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 81-06459 & 82-02139
February 22, 1985
Consolidated Order on Review

Reviewed by Board Members McMurdo and Lewis.

This case is before us on the insurer's request for review of two Referee's orders. In WCB Case No. 81-06459, Referee Shebley awarded claimant permanent total disability in connection with her 1979 ankle injury. In WCB Case No. 82-02139, Referee Baker set aside the insurer's post-Shebley-hearing denial (issued pre-Shebley order), which denied the causal relationship between claimant's original ankle injury and subsequent back condition. Referee Baker also imposed a penalty and associated attorney's fee for the insurer's failure to pay, after the date of its denial, the permanent total disability benefits awarded by Referee Shebley. The insurer has moved the Board for remand in both cases, based in part upon allegations of fraud committed by claimant, her daughter and claimant's physician. The allegedly fraudulent conduct consists of the failure to disclose a prior industrial back injury, of which the insurer apparently was unaware until it was mentioned by claimant during the hearing before Referee Shebley.

By an Interim Order, the Board deferred ruling on the insurer's motions for remand and granted its motion to consolidate review of the two Referee's orders. 34 Van Natta 1191 (1982). Presumably, during the pendency of this proceeding, claimant has been receiving compensation for permanent total disability.

The issues before us, therefore, are: (1) whether this case should be remanded to a Referee for further evidence taking; (2) whether the insurer's post-hearing partial denial was procedurally permissible; (3) whether the insurer's failure and refusal to pay permanent total disability benefits after the date of its denial warrants the imposition of a penalty and attorney's fee; and (4) whether the record before us establishes that claimant is permanently and totally disabled as a result of her industrial injury.

A recitation of the facts and procedural history of this case is appropriate. Claimant sustained a compensable left ankle injury in December of 1979 when she slipped while climbing a small step at work. She was 56 years old at the time. She was employed as a cherry processing belt worker. The majority of her prior work experience involved vegetable farm work and cannery work. Claimant is of Mexican descent and was born in Texas. She never learned to speak English, other than a minimal amount of conversational English. She can neither read nor write Spanish or English. Her testimony was taken at the hearing with the assistance of an interpreter.

Claimant's left ankle injury was accepted and closed in July 1980 with an award for temporary disability only. She continued to experience problems with her left ankle, and during mid-1980 began to experience a back problem. Claimant requested claim reopening, which was initially resisted by the insurer. Claimant requested a hearing, which led to the parties' stipulation in June of 1981. The stipulation provided for claim reopening as of February 20, 1981 and dismissal of claimant's request for hearing. The stipulation contains the following provision:

> "Claimant's original complaint on the accident report was for an injury to her left foot and ankle. She is now being treated for back pain and disability. Employer and carrier, either by making payment or by this stipulation, does not waive any right to at a later date raise the issue of whether or not the back difficulty is connected with the ankle injury which was reported."

The following month, by a Determination Order dated July 8, 1981, claimant was awarded additional temporary disability and 128° for 40% unscheduled disability for injury to her low back. Claimant requested a hearing designating temporary and permanent disability as issues. The employer filed a response stating, "Determination Order is excessive and should be reduced."

The matter came before Referee Shebley for hearing on February 3, 1982. At the outset, counsel for the insurer pointed out that the parties' stipulation reserved the issue of the causal relationship between claimant's ankle injury and ensuing back complaints. Counsel further stated:

> "* * * I want the record to be clear today that, by coming to this hearing, we are not waiving our right at any time in the future to raise that question [i.e. the causal connection between claimant's ankle injury and ensuing back problems]. * * * [B]y appearing here at this hearing, we do not waive the right of the employer or carrier to completely deny -- at least partially deny -- the connection between the back and the ankle at any time in the future."

In response, claimant's attorney simply stated that he did not care to respond: "This is an accepted claim, and back disability was awarded by [the Evaluation Division]. It is in the Determination Order. I don't need to respond further."

The hearing proceeded. Claimant testified about her back complaints. The Referee considered claimant's testimony, the testimony of other lay witnesses, including claimant's daughter, relative to the nature and extent of claimant's infirmity, as well as the medical evidence discussing the condition of claimant's low back. In the beginning of her testimony, claimant stated that she had sustained an injury in 1968 involving the area of her waist toward the upper back; that this was in a different location than her back problem subsequent to her 1979 ankle injury; and that her "upper back problems" associated with this 1968 injury eventually completely resolved. On cross-examination, counsel inquired whether claimant recalled telling Mr. Pitts, who is an investigator for the insurer, that she had never had a back injury. Claimant testified that she did not recall relating this to Mr. Pitts. She further testified that she had sustained this 1968 injury while working at a cannery, had filed a workers' compensation claim and had received benefits for the injury. She also indicated that she had been hospitalized as a result of the injury, although no surgery had been performed.

A rehabilitation counselor appeared and testified in claimant's behalf that claimant was not employable considering her medical problems, including her back condition, and pertinent social/vocational factors.

After presentation of claimant's case in chief, the hearing adjourned, and the record was closed that same date, February 3, 1982. Referee Shebley's order awarding claimant permanent total disability was entered March 3, 1982. In his order, the Referee refers to the parties' written stipulation reserving the right to raise the issue of the compensability of claimant's back condition. The Referee recited the evidence concerning claimant's post-ankle injury back problems, which includes her attending physician's (Dr. Winkler) statements that her low back problems were caused by the ankle injury. The Referee's order states: "My review of the medical evidence leads me to conclude that claimant has a mild or mildly moderate permanent impairment of her low back and left leg." The Referee further concluded that it would be futile for claimant to make an effort to find gainful and suitable employment, and that the record established she was permanently and totally disabled.

After the February 3, 1982 hearing, but before issuance of Referee Shebley's March 3, 1982 order, the insurer issued the following formal, partial denial, dated February 24, 1982:

> "As you know, we accepted your claim for an ankle injury of December 14, 1979 and have paid benefits to you. You have also treated for back problems.
>
> "Please be advised that we will pay for no further medical treatment due to your back condition nor will we pay time loss benefits due to your back problems.
>
> "We do not feel your back condition is a result of your ankle injury of December 14, 1979.
>
> "This is only a partial denial and we will continue to pay for medical treatment which is directly related to your ankle injury."

On or about March 8, 1982 the insurer requested Board review of Referee Shebley's order awarding permanent total disability. Claimant requested a hearing contesting the insurer's February 24, 1982 partial denial. By letter dated March 11, 1982, the insurer advised claimant that it would pay permanent total disability benefits from May 30, 1981 through February 24, 1982, the date of its denial. The following month claimant filed a supplemental hearing request designating penalties and attorney fees for unreasonable resistance/delay in payment of compensation, and failure to pay permanent total disability as ordered by Referee Shebley's March 3, 1982 order.

A briefing schedule was established in the proceeding on review of Referee Shebley's order. In accordance with that briefing schedule, the insurer submitted its appellant's brief on

or about June 22, 1982, arguing that claimant had failed to prove her entitlement to an award for permanent total disability. In the meantime, an expedited hearing, based upon claimant's allegation of financial hardship, was scheduled to hear the issues relative to the insurer's partial denial and failure to pay permanent total disability benefits.

On June 24, 1982, a hearing convened before Referee Baker. At the outset of this hearing, claimant moved that the insurer's denial be "dismissed." The basis for the motion was that the insurer's post-hearing partial denial was barred by res judicata by virtue of the extent litigation before Referee Shebley, and his "finding" that claimant's back condition was a compensable consequence of her accepted ankle injury. In addition, claimant argued that because the Determination Order awarded unscheduled disability for claimant's low back injury, and the insurer failed to raise the medical causation issue in the proceeding before Referee Shebley, it was precluded from issuing a denial on that basis after the hearing and after the record closed. In response, the insurer pointed out its reservation of the medical causation issue in the parties' June 1981 stipulation; its reservation of the issue at the outset of the Shebley hearing; and the fact that its denial of medical causation vis-a-vis claimant's low back condition was issued within one year of the Determination Order awarding unscheduled low back disability.

The insurer was obviously prepared to proceed to hearing on the issue of the causal relationship between claimant's ankle injury and ensuing low back problems. Documentary evidence was offered but not admitted with regard to the medical causation issue. After reviewing the record of the proceedings before Referee Shebley, including a copy of the transcript of oral proceedings, Referee Baker granted claimant's motion in a ruling from the bench. He ordered the insurer to resume payment of permanent total disability and incorporated his findings and conclusions in an order dated July 2, 1982.

On July 1, 1982, in the proceeding on review of Referee Shebley's order, the insurer filed its motion to remand alleging claimant's misrepresentation, as well as the misrepresentations of claimant's doctor. In support of the motion for remand, the insurer submitted an affidavit of counsel, an affidavit of its investigator, Mr. Pitts, previously referred to, an 801 claim form relative to an October 1969 back or waist injury while claimant was employed by Stayton Canning Company; and a copy of what appears to be a history and physical report dated May 7, 1975, signed by claimant's physician, Dr. Winkler, indicating that claimant was being hospitalized for severe back pain possibly related to her 1969 "neck and back" injury. Mr. Pitts' affidavit alleges that he questioned Dr. Winkler sometime after September 23, 1980, with regard to a possible back injury prior to 1979, and that Dr. Winkler denied any such injury.

After Referee Baker issued his order, the insurer moved for reconsideration, which was denied. The insurer thereafter requested Board review of Referee Baker's order and, at the same time, moved the Board for remand in that case. As indicated above, the Board consolidated its review of the two Referee's orders. After issuance of the Board's Interim Order, the briefing was completed upon receipt of claimant's respondent's brief.

I

The insurer seeks remand in order to develop further evidence on the issues pertaining to claimant's low back condition. The substantive issue of the causal relationship between claimant's 1979 injury and her back condition is not before us in this proceeding. Indeed, that is the issue which the insurer intended to litigate at the proceeding before Referee Baker, which resulted in his summary ruling disposing of the insurer's denial on procedural grounds. The issue of medical causation is the issue which would be developed at a hearing on remand. What we are required to decide is whether the insurer should be permitted to make a record on the issue of medical causation at a hearing on remand. The considerations involved in deciding this question are intimately related to the issues concerning Referee Baker's ruling that the insurer's post-Shebley-hearing denial was procedurally impermissible. We find it appropriate, therefore, to initially address the propriety of Referee Baker's ruling.

The question is whether the insurer, by its failure to litigate the medical causation issue at the Shebley hearing, has thereby waived that issue. The insurer contends that the Shebley hearing is not a bar to its later denial because it expressly reserved the right to raise that issue at a later date; and, further, because it is permitted to deny the causal connection between claimant's compensable injury and her back condition at any time, notwithstanding its payment of compensation for that condition.

There is no question that the parties' stipulation effectively reserved the insurer's right to contest the compensability of claimant's low back condition, when the stipulation was executed. The real issue before us, however, is whether the insurer's attempted reservation at the outset of the Shebley hearing was effective to allow it to deny claimant's back condition after the record of that hearing closed.

We begin our discussion of this issue by noting that Referee Shebley did not "find" that claimant's back condition was a compensable consequence of her ankle injury. His order merely recites the evidence addresssing the condition of claimant's low back and concludes that the extent of claimant's low back and left leg impairment is in the mild to mildly moderate category. In effect, his analysis assumes the compensability of the back condition, which is entirely consistent with the insurer's comments at the outset of the hearing.

Thus, there was not actually an adjudication of the causation issue. This conclusion, standing alone, does not necessarily dictate the further conclusion that the insurer could, at any time, decide to raise causation as an issue. This Board's longstanding policy has been to avoid the proliferation of hearing requests and, thus, to encourage the resolution of all pending issues in a single proceeding.

> "It is contemplated that a request for hearing will resolve all matters at one time, and the conclusion of an order extends not only to matters actually determined, but also to other matters which could properly have been determined. This

> rule applies to every question falling within the purview of the original action . . . with respect to matters of both claim and defense which could have been presented by the exercise of diligence." Elfreta Puckett, 8 Van Natta 158, 159 (1972).

This policy is derived from principles associated with the rule of res judicata. "The sum and substance of the whole rule is that a matter once judicially decided is finally decided." Black's Law Dictionary (Revised 4th ed. 1968). Its principal purposes are the avoidance of successive legal proceedings and economy of judicial, or administrative, resources. Dean v. Exotic Veneers, Inc., 271 Or 188, 192 (1975). The rule applies not only to every claim included "in the pleadings," but also to every claim which could have been alleged under the same "aggregate of operative facts which compose a single occasion for judicial relief." Million v. SAIF, 45 Or App 1097, 1102 (1980).

The insurer had been aware of claimant's back condition and her contention that it was related to her ankle injury since mid-1980. It agreed to pay compensation for this condition, although it reserved the right, with claimant's approval, to cease payment of compensation at a later date. See ORS 656.262(9); 656.018(4). The insurer was paying compensation for this low back condition, including the permanent disability awarded by the Determination Order, when a hearing convened to determine the extent of claimant's injury-related impairment. We believe that it was incumbent upon the insurer to assert and establish its causation defense at that hearing. Considering the circumstances, this was an issue which could have and should have been raised at that hearing.

The insurer contends that Clinkenbeard v. SAIF, 44 Or App 583 (1980) requires the conclusion that it effectively reserved the medical causation issue by counsel's opening remarks in the Shebley hearing. Clinkenbeard held that where a stipulation provided that a claim would be reopened for payment of temporary total disability and medical treatment for claimant's diabetes and lupus erythematosis, and that the claim would be closed pursuant to ORS 656.268 when the claimant became medically stationary, the question of compensability was "no longer open," and the insurer's post-stipulation denial was of no force or effect. 44 Or App at 585. Clinkenbeard tells us that the written stipulation in this case was effective in reserving the medical causation issue for possible, future litigation after the stipulated reopening. It sheds no light on the issue before us, which is the effect of the insurer's failure to assert and establish this defense at the extent hearing.

In further support of the contention that it was not required to litigate the causation defense at the Shebley hearing, the insurer cites Frasure v. Agripac, 290 Or 99 (1980) and its progeny. Of course, since the parties' argument was submitted in this case, the Supreme Court has "retreated slightly" from Frasure. Bauman v. SAIF, 295 Or 788 (1983). Strictly speaking, Bauman may be inapposite to the facts of this case, in which the insurer never "accepted" claimant's low back condition, although compensation was being paid therefor. Cf. Faught v. SAIF, 70 Or App 388 (1984). In addition, we have held Bauman inapplicable in cases involving partial denials. Clyde C. Wyant, 36 Van Natta 1067 (1984); see also John E. Russell, 36 Van Natta 678 (1984).

Because Bauman arguably is inapplicable, it might follow that the insurer was permitted to deny the compensability of claimant's low back conditon. In view of our conclusion that the insurer's failure to litigate the medical causation issue at the Shebley hearing precludes its denial, questions concerning the possible applicability of Bauman are purely academic.

We have some difficulty denying the insurer an opportunity to develop additional evidence on the medical causation issue, in light of its allegations that claimant fraudulently failed to disclose the facts pertinent to her 1968 or 1969 industrial injury. We admit some bewilderment about Dr. Winkler's alleged denial of any prior back injury. His failure to make such a disclosure may be due to a lack of recall (the proffered evidence relates to a 1975 hospitalization, and Mr. Pitts apparently spoke with Dr. Winkler sometime after September 23, 1980); however, it is much more difficult to ascribe claimant's nondisclosure to such an innocent cause. Although it is possible that claimant merely forgot to tell the Orthopaedic Consultants, for example, about her prior injury, it is fairly improbable.

The fact remains, however, that the insurer gained the knowledge of claimant's prior injury during the course of the proceeding before Referee Shebley, not sometime thereafter. Rather than requesting that the hearing be continued, or requesting reconsideration on the basis of this "newly discovered evidence," see former OAR 436-83-480(2), since renumbered OAR 438-07-025(2), the insurer issued a denial which made no mention of fraud or misrepresentation. Indeed, the allegations of fraudulent conduct were not made until after it became apparent that there might be some impediment to the insurer's partial denial.

The insurer's motion for remand is addressed to the Board's discretion. Bailey v. SAIF, 296 Or 41, 44 (1983). If we find that a case has been improperly, incompletely or otherwise insufficiently developed or heard, we may exercise our authority to remand for further evidence taking. ORS 656.295(5).

The standard for exercising this discretion was articulated in Robert A. Barnett, 31 Van Natta 172 (1981), 59 Or App 133 (1982), as follows: "To merit remand it must be clearly shown that material evidence was not obtainable with due diligence before the hearing." 31 Van Natta at 173. In Bailey the Supreme Court found this standard inapplicable to cases involving a request for remand for consideration of "newly created evidence," but applicable to cases involving "newly discovered evidence." 296 Or at 48. Thus, the Barnett standard is of continuing vitality in certain cases, depending upon the nature of the evidence in question.

We cannot consider the affidavits submitted by the insurer, or the documents pertaining to claimant's prior injury and 1975 hospitalization for any purpose other than ruling on the insurer's motion for remand. See Bailey v. SAIF, supra, 296 Or at 45 n.3. Thus, the evidence that would be before the Referee on remand is that which pertains to the allegations of claimant's fraud and, presumably, additional evidence on the issue of medical causation. It is obvious that the insurer is alleging fraud in order to litigate, for the first time, the causation issue. That is an issue which we have already decided should have been

litigated at the Shebley hearing. We do not believe remand is appropriate in this instance.

We might be inclined to decide the remand question differently if we were persuaded, based upon the insurer's showing in support of remand, that claimant had acted in a manner which substantially prejudiced the insurer's ability to investigate her medical history. However, there is little indication of a serious effort on the insurer's part to make such an investigation at any time prior to the Shebley hearing. For example, it does not appear as though the insurer made any effort to obtain Dr. Winkler's medical file, which certainly would have been more informative and, presumably, more reliable than any brief encounter Mr. Pitts may have had with him. As it is, we do not believe that the insurer made an adequate investigation of the medical causation issue at any time prior to the Shebley hearing.

We find and hold that the insurer has failed to make an adequate showing of due diligence. We further conclude that the standard for remand articulated in Barnett is applicable to the facts and circumstances of this case. The evidence which the insurer would adduce on remand is clearly "newly discovered evidence." In view of our conclusions, it necessarily follows that the insurer's motion for remand must be denied. See also Gallea v. Willamette Industries, 56 Or App 763 (1982); Logue v. SAIF, 43 Or App 991 (1979); Brenner v. Industrial Indemnity Co., 30 Or App 69 (1977); Buster v. Chase Bag Co., 14 Or App 323 (1973); Maumary v. Mayfair Markets, 14 Or App 180 (1973); Tanner v. P & C Tool Co., 9 Or App 463 (1972).

As an alternative to remand, the insurer requests that the Board exercise its authority under ORS 656.278, the own motion statute, and uphold its denial based upon principles of equitable estoppel. The Board's longstanding practice and policy has been to consider a request for own motion relief only when the relief requested is not available through some other administrative or judicial remedy. OAR 438-12-005(1)(a), formerly OAR 436-83-810(1)(a); Garold Hurley, 34 Van Natta 124 (1982); Bringfried Rattay, 17 Van Natta 171 (1976); George N. Roth, 14 Van Natta 202 (1975). This case does not present sufficiently compelling circumstances to warrant a departure from past practice.

In conclusion, we hold that the insurer's denial of claimant's back condition is precluded by operation of principles associated with the rule of res judicata. Accordingly, Referee Baker correctly set aside the denial. In addition, the insurer has not made an adequate showing in support of its motion for remand. The motion, therefore, is denied.

II

The remaining issue relative to the insurer's denial concerns Referee Baker's imposition of a penalty and associated attorney's fee. Referee Baker penalized the insurer for its failure and refusal to pay claimant compensation for permanent total disability in accordance with Referee Shebley's March 3, 1982 order for any period subsequent to its February 24, 1982 denial. We hold that in this case the insurer's denial did not terminate its obligation to pay compensation in accordance with Referee Shebley's order; therefore, we affirm the imposition of penalties and attorney fees.

Referee Baker reasoned that, "[T]he statutory scheme does not contemplate that payment ordered by a Referee may be stayed by a unilateral act of denial." We have recently held to the contrary. In Patrick M. Hannum, 36 Van Natta 1680 (1984), we held that an insurer's retroactive denial alleging fraud, issued after a Referee's order was published awarding claimant additional permanent disability, terminated the insurer's obligation to pay the compensation awarded by the Referee. We concluded that there was no conflict between ORS 656.262(2) and ORS 656.313(1), which provide:

> "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." ORS 656.262(2).
>
> "Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant." ORS 656.313(1).

We also concluded that, if a possible conflict was considered to exist between these two provisions, it was more likely that the legislature would intend that no compensation be paid to a claimant, including compensation ordered by a litigation order, when the insurer retroactively denied the claim on the basis of fraud. 36 Van Natta at 1681-82.

In a related vein, we have held that an employer's partial denial of injury-related permanent impairment terminated its obligation to pay permanent disability awarded by a Determination Order. Leokadia W. Piwowar, 37 Van Natta 21 (January 9, 1985). A Determination Order had closed the claim with an award for unscheduled permanent disability for injury to claimant's low back. After the claim was closed, claimant was examined by a physician who stated that all of claimant's back impairment was due to a natural progression of her preexisting ankylosing spondylitis, which was neither caused nor worsened, other than possibly in a temporary, symptomatic sense, by claimant's minor industrial back strain; and that claimant's industrial injury had fully resolved without any resulting permanent impairment. Subsequently, most of the physicians who had previously treated or examined claimant indicated their agreement with this physician's findings and conclusions. The employer was unable to request reconsideration of the Evaluation Division because claimant had requested a hearing contesting the Determination Order awarding permanent disability. See ORS 656.268(4). Therefore, the employer issued a denial stating that claimant's injury had resulted in nothing more than a temporary, symptomatic flareup of a preexisting condition, specifically denying any resulting permanent impairment. We held that, in order to allow the employer a meaningful review of the Determination Order award, it was not obligated to pay the compensation awarded by the Determination Order once claimant's entitlement thereto had been denied. ORS 656.262(2).

The denial in this case raised the issue of claimant's entitlement to medical services and temporary disability for claimant's back condition. Like the denial in Piwowar, it was a partial denial. Aside from the obvious differences between the

Determination Order in Piwowar and the Referee's order in this case vis-a-vis ORS 656.313(1), there is a significant difference in the nature of the compensation awarded by the Determination Order in Piwowar -- permanent partial disability -- and the compensation awarded by the litigation order in this case -- permanent total disability. ORS 656.214 provides that permanent partial disability shall be based upon permanent impairment due to an industrial injury. By contrast, ORS 656.206(1)(a) provides that in determining whether an injured worker is permanently and totally disabled, preexisting disability shall be taken into account.

The denial in Piwowar specifically denied that claimant experienced any permanent impairment due to the industrial injury in question. Therefore, the employer's denial and the Determination Order awarding compensation for permanent disability were mutually exclusive. By contrast, the same cannot be said of the insurer's denial in this case and the Referee's order awarding permanent total disability. Even if the insurer's denial proved to be correct, and claimant's back condition was not compensably related to her original ankle injury, her back condition, which prompted the insurer's denial, might nevertheless be a component in the determination that claimant was permanently and totally disabled, taking into consideration not only claimant's 1979 injury-related impairment, but preexisting disability as well. In the event that the insurer ultimately prevailed on the merits of its denial, thereby relieving it of any possible obligation to pay back-related medical benefits, for example, this would not be inconsistent with claimant's entitlement to permanent total disability based upon consideration of her back condition as a preexisting disability.

Similarly, the insurer's post-litigation order backup denial in Hannum asserted that the claim was fraudulent. If this contention prevailed, claimant would not be entitled to any compensation whatsoever. Thus, as in Piwowar, and unlike this case, the insurer's denial and the order awarding compensation were mutually exclusive.

For the foregoing reasons, we conclude that the insurer's post-hearing denial did not excuse it from its obligation to pay the compensation awarded by Referee Shebley. In addition, we agree with Referee Baker's conclusion that the insurer's nonpayment of permanent total disability was unreasonable under the facts and circumstances presented herein.

III

The remaining issue is whether claimant is permanently and totally disabled, as found by Referee Shebley. At the time of the hearing, claimant was 59 years old. She has had no formal education, other than some slight instruction in conversational English. She neither reads nor writes in either English or Spanish. She speaks almost exclusively Spanish and understands little English. The majority of her work experience has been as a farm laborer. She has also worked in canneries in order to supplement her work in the fields.

Referee Shebley found that claimant suffers a mild or mildly moderate impairment of her low back and left leg. We agree with this finding. Claimant is no longer physically capable of

performing farm work or the cannery work she had done before this injury. Considering claimant's physical impairment, together with the relevant social/vocational factors, we conclude that claimant is permanently incapacitated from regularly performing work at a gainful and suitable occupation. In addition, we conclude that it would be futile for claimant to attempt to obtain suitable employment, and that she is excused from the seek work requirement of ORS 656.206(3). Therefore, we affirm Referee Shebley's order awarding claimant compensation for permanent total disability.

ORDER

Referee Shebley's March 3, 1982 order (WCB Case No. 81-06459) is affirmed. In addition, Referee Baker's July 2, 1982 order (WCB Case No. 82-02139) is affirmed. Claimant's attorney is awarded $2,000 for services on this consolidated Board review, to be paid by the insurer.

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
February 22, 1985
Order on Review

Reviewed by the Board en banc.

Claimant requests review of that portion of Referee St. Martin's order that upheld Coast Packing Company's denial of claimant's right upper arm, shoulder and neck claim. Brander Meat Company and its insurer, Glen Falls Insurance Company, cross-requests review of that portion of the Referee's order that held Brander/Glen Falls responsible for medical services for claimant's complex partial seizure disorder. The issues on review are: (1) the compensability of claimant's current arm, shoulder and neck condition as a consequence of a 1974 right hand injury sustained while claimant was employed by Coast Packing Company; (2) the compensability of medical services for claimant's complex partial seizure disorder as a consequence of a 1970 head injury sustained while claimant was employed by Brander Meat Company; and (3) responsibility as between Coast Packing and Brander Meat for claimant's complex partial seizure disorder.

We have twice before issued orders addressing procedural issues that have arisen during the processing and litigation of these complicated claims. Edward O. Miller, 35 Van Natta 286 (1983), 36 Van Natta 1578 (1984). We will not repeat the procedural history of these claims here.

Pursuant to the Board's previous remand order, the Referee's order also contains recommendations pertaining to our resolution of claimant's petition requesting that the Board exercise its continuing jurisdiction pursuant to ORS 656.278 relative to the 1970 injury. We have this date issued our separate Own Motion Order addressing the issues raised by claimant's petition. Our resolution of those issues moots several issues briefed by the parties on the "regular" component of claimant's claims. The detailed facts of this series of claims are set forth in full in the companion Own Motion Order issued this date and will not be repeated here.

We note at this point that claimant submitted a written report by Dr. Olmscheid directly to the Board after the hearing

record had been closed. Brander Meat/Glen Falls object to this submission, apparently on the basis of, although without citation to, ORS 656.295(5). We conclude that the report was submitted solely for our consideration in the own motion matter, to which ORS 656.295 does not apply. In any event, Dr. Olmscheid's most recent report was not considered by the Board in reaching its decision, and we do not believe the submission of the report is indicative that the case was incompletely or insufficiently developed at the hearing level.

Our finding in the companion Own Motion Order that all of claimant's present medical conditions are present as a result of the 1970 head injury for which Brander Meat Company and its insurer, Glen Falls Insurance Company, are responsible is dispositive of these cases. Because Brander Meat/Glen Falls are responsible for all of claimant's treatment, it follows that Coast Packing Company's December 4, 1981 denial of responsibility for claimant's arm/shoulder/neck condition was correctly affirmed. It follows equally, however, that the Referee's limiting of Brander Meat/Glen Falls responsibility for medical services under ORS 656.245 to those discretely identifiable as arising out of claimant's complex partial seizure disorder was in error. The Referee's order will be modified accordingly.

We note that the Referee did not award claimant's attorney an insurer-paid fee for having prevailed against Brander Meat/Glen Falls' de facto denial of claimant's medical services claim. We conclude that such a fee should have been awarded. We note also that this was an unusually complex case in view of the medical issues involved and the volume of evidence marshalled to clarify and present those issues. In view of the complexity of this case and the result obtained for claimant, we conclude that claimant's attorney should be awarded an insurer-paid fee of $2,500 for services at hearing and an additional $1,500 for services on Board review, to be paid by Brander Meat Company and its insurer, Glen Falls Insurance Company.

Those portions of the Referee's order that increased claimant's scheduled disability award and allowed an offset against that increased award to be taken by Coast Packing Company and Eldorado Insurance Company will be affirmed.

ORDER

The Referee's orders dated March 16, 1984 and March 22, 1984 are modified in part and affirmed in part. That portion of the Referee's orders that limited Brander Meat Company's and Glen Falls Insurance Company's responsibility for medical services to those linked solely to claimant's complex partial seizure disorder is modified to hold Brander Meat Company and Glen Falls Insurance Company responsible for all medical services currently required by claimant as a result of the 1970 head injury. The Referee's orders are further modified to award claimant's attorney a fee of $2,500 for his services at hearing, to be paid by Brander Meat Company and Glen Falls Insurance Company. The remainder of the Referee's orders are affirmed. Claimant's attorney is awarded $1,500 for his services on Board review, to be paid by Brander Meat Company and Glen Falls Insurance Company.

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

Own Motion 82-0210M
February 22, 1985
Own Motion Order

Claimant, by and through his attorney, has requested that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an alleged worsening of his condition related to his March 11, 1970 industrial injury. Claimant's aggravation rights have expired. At the time claimant filed his own motion petition he had pending before the Hearings Division a hearing in case number 79-03231. Following procedural difficulties post hearing, case number 79-03231 was consolidated with case number 83-02511 and this own motion matter and remanded for rehearing before Referee St. Martin. The Referee was instructed to make his recommendations to the Board relative to the disposition of the own motion petition.

We have this date issued our Order on Review in cases 79-03231 and 83-02511. After thorough review of a voluminous record compiled before Referee St. Martin, we conclude that claimant is entitled to additional compensation for his March 11, 1970 industrial injury.

Claimant was employed by Brander Meat Company as a butcher in a custom slaughterhouse. On March 11, 1970 claimant was struck on the head by a beef shackle weighing approximately 25 pounds. The blow caused a laceration of claimant's frontal scalp and a concussion. He was treated in the emergency room and released. He lost five days from work. The claim was accepted and later closed by a Determination Order issued April 15, 1970 that awarded no permanent disability.

Claimant and his wife both testified that shortly after the 1970 head injury claimant's behavior began to change. He was subject to rage attacks accompanied by "blackouts," he had frequent headaches and dizziness and he behaved irrationally at times. However, claimant did not seek medical attention and did not attempt to relate these behavioral changes to any particular event.

On January 7, 1974 claimant was employed by Coast Packing, the successor to Brander Meat, still as a butcher, when he lacerated his right index and long fingers with a rumping knife, causing damage to the right index finger extensor tendon. Emergency treatment consisted of repair of the lacerated tissue and a tendon graft of the extensor tendon. Claimant began treating with Dr. John M. Coletti, Jr., orthopedic surgeon. On April 4, 1974 Dr. Coletti reported that claimant was medically stationary and would have a permanent lack of 3 to 5° extension and 5 to 10° flexion of the right index finger due to the injury. A Determination Order issued July 24, 1974 awarded claimant temporary disability benefits and a scheduled permanent partial disability award of 2.4° for 10% loss of use of the right index finger.

Claimant continued to have difficulty with his right hand. On January 27, 1975 another Determination Order awarded additional time loss and an additional 12.6° scheduled permanent disability, for a total scheduled award of 15° for loss of use of the right index finger.

In April and May of 1975 Dr. Peter Nathan, a hand specialist, diagnosed that claimant had tenosynovitis of the first dorsal compartment of the right wrist, consistent with the injury. Dr. Nathan noted a palpable nodule within the area of the extensor carpi radialis and opined that surgery was indicated. On July 29, 1975 another Determination Order awarded time loss from April to July 1975, but no additional permanent disability. Dr. Coletti performed surgery on September 26, 1975 in which he excised an old suture mass, performed a proximal trigger finger release and a release of the transverse carpal ligament, synovial sheath and retinaculum.

On December 5, 1975 claimant's hand claim was reopened by stipulation effective September 16, 1975 and claimant was referred to vocational rehabilitation on December 22, 1975. On January 19, 1976 Dr. Nathan declared claimant stationary following surgery. Dr. Coletti reported on February 17, 1976 that claimant's tenosynovitis and other wrist problems had resolved.

Also in February 1976 claimant was evaluated by Dr. Wilbur Sloat, a psychologist, in connection with his vocational rehabilitation program. A Minnesota Multiphasic Personality Inventory suggested acute moderate depression, a mildly elevated paranoid scale and a slightly elevated hypochondriacal scale. Overall, claimant was suited for vocational rehabilitation, according to Dr. Sloat, and a community college engineering program was selected.

Claimant's rehabilitation counselor reported on September 2, 1976 that numerous difficulties had been encountered in getting claimant's engineering studies started and that claimant was reacting in an exceptionally angry manner. Dr. Sloat was again consulted and on September 17, 1976 he referred claimant for immediate psychiatric care for what he diagnosed as a paranoid psychosis.

On October 22, 1976 Dr. Elmore Duncan, psychiatrist, opined that claimant required immediate inpatient psychiatric care for paranoid psychosis. Dr. Duncan related that claimant suffered delusions involving dangerously violent behavior and was, in his opinion, unpredictable and a positive danger to himself and others. Dr. Duncan prescribed a major tranquilizer, Mellaril, a phenothiazine preparation. By November 3, 1976 Dr. Duncan had revised his estimate of the danger claimant posed and opined that claimant could be treated as an outpatient, so long as he continued to be managed with Mellaril.

Dr. Duncan's opinion was that claimant's psychosis developed from a personality that was predisposed to paranoia and that the 1974 hand injury and its sequela were substantial contributing factors. Dr. Duncan was unaware that claimant had sustained a head injury in 1970. Dr. Guy A. Parvaresh, psychiatrist, opined to the contrary, and concluded that claimant's psychosis was of long duration and to a reasonable medical probability had nothing to do with the 1974 hand injury. Dr. Parvaresh also was unaware of the 1970 head injury.

On May 19, 1977 claimant and Coast Packing entered into a disputed claim settlement of the "emotional, psychological and psychiatric. . ." component of the 1974 hand injury claim, leaving the remainder of claimant's claim open for continuation of

vocational rehabilitation. (Although claimant testified at one point that he did not execute the settlement document, we find the preponderance of the evidence to be to the contrary.)

Claimant continued seeking treatment for what by this time was complained of as upper arm, shoulder and neck pain. On September 19, 1977 Dr. Coletti opined that claimant had acromial bursitis as a result of immobility of the right upper extremity, which he considered to be related to claimant's "underlying medical condition." Claimant continued to treat with Dr. Coletti for his arm/shoulder/neck condition and with Dr. Duncan for his psychiatric condition. In April 1978 Dr. Coletti noted that a precise statement as to the etiology of claimant's arm/shoulder/neck symptoms was difficult, especially in view of claimant's psychiatric diagnosis. Dr. Duncan's diagnosis remained that of paranoid schizophrenia, partially compensated by the prescribed phenothiazine preparation, with a fair prognosis.

On April 24, 1978 claimant was examined by Dr. Richard Olmscheid, neurologist. Claimant's chief complaints at the time involved recurrent headaches and dizzy spells, intermittent bouts of shakiness in the extremities, light-headedness, nausea, a general sweaty sensation and dimming of the vision of both eyes. Claimant reported that these symptoms had been present for the previous six to eight months. Dr. Olmscheid was aware that claimant had been taking a phenothiazine preparation for the prior six to eight months. He opined that claimant's shakiness was most probably a side effect of the phenothiazine preparation and that the remainder of the symptoms were due either to claimant's psychiatric condition or were the results of phenothiazine-induced seizure equivalents. Dr. Olmscheid began treating claimant with Dilantin.

On May 9, 1978 Dr. Olmscheid reported that claimant exhibited a minimally abnormal electroencephalogram. He also reported that claimant's dizzy spells and dimness of vision were responding to the Dilantin therapy. Dr. Olmscheid continued to treat claimant. His reports reflect that in August 1978 claimant stopped taking his phenothiazine preparation for several days, resulting in increased agitation. In November 1978 Dr. Olmscheid noted that claimant missed his Dilantin for several days and had increased dizzy spells. It was also in November 1978 that Dr. Olmscheid first became aware that claimant had sustained a head injury in 1970. He related that following the head injury claimant was reported to have exhibited adverse personality changes, which had improved following the use of Dilantin.

In May 1980 Dr. Olmscheid finally opined that claimant suffered from complex partial seizure disorder and/or seizure equivalent that was in medical probability related to the 1970 head injury. He further opined that the use of the phenothiazine preparation had lowered claimant's seizure threshhold to a level where the seizure activity became more apparent.

In July 1980 claimant was examined by Dr. Robert S. Dow, neurologist, at Brander Meat/Glen Falls' request. In an October 1980 report, Dr. Dow confirmed Dr. Olmscheid's diagnosis of complex partial seizure disorder. Dr. Dow went so far as to suggest that what had previously been diagnosed as a paranoid state could in reality be psychomotor epilepsy caused by the 1970 head injury. He linked claimant's condition to the 1970 injury by

the history given him by claimant and his wife, the EEG result that showed abnormal brain function and claimant's marked response to Dilantin.

In February 1981 Dr. Duncan rendered his opinion of claimant's state based for the first time upon knowledge of the 1970 head injury. He concluded that claimant's hand/arm injury most likely caused claimant's underlying paranoid traits to activate into a psychosis. In Dr. Duncan's opinion, treatment of the psychosis with phenothiazine preparations then most probably caused the complex partial seizure disorder to become apparent, which in turn accounted for claimant's poor response to psychiatric treatment until the seizure disorder was managed by the administration of Dilantin.

On April 28, 1981 the Board denied own motion reopening of claimant's 1970 claim on the ground that the available evidence at that time indicated that the seizure disorder was caused by the phenothiazine preparations and that, under the last injurious exposure rule, Coast Packing, not Brander Meat, would be responsible for claimant's condition.

The last word on claimant's complex partial seizure disorder condition was furnished by Dr. Olmscheid in his deposition taken July 19, 1983, which supplements his last written report dated July 6, 1982. In the written report, Dr. Olmscheid stated:

> "I think it is medically probable that the patient had elements of psychopathology prior to his head injury, and the addition of the head injury served to produce temper outbursts and rage attacks which would appear, by all the medical evidence to date, to be on the basis of a complex partial seizure disorder."

In his deposition, Dr. Olmscheid testified that claimant's symptomatology, i.e. rage attacks, dizziness, headaches and blackouts, could be attributed both to claimant's complex partial seizure disorder and to his paranoid psychosis. However, Dr. Olmscheid ultimately testified, "I think it is medically probable that the majority of the patient's stereotyped headaches, dizziness, breathlessness episodes, occasionally with nausea are on the basis of a seizure disorder." In addition, Dr. Olmscheid testified without reservation that claimant's seizure disorder was not caused or aggravated by the phenothiazine preparation. The phenothiazine preparation served, according to Dr. Olmscheid, only to accelerate the diagnosis.

The final words on claimant's arm/shoulder/neck problems were expressed by Dr. Nathan in his deposition taken July 12, 1983 supplemented by his last written report dated July 19, 1983. In essence, Dr. Nathan believed that claimant exhibited no organic basis for his arm/shoulder/neck complaints. He concluded, "In summary, I believe one must look elsewhere other than organicity for the source of this patient's recurrent complaints." The record is more than adequately developed with reasons "other than organicity" to explain claimant's arm/shoulder/neck condition.

Brander Meat/Glen Falls have advanced several arguments that attempt to relieve them of all responsibility for claimant's present conditions. Implicit in our resolution of this matter is

our rejection of Brander Meat/Glen Falls' arguments that our previous denials of own motion relief have a res judicata or collateral estoppel effect. Brander Meat/Glen Falls have also urged that the disputed claim settlement between Coast Packing and claimant should operate to excuse Brander Meat/Glen Falls from responsibility for claimant's psychiatric treatment or any other condition caused or made symptomatic by claimant's mental condition. We have concluded that it is claimant's organic brain injury from the 1970 blow to the head that is the cause of all of claimant's present difficulties. Therefore, the agreement between Coast Packing and claimant relating to the 1974 hand injury is irrelevant.

We note at this point that claimant submitted a written report by Dr. Olmscheid directly to the Board after the hearing record had been closed. Brander Meat/Glen Falls object to this submission, apparently on the basis of, although without citation to, ORS 656.295(5). We conclude that the report was submitted solely for our consideration in the own motion matter, to which ORS 656.295 does not apply. In any event, Dr. Olmscheid's most recent report was not considered by the Board in reaching its decision, and we do not believe the submission of the report is indicative that the case was incompletely or insufficiently developed at the hearing level.

We are persuaded by a preponderance of the credible medical and lay evidence that all of claimant's present problems are directly related to the 1970 head injury incurred while claimant was employed by Brander Meat Company. We are further convinced that the ongoing psychiatric treatments claimant is receiving from Dr. Duncan cannot be separated from treatment of claimant's complex partial seizure disorder. The Referee recommended that Brander Meat/Glen Falls be held responsible for claimant's complex partial seizure disorder, but not for any other treatment, and most especially not for psychiatric treatment. We do not accept this recommendation. We agree with Dr. Olmscheid that treatment of each of claimant's conditions is necessarily effective in treating all of the others. We find that all of the treatment claimant has sought and now seeks, including that treatment sought for the arm/shoulder/neck complaints, is required as a result of the consequences of the 1970 head injury.

We find that the preponderance of the medical evidence shows that claimant's condition was medically stationary as of the most recent hearing. Claimant claims he is permanently and totally disabled. We disagree. Claimant has the burden of proving permanent total disability status. None of the medical evidence suggests that claimant is totally disabled from either a physical or mental standpoint. Claimant has not proven that it is futile for him to seek employment or that he has sought employment.

We do agree, however, that claimant is permanently, albeit not totally, disabled as a result of the consequences of the 1970 head injury. Drs. Olmscheid and Duncan both substantiate that claimant has suffered a permanent aggravation of his underlying psychosis which must be medicated. We find that under the guidelines of OAR 436-65-665(5), claimant has a class 2 aggravation of his psychosis. Beginning with this level of impairment, and comparing claimant's situation to the guidelines set forth at OAR 436-65-600 et seq., we find that claimant would be most appropriately compensated by an award of 192° for 60%

unscheduled permanent partial disability for loss of earning capacity as a consequence of the 1970 head injury.

The fee agreement between claimant and his attorney is approved. Claimant's attorney shall receive 25% of the increased compensation awarded not to exceed a total of $3,000.

Claimant's claim is remanded to Brander Meat Company and its insurer, Glen Falls Insurance Company, for the payment of compensation in accordance with this order.

IT IS SO ORDERED.

CLARA E. STEWART, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05609
February 22, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of those portions of Referee Nichols' order which: (1) declined to order claim reopening for worsening of an allegedly injury-related condition; (2) upheld the SAIF Corporation's denial of low back surgery performed in May 1983; and (3) declined to impose a penalty and associated attorney's fee for an allegedly unreasonable denial. In its respondent's brief, SAIF asserts that the Referee erroneously awarded claimant interim compensation from March 24 through June 24, 1983.

We affirm the Referee's order on all issues with the exception of the interim compensation issue, on which we reverse.

Claimant experienced the onset of neck and back pain during her employment in October 1979. Chiropractor Strom diagnosed lumbar strain with attendant paravertebral muscle spasm, myofascitis and sciatic neuralgia. The claim was accepted as a nondisabling injury. In February 1980 Dr. Robertson, an orthopedic surgeon, reported to Dr. Strom that claimant had low back pain secondary to degenerative disc disease, osteoporosis and possibly spinal stenosis. In March 1980 SAIF denied responsibility for claimant's degenerative disc disease, osteoporosis and possible spinal stenosis. On November 18, 1980 the claim was closed by a Determination Order awarding compensation for temporary disability and 96° for 30% unscheduled disability for injury to claimant's low back.

An office note entry by Dr. Robertson in December 1980 indicates that claimant had been awarded "disability retirement under Social Security." Dr. Robertson indicated that there was no reason for claimant to return unless she experienced additional problems. A report from Dr. Robertson to SAIF in September 1981 indicates that claimant continued to experience back pain, which occasionally was severe. He indicated her condition was medically stationary and that there had been no substantive change. This report states: "She continues to be totally disabled from work."

A stipulation was entered into by the parties and approved on December 1, 1981. Under the terms of this stipulation, claimant was awarded an additional 20% unscheduled low back disability for a total of 50% unscheduled disability. In addition, the conditions which were the subject of SAIF's partial denial,

degenerative disc disease, osteoporosis and spinal stenosis, expressly remained in denied status. The stipulation provided that claimant was entitled to continuing medical services for her "industrially injured back."

In May 1982 and again in October 1982, Dr. Strom reported to SAIF that claimant was continuing under his treatment with one to two chiropractic treatments per month, and that she periodically "checked in with" Dr. Robertson.

On January 21, 1983 Dr. Robertson made the following office note entry:

> "Patient is on Soc. Sec. for her back pain. She comes in for verification of her insurance. She says it continues to give her pain both at rest and while she is up and around. No increase of pain with coughing or sneezing. If she tries to do any standing or lifting, her left leg goes to sleep. No permanent numbness however. No crepitus on movement.
>
> " * * *
>
> "Imp: Continued low back pain secondary to traumatic arthritis, degenerative disc disease and osteoporosis. I feel she is unable to work. To return prn. Gave her Zomax to see if this will help her pain."

A copy of this note was forwarded to SAIF and received on March 24, 1983. Claimant contended at hearing that this note constituted a claim for aggravation pursuant to ORS 656.273, and that it provided notice of a worsened condition requiring SAIF to commence payment of interim compensation within 14 days of its receipt. The Referee agreed and ordered SAIF to pay interim compensation.

We conclude that Dr. Robertson's office note entry was not a sufficient claim for aggravation because it failed to give reasonable notice that claimant was claiming further medical services or additional compensation for a worsened condition related to or resulting from her industrial injury. See Douglas Dooley, 35 Van Natta 125 (1983); Clark v. SAIF, 50 Or App 139 (1981); Stevens v. Champion International, 44 Or App 587 (1980); Silsby v. SAIF, 39 Or App 555, 563 (1979); Hewes v. SAIF, 36 Or App 91 (1978). Assuming that Dr. Robertson's reference to "traumatic arthritis" might be sufficient to put SAIF on notice that the findings stated in his office note were related to the residuals of claimant's industrial injury, as opposed to her ongoing unrelated conditions of degenerative disc disease, osteoporosis and spinal stenosis, we nevertheless conclude that the office note simply fails to state that claimant's condition (be it industrial or nonindustrial) was worse or worsening. As the Referee stated: "[I]t was not clear to SAIF that this report was the basis for an aggravation claim until the time of the hearing."

Moreover, we note that Dr. Robertson's early 1983 comment about claimant being "unable to work" is no different than the doctor's September 1981 comment about claimant being "totally disabled from work," the earlier comment having been made before

the December 1981 stipulation which is the last award of compensation for purposes of this aggravation claim.

Based upon our conclusion that the Referee erred in awarding claimant interim compensation, it necessarily follows that the attorney's fee awarded to claimant's attorney is not payable. We note in passing, however, that the Referee ostensibly awarded this insurer-paid fee under the provisions of ORS 656.386(1). When a claimant is awarded interim compensation, any attorney's fee is payable out of that additional compensation unless it is also found that the employer/insurer has unreasonably delayed, refused or resisted the payment of compensation, in which case an insurer-paid attorney's fee is payable under the provisions of ORS 656.382(1). See Bonnie R. Tolladay, 35 Van Natta 198, 202 (1983).

ORDER

The Referee's order dated April 5, 1984 is affirmed in part and reversed in part. Those portions which awarded claimant interim compensation from March 24, 1983 until June 24, 1983, and awarded claimant's attorney an insurer-paid fee are reversed. The remainder of the Referee's order is affirmed.

VERNON L. WELLINGTON, Claimant
Michael B. Dye, Claimant's Attorney
Rankin, et al., Defense Attorney

WCB 82-10208
February 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee Galton's order denying its motion to dismiss claimant's request for hearing as untimely. The issues on review are: (1) whether the insurer's denial was effective; (2) whether the insurer failed to process a misdirected request for hearing; and (3) whether claimant showed good cause for failing to file a request for hearing within 60 days after the insurer's denial.

On June 21, 1982 claimant reported to his employer that he had injured his shoulder on the job while lifting 80 pound bags of salt on June 10, 1982. Claimant's claim was filed on June 23, 1982. The claim was denied August 6, 1982.

On or about August 18, 1982 claimant retained an attorney to handle his claim. Claimant's attorney testified at the hearing that because of extraordinary demands upon his office word processing equipment, he was not able to follow his usual practice in initiating new workers' compensations cases, which was to have the new client sign a workers' compensation fee agreement before leaving the office. He instead dictated a letter to claimant forwarding the fee agreement. He also dictated a letter of representation to the insurer and a request for hearing. The letter to the insurer was dated August 24, 1982 and was purported to be, but was not, accompanied by a copy of a request for a hearing.

On September 8, 1982 the insurer's attorney wrote to claimant's attorney and requested, among other things, a copy of the request for hearing referred to in claimant's attorney's August 24, 1982 letter. Claimant's attorney received the September 8, 1982 letter, but took no action in response to it because he believed that his secretary had already furnished the

insurer a copy of the request for hearing. Claimant's attorney did not review claimant's file at that time. Claimant's attorney testified that he was extremely busy in preparation for two major criminal trials.

On or about November 5, 1982 claimant's file was routinely reviewed. Claimant's attorney saw the September 8, 1982 letter and again was curious as to why the insurer was apparently not receiving copies of documents. The attorney noted that he was unable to find a copy of a request for hearing in claimant's file. This prompted him to investigate further.

Upon questioning his secretary, claimant's attorney learned that no request for hearing in claimant's case has been prepared. His secretary had deferred preparing the request until the signed fee agreement was returned. Claimant signed the fee agreement on August 30, 1982 and his attorney received the agreement shortly thereafter. Claimant's attorney's secretary had forgotten to process the request for hearing upon receipt of the fee agreement. A request for hearing was promptly prepared and mailed on November 5, 1982. The request was received by the Board on November 8, 1982.

On February 15, 1983 the insurer formally moved to dismiss claimant's request for hearing as untimely. Referee Daughtry ordered that the motion be considered as a threshold matter at the hearing. A hearing was held October 20, 1983. After the hearing the Referee entered an order denying the motion to dismiss the request for hearing and holding claimant's condition to be compensable.

ORS 656.319(1) provides that a claim is barred if a request for hearing is not filed within 60 days after the denial, except in cases where a request for hearing is filed not later than 180 days after a denial and the claimant is able to show good cause for not filing before the sixtieth day. The request for hearing in this case was filed more than 60 days and less than 180 days after the insurer's August 6, 1982 denial. The issue, therefore, is whether there was good cause for the late filing.

In addition to finding that claimant had good cause for filing the request for hearing more than 60 days after the denial, the Referee found two other reasons for denying the insurer's motion to dismiss. We deal with those findings first.

The Referee conluded, relying upon William T. Lattion, 34 Van Natta 1518 (1982), that the insurer's August 6, 1982 denial was not effective because it denied responsibility for a condition claimant did not have. We find the reliance on Lattion to be misplaced, and we disagree that the August 6, 1982 denial denied a nonexistent condition.

In Lattion, supra, we said that an insurer's partial denial of one nonexistent condition out of several conditions that did exist was "neither right nor wrong, but merely irrelevant...." This case does not involve a partial denial. The operative language of the denial in this case states:

> "It appears from the medical reports we have received that your back problem existed before your employment with

[employer]. There is no indication that your work caused the worsening of your back problems. We therefore deny your claim as being non-compensable." (Emphasis supplied.)

The medical reports available to the insurer at the time of the denial indicated an aggravation of preexisting cervical spondylosis causing pain radiating to the posterior upper shoulder. We believe that the phrase "back problems" is an appropriate description, in lay terms, of claimant's complaint. Furthermore, there was no evidence that claimant had more than the one claim that was denied or that the denial confused him. We find that the August 6, 1982 denial was an effective denial.

The Referee also found that the August 24, 1982 letter from claimant's attorney to the insurer was the functional equivalent of a misdirected request for hearing, which the insurer was obligated to forward forthwith to the Board for processing under former OAR 436-83-230 (now OAR 438-06-015). The material language in that letter, relied upon in support of this finding, is the last sentence: "This date a request for hearing has been submitted to the Workers['] Compensation Board of the State of Oregon." Although ORS 656.283(2) does not require a request for hearing to be in any particular form, we do not believe that the above quoted language could reasonably be interpreted as a "request for hearing" that a reasonable insurer would forward to the Board for processing, or, for that matter, that the Board would process. We find that it was not.

Finally, the Referee found that claimant made a showing of good cause for failing to file the request for hearing within 60 days. ORS 656.319(1)(b). The Referee concluded that the failure to timely file the request for hearing was due to the neglect of claimant's attorney's secretary.

The Supreme Court has twice construed ORS 656.319(1)(b) in fact situations involving alleged negligence on the part of attorneys or their employes. In Sekermestrovich v. SAIF, 280 Or 723 (1977), the court held that an attorney's failure to timely file a request for hearing was not good cause unless the attorney's reason for not filing would be good cause if attributed to his or her client. Negligence, i.e. the failure to exercise reasonable care, is not good cause, either for an attorney or a claimant.

In Brown v. EBI Companies, 289 Or 455 (1980), the fault for missing the deadline lay with an employe in the claimant's attorney's office, and not the attorney. The court refused to extend the holding of Sekermestrovich to say that the attorney's employe's negligence was attributed to the client as a matter of law, as it is with the claimant's attorney. Rather, the court held that whether an attorney's employe's negligence will be attributed to the claimant is a matter to be decided in the Board's judgment. In Donna P. Kelley, 30 Van Natta 715 (1981), we said that, "In our judgment, an attorney's employe's negligence is good cause for an untimely request for hearing."

This, however, is a case in which there is persuasive evidence that both the attorney and his employe failed to exercise reasonable care. As such, it is indistinguishable from EBI Companies v. Lorence, 72 Or App 75 (February 6, 1985). In Lorence, the court concluded:

"[C]laimant's attorney did dictate a request for hearing, and the secretary may have been negligent in failing to return the dictation to her employer. However, the negligence of the secretary cannot excuse the primary negligence of the attorney, who had the denial in his possession, was aware of the exact date on which the request for hearing had to be filed and merely forgot about the file and the deadline, because he had dictated the request for hearing.

"Under the facts of this case, it was the negligence of the attorney in failing to keep track of the preparation of the request for hearing and to make sure that it was filed on time that caused the late request. Further, nothing under these facts could be held to be excuseable neglect if it were done by the claimant himself. Claimant has failed to establish good cause for his failure to timely file a request for hearing. The denial must therefore stand." Slip Op at 3-4.

On de novo review we find that the proximate cause of the untimely filing was claimant's attorney's failure to reasonably react to the insurer's attorney's letter of September 8, 1982. It was apparent from that letter that the insurer had not received a copy of a request for hearing. Claimant's attorney testified that he read the letter, but did not look at claimant's file. It is significant to our finding that two months later a look at the very same letter triggered an immediate investigation of the status of claimant's case, which in short order disclosed the missed deadline. Nothing about claimant's case file had changed between September 1982 and November 1982. Had claimant's attorney reacted in September as he did in November, the request for hearing would have been timely filed.

Because the omission that caused the untimely filing was claimant's attorney's, that omission, when attributed to claimant, as it must be, bars claimant's claim as a matter of law. Sekermestrovich v. SAIF, supra. Accordingly, the insurer's motion to dismiss should have been allowed.

ORDER

The portion of the Referee's order dated October 31, 1983 denying the insurer's motion to dismiss claimant's request for hearing is reversed. The insurer's motion to dismiss claimant's request for hearing is allowed, and claimant's request for hearing is hereby dismissed. The remainder of the Referee's order is reversed as moot.

VICKIE L. KRATZER, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-04163
February 25, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Daron's order which set aside its denial of claimant's prolapsed uterus claim. On review, SAIF contends the claim should have been classified as one for an occupational disease and, if so classified, the evidence does not support the conclusion that claimant's work was the major contributing cause of her disability. We agree and reverse.

Claimant was 31 years old at the time of hearing. She began working for SAIF's insured, a lumber company, in September 1979. After performing clean-up duties for two months, she was assigned to work on the log pond. This job required claimant to push and pull logs, usually with the aid of a pike pole.

Around June 1981 claimant began noticing a "heaviness" and "a kind of bloated feeling" in her lower abdomen. However, she sought no medical treatment nor missed any time from work.

In December 1981 claimant underwent surgery for an unrelated gynecological condition. At that time Dr. Enbom, claimant's treating gynecologist, noted: "the uterine cervix prolapsed out to and just past the vaginal introitus approximately 1-2 cm." Dr. Enbom also noted the presence of a cystocele. Claimant did not receive any medical treatment for the prolapse or the cystocele and was advised by Dr. Enbom that "nothing was seriously wrong."

Thereafter she returned to her regular work. Claimant continued to work and sought no further medical attention until January 1983 when she returned to Dr. Enbom. Claimant testified that no specific incident triggered her symptoms, but that the pain "just gradually got worse and worse."

Beginning in April 1982 claimant's work changed "drastically." Prior to April 1982 claimant had been responsible for "small" logs, i.e. logs varying in lengths from 8 to 20 feet and diameters from 15 to 24 inches. In April 1982 the "big" mill was destroyed by fire, requiring heavier physical demands on claimant in order to handle the "big" logs, i.e. logs of similar lengths, but diameters ranging up to 48 inches.

Upon claimant's return for treatment in January 1983, Dr. Enbom noted that claimant reported a persistent increase in pelvic pressure, dyspareunia and pelvic pain at the end of the day. Soon after claimant filed her claim. She continued to work until late March 1983, when she underwent a hysterectomy.

Dr. Enbom opined that claimant's work was a "significant aggravant in her symptom complex which did in time require vaginal hysterectomy and bladder repair." However, the doctor could not state the only or sole factor of major importance was claimant's work. Dr. Enbom acknowledged that statistically the more common instigating factor in uterine relaxation and prolapse was childbirth. Dr. Enbom also felt that the "primary process unquestionably was instigated by childbearing." Claimant had two children by vaginal birth.

Dr. McGee, gynecologist, reviewed the record and testified at the hearing. Dr. McGee opined that the major contributing cause of claimant's problems was her vaginal childbirth of two children. Dr. McGee conceded that claimant's physically demanding work activities could aggravate her condition.

Occupational diseases are different from accidental injuries in that they cannot honestly be said to be unexpected. They are recognized as an inherent hazard of continued employment exposure conditions and are gradual, rather than sudden, in onset. James v. SAIF, 290 Or 343, 349 (1981). An accidental injury is sudden, unexpected and occurs during a short, discrete time period. Valtinson v. SAIF, 56 Or App 184, 188 (1982).

The case of Donald Drake Co. v. Lundmark, 63 Or App 261 (1983) provides an analysis of the distinction between an occupational disease and an accidental injury. In Lundmark the claimant had worked for eight years as an "operating engineer" before beginning work for Early, the first employer. Approximately half of his work day required the operation of a front-end loader with transmission problems. These problems caused the loader to jolt when claimant attempted to change directions. The claimant, who had no prior history of back problems, soon experienced back pains which grew progressively worse. Claimant's employment with Early lasted six weeks. After a week lay-off, claimant returned to the work force, but for Drake. Although claimant operated a front-end loader similar to his previous employment, this loader did not have any transmission problems.

The Lundmark court held that the claimant's subsequent back strain was the result of an injury which occurred at Early, rather than an occupational disease. The court found an injury where claimant's back trouble "coincided precisely" with an identifiable event, the traumatic jolting of the faulty loader. The fact that his pain grew progressively worse over his six-week employment did not make it "gradual in onset." Lundmark, 63 Or App at 266.

We find that this claim should be classified as an occupational disease. The medical evidence persuades us that given the physical nature of claimant's work and her uterine susceptibilities, the eventually disabling effects of her gynecological problems were not unexpected. Claimant exhibited symptoms in June 1981, some ten months before her work changed "drastically." Furthermore, in December 1981 the prolapse and cystocele had been diagnosed, more than one year before she sought medical treatment for the condition. Secondly, her condition did not occur during a short, discrete period of time. The onset of her condition did not "coincide precisely" with her log pulling and pushing activities which began in late 1979. Claimant reported symptoms beginning in June 1981, which gradually worsened until she sought treatment for the problem in January 1983. Claimant cannot point to an identifiable event, other than the April 1982 "drastic" change. However, it was still some eight months before she felt as though she required medical attention. We do not think eight months, let alone 18 months, can be considered a short, discrete period of time.

In order to establish a compensable occupational disease claim, the evidence must preponderate that the work conditions

were the major contributing cause of claimant's disability. Dethlefs v. Hyster Company, 295 Or 298 (1983); SAIF v. Gygi, 55 Or App 570 (1982). The medical evidence does not support a finding of compensability. Both doctors acknowledge that claimant's physical work activities probably significantly aggravated her condition. However, neither doctor concluded that her work activities were the major contributing cause of her condition. With varying degrees of emphasis, the doctors suggest that claimant's two vaginal childbirths are the major contributing cause of her current condition.

ORDER

The Referee's order dated May 1, 1984 is reversed. The SAIF Corporation's denial dated April 25, 1983 is reinstated and affirmed.

CLINTON L. MADDOCK, Claimant
Donald D. Yokom, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 81-07219
February 25, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Braverman's order which set aside its denial of claimant's injury claim. The issue is whether claimant's injury on May 28, 1981 arose out of and in the course of his employment.

This case was previously before us on review of Referee Braverman's prior order dated September 28, 1982. We remanded for further evidence taking on the issue of claimant's employment status between the early morning and late afternoon of the day he was injured. 35 Van Natta 1814 (1983). The additional evidence admitted on remand consists of a payroll record for the period May 15, 1981 through May 31, 1981 (with an appended copy of a check made payable to claimant on the employer's account), and additional testimony by Mr. Christensen, President of Markle Truck Line, Inc., the employer herein. The payroll record contains no entry for May 28, 1981, the date of claimant's injury. Claimant did not testify at either hearing. It is apparent that, as a result of the injuries he sustained, he has no independent recollection of the events leading up to the injury.

The employer is in the business of hauling for hire, usually livestock and bulk grain in the Pendleton, Oregon area. Claimant was employed on an on-call basis; that is, he worked when the employer had work for him to do. At the time he was injured, claimant had worked for the employer for approximately ten months. Claimant and the other truck drivers generally were paid according to the number of miles driven, unless their deliveries required driving less than 200 miles a day, in which case they were paid at an hourly rate. The drivers kept their own "pay sheet" for a two week period. At the end of that period the pay sheet was submitted and the driver paid. Mr. Christensen was in charge of payroll, and he generally scrutinized the hours and miles listed on the pay sheets.

On the evening of May 27, 1981, the day before claimant's injury, Mr. Christensen informed claimant that his job duties the following day consisted of delivering a truck to a repair shop (Barton's) for the purpose of changing a hitch on the trailer. Claimant was not expected to stay with the truck while it was

being repaired; he was required, however, to pick up the truck after it had been repaired and return it to Markle's lot. Markle's lot is on the western outskirts of Pendleton. Barton's is approximately 28 miles west of Pendleton. The employer frequently used Barton's for truck repair work.

Mr. Christensen testified that the only portion of the day for which claimant was to be paid was the portion during which he was driving the truck from Markle's lot to Barton's, and then returning the truck to Markle's lot. It was understood that at all other times during the day, claimant was on his own time and would not be paid. Picking up and delivering a truck generally took about three hours. Drivers would occasionally stay with a truck while it was being repaired if the job was expected to be completed within an hour or two. In those instances, the drivers were paid during the time the truck was in repair. This particular repair work was expected to require six or seven hours, and it was understood that claimant would not remain with the vehicle.

On the morning of May 28, 1981 claimant picked up the truck as instructed and drove it to the repair shop. He apparently hitched a ride to his parents' home in Cayuse, which is approximately forty miles east of Barton's and twelve miles east of Markle's lot. He arrived there during mid-morning and stayed until early afternoon. He drove his brother's pickup truck to his brother's place of employment in order to get his (claimant's) motorcycle, which his brother had been using during the preceding three weeks. At approximately 4 o'clock p.m. claimant picked up the motorcycle and started on the return trip to the repair shop.

Claimant had to gain access to the westbound lanes of Interstate 84 in order to return to Barton's. Shortly after 4 p.m. claimant was found injured, lying unconscious at the edge of the Highway 30 on-ramp to the eastbound lanes of Interstate 84. The evidence, consisting of claimant's brother's testimony, is convincing that claimant was intending to gain access to the westbound lanes of Interstate 84 by entering the eastbound lanes and illegally crossing over into westbound traffic. The injuries resulting from this accident are the subject of the present claim.

The issue as it is now framed is whether claimant was acting in the course of his employment at the time he was injured, in which case his claim would be compensable; or whether he was on a personal mission of his own, in which case it would not. The Referee first analyzed the case by stating that there are several factors for determining whether a claimant is within the "going and coming rule," and then going on to discuss the factors enumerated in Jordan v. Western Electric, 1 Or App 441, 443-44 (1979), a "coffee break" or personal break case.

The difficulty with the present case is that it does not neatly fit into any one of the categories of cases commonly used to analyze a particular factual situation to determine whether an injury arose out of and in the course of employment. The unitary "work-connection" approach adopted by the court in Rogers v. SAIF, 289 Or 633 (1980), requires that we carefully consider the nature and extent of the connection between claimant's injury and his employment.

> "Although the relationship may be measured in different factual situations by the

application of one test or another, the ultimate inquiry is the same: is the relationship between the injury and the employment sufficient that the injury should be compensable?" 289 Or at 642.

In determining whether an injury is sufficiently work-connected to be compensable, consideration of the factors outlined in Jordan v. Western Electric, supra, is helpful. Those factors are:

"(a) Whether the activity was for the benefit of the employer;

"(b) Whether the activity was contemplated by the employer and employe either at the time of hiring or later;

"(c) Whether the activity was an ordinary risk of, and incidental to, the employment;

"(d) Whether the employe was paid for the activity;

"(e) Whether the activity was on the employer's premises;

"(f) Whether the activity was directed by or acquiesced in by the employer;

"(g) Whether the employe was on a mission of his own." 1 Or App at 443-44.

"It is not necessary that all of these criteria be satisfied. * * * Because of the multitude of employment situations that exist, it is impossible to formulate precisely how to weigh each of the Jordan criteria, particularly in those situations where some, but not all the factors, are to a degree present. Such situations necessarily must be decided on a case by case basis." Haugen v. SAIF, 37 Or App 601, 604 (1978) (footnotes omitted).

The Referee found claimant's injury compensable utilizing the Jordan factors. He considered "the activity" in question to be that of "going to pick up the truck at Barton's . . . ." The insurer argues that, "The Referee went astray in his analysis of the Jordan factors because he misunderstood the meaning of 'the activity' as used in Jordan and the cases following it." The insurer contends that the proper focal point is the activity engaged in while the employe is away from the work site, and that in this case "the activity" was claimant's family visit 40 miles east of the repair shop.

We believe that the proper analysis of this case requires that "the activity" be defined as claimant's entire journey from the repair shop in the morning to his parents' home in Cayuse, his travel in the pickup truck to his brother's place of business, his regaining use of his motorcycle, and his beginning return trip

which was abruptly terminated by his unfortunate mishap. When viewing "the activity" in this manner, there are elements of the activity which are work-connected and elements which are not. However, applying the Jordan factors, we find that claimant's injury is not compensable.

When claimant began his return trip to the repair shop, he clearly was headed toward doing his employer's bidding. He was, however, on the return leg of a personal journey, and he had not yet resumed his employment. An analogy can be drawn from Professor Larson's discussion of dual-purpose trips and deviations. In the black letter discussion of deviations, Professor Larson's treatise states:

> "An identifiable deviation from a business trip for personal reasons takes the employe out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. In some jurisdictions, the course of employment is deemed resumed if, having completed his personal errand but without having regained the main business route, the employe at the time of the accident was proceeding in the direction of his business destination. If the main trip is personal, a business detour retains its business character throughout the detour." 1 Larson, Workmen's Compensation Law § 19.00 (1984).

If we regard claimant's journey from the repair shop to his parents' home in Cayuse as a personal side-trip, then the side-trip would appropriately be considered as having ended when claimant returned to Barton's where the truck was being repaired. This type of "deviation problem" presents the following question, as stated by Larson: "[W]hether an employe, who has completed a personal side-trip and is moving back toward his business route when injured, should be deemed to have resumed his employment as soon as he starts back, or only when he actually regains the main business route or destination." 1 Larson, supra, § 19.33, at 4-326. Larson states that the majority rule is to deny recovery in these instances, on the ground that a side-trip is a personal deviation until completed. Larson also states, however, that a minority have taken the position that, "[T]he journey toward the employment destination or route should be compensable, because the personal motivation is spent, and the employe's object has become the single minded purpose of getting to his employment destination." 1 Larson, supra, at 4-327-28.

We applied reasoning similar to the above-quoted minority rationale in a case involving what was clearly a dual-purpose trip (as opposed to a "deviation"). In Loren Stevens, 34 Van Natta 448 (1982), we held claimant's injury compensable where claimant had been directed by his foreman to stop, on his way back from lunch, at a mobile home supplier in order to arrange a meeting to discuss a new product. We held:

> "Once claimant finished his lunch break and set out for the supplier's place of business, he was on a venture for the benefit of his employer. His traffic

accident occurred en route from the supplier back to his employer's headquarters. There was no personal element whatsoever in this leg of claimant's journey." 34 Van Natta at 448.

This case is distinguishable from Stevens, primarily because in this case the time, place and circumstances of the return trip were almost totally personal to claimant. It was claimant's own choice to spend the major portion of his day in the Cayuse area. Claimant had made his own arrangements for his transporation in returning to pick up the repaired truck. There was absolutely no element of employer control involved in the manner or mode of transportation. The only identifiable connection between the time, place and circumstances of claimant's injury and his employment is the fact that claimant may not have been on that road at the fateful moment if he had not been returning to pick up the truck. This fact alone is insufficient to justify the conclusion that claimant's injury should be compensable, as evidenced by all of those cases in which coverage has been denied on the basis of the "going and coming rule."

We find and hold that at the time of injury claimant was on a personal mission of his own. Although he was returning to resume his employer's bidding, he was injured at a location which was completely removed from the locus of his employer's business concerns for that day. At the time of his injury, therefore, claimant had not yet reentered the time, place and circumstances of his employment.

Claimant's activity in going to Cayuse, which then necessitated his return to the repair facility, was certainly not directed by the employer. As discussed above, it was contemplated that the time that was taken to repair the truck was not time during which claimant would be paid, nor was it time during which he was expected to render any services for the employer. One could only conclude that the employer acquiesced in this activity in the sense that any employer must admit that an employe's free time is his to do as he pleases. We find no evidence to warrant the conclusion that the employer had any knowledge of the activities which claimant had planned to fill the interlude while the truck was being repaired.

If we were to analyze this case in accordance with more traditional concepts, rather than the work-connection approach of Rogers and the factors enumerated in Jordan, we would simply conclude that claimant's only assignment for the day in question was to deliver the truck for repair in the morning and pick up the truck, once repaired. The interim was a period during which claimant simply was not employed, there being insufficient evidence of an employment relationship during that time. Claimant's return trip, when he was injured, was factually similar to any journey to one's place of employment. Under the basic "going and coming" rule, claimant's injury, which occurred on his way to work, is not compensable.

ORDER

The Referee's order dated May 14, 1984 is reversed, and the insurer's denial dated July 17, 1981 is reinstated and affirmed.

LEE E. SHORT, Claimant
Bloom, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-00025
February 25, 1985
Order on Reconsideration

Claimant requests reconsideration of the Board's Order on Review dated February 13, 1985. 37 Van Natta 137 (1985). Claimant contends that his claim should be reopened as of an earlier date, and that his attorney is entitled to additional attorney fees.

On reconsideration we adhere to our original order. The Board thoroughly considered this lengthy evidentiary record in order to determine the appropriate date for claim reopening. Claimant's position in support of his request for reconsideration presents no argument or theory that was not previously considered by the Board. Therefore, claimant's request that the claim be reopened as of an earlier date is denied.

We determined that claimant's attorney had rendered extraordinary services, OAR 438-47-010(2), in the proceeding before the Referee; therefore, we granted an appropriate increase in the Referee's award of attorney fees. We considered all of claimant's submissions in support of counsel's application for an extraordinary fee at the hearing and Board levels, including counsel's supplemental affidavit. We believe the extraordinary fee for services at the hearing and the fee for services on review are sufficiently remunerative considering the efforts expended and results obtained in claimant's behalf; therefore, we decline to modify our order in this regard.

ORDER

On reconsideration of the Board's Order on Review dated February 13, 1985, the Board adheres to its former order which hereby is republished effective this date.

PAULINE L. TRAVIS, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 82-03177
February 25, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests, and the insurer cross-requests, review of Referee Neal's order which: (1) awarded claimant an additional 96° (30%) unscheduled disability, thereby granting claimant a total award of 272° for 85% unscheduled disability for injury to her low back; and (2) authorized the insurer to recover overpaid temporary disability benefits from the additional permanent disability award granted. Claimant contends that she is entitled to an award for permanent total disability, and that the insurer should not be permitted to recover its overpayment. The insurer contends that claimant is entitled to no permanent disability in addition to the 176° (55%) unscheduled award previously granted. As a sub-issue, the insurer contends that in evaluating the extent of claimant's permanent disability, the Referee should not have considered claimant's condition as of any time after December 16, 1982, because: (a) claimant's aggravation rights expired on October 28, 1982; (b) it appears that claimant's condition worsened as of December 16, 1982; and (c) claimant thereafter requested that the Board exercise its own motion authority and reopen her claim pursuant to ORS 656.278.

Because it might affect our evaluation of claimant's unscheduled permanent disability, we will first address the insurer's contention that claimant's condition on and after December 16, 1982, the date of an alleged aggravation, should not be taken into consideration. In a recent decision, Jeffrey Barnett, 36 Van Natta 1636 (1984), we held that it was proper to rate claimant's disability as it existed at the time of hearing under the following circumstances: the claim was in open status when aggravation rights expired; the claim thereafter was closed pursuant to ORS 656.268; claimant requested a hearing contesting that Determination Order; and the evidence established that claimant's condition was medically stationary at the time of hearing.

This case and Barnett are similar in that the claimant's aggravation rights had expired when a hearing convened to determine the extent of permanent disability. As in Barnett, there is a question in this case whether the claimant's condition worsened after expiration of the aggravation period and sometime prior to the extent hearing. In Barnett we concluded that claimant's condition had not worsened and that claimant was medically stationary at the time of the hearing. Thus, the claimant was entitled to the benefit of the usual rule that disability is rated based upon the facts and circumstances existing 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). This was so despite the fact that the hearing was held during the "own motion" period.

In this case, by contrast, we believe the evidence convincingly establishes that claimant's condition, in fact, worsened on or about December 16, 1982. More significantly, we find that claimant's condition was not medically stationary at the time of the June 22, 1983 hearing. Because claimant's condition was not stationary at the time of hearing, her permanent disability could not be evaluated as of that date. Kociemba v. SAIF, 63 Or App 557, 560 (1983); Gary A. Freier, supra, 34 Van Natta at 544-46.

Ordinarily, if the claimant is not medically stationary when an extent hearing convenes, assertion of the right to have disability rated at the time of hearing is merely delayed. That right can be asserted at a future hearing after reclosure. Such a possibility does not exist in this case, however, because claimant's condition worsened after her aggravation rights expired, and this recent worsening is a matter arising under the Board's own motion jurisdiction. See Claude Allen, 34 Van Natta 769 (1982), aff'd mem 62 Or App 664 (1983). Thus, in the event that the claim is reopened pursuant to claimant's own motion request, a future reclosure of the claim will be pursuant to ORS 656.278, i.e. the own motion statute, and will not involve any right to a hearing on the issue of extent of disability.

It would violate claimant's procedural rights to a hearing, Board review and judicial review to conclude that because her condition worsened after expiration of her aggravation rights, and her condition was not medically stationary at the time of the hearing, she is not entitled to any evaluation of permanent disability in this proceeding. See Buell v. SIAC, 238 Or 492 (1964); Carter v. SAIF, 52 Or App 1027 (1981); Coombs v. SAIF, 39 Or App 293 (1979). It is necessary in this proceeding, therefore,

to evaluate claimant's disability as of some time prior to the hearing and award appropriate compensation on the basis of claimant's condition as it then existed.

We conclude that where claimant's aggravation rights have expired and claimant is not medically stationary at the time of hearing, claimant's disability should be rated based upon the facts and circumstances existing as of the time claimant was last medically stationary, i.e. immediately prior to the worsening of claimant's injury-related condition. If claimant's condition is, in fact, stationary at the time of hearing, claimant is entitled to have his or her disability evaluated, and appropriate compensation awarded, based upon then existing facts and circumstances. Jeffrey Barnett, supra.

Thus, we evaluate claimant's condition as it existed immediately prior to her most recent "aggravation," i.e. December 16, 1982. The insurer contends that claimant is entitled to no additional permanent disability because her condition has not worsened subsequent to the 1977 Determination Order which awarded 55% unscheduled low back disability. The insurer contends that claimant's condition, in fact, has improved by virtue of a successful 1980 laminectomy.

> "'When a claim is closed with an award for permanent partial disability and later reopened, then at the time of the subsequent reclosure of the claim it is necessary to again rate the extent of permanent disability. This does not mean, we believe, that the prior extent rating is in any way binding or conclusive; nor does it mean that the prior extent rating is totally irrelevant. We conclude that the emphasis in this kind of situation has to be based on changed circumstances since the last rating of permanent disability. * * *'" James B. Johnson, 35 Van Natta 47, 49-50 (1983), aff'd 66 Or App 640 (1984).

A claimant's submission to surgery may constitute a sufficient change in circumstances to warrant reevaluation of permanent disability upon reclosure of the claim. Eduardo Ybarra, 36 Van Natta 1108 (1984). In this case, we conclude that it does.

Addressing the extent of claimant's permanent disability, as it existed immediately prior to December 16, 1982, we find that claimant has failed to establish her entitlement to an award for permanent total disability. The evidence is fairly convincing that, had claimant's condition not worsened in December of 1982, she would have continued her employment with Metropolitan Family Services. Although this employment was only part time, it appears that part time employment is all that claimant wanted. Under these circumstances, we find that claimant has failed to satisfy her burden of proving that she is permanently incapacitated from regularly performing any work at a gainful and suitable occupation. ORS 656.206(1)(a), (3). In addition, we find and hold that the Referee's award of an additional 96° (30%) unscheduled disability adequately and appropriately compensates claimant for the loss of earning capacity attributable to her industrial injury. Therefore, we affirm that portion of the Referee's order.

The issue of the insurer's right to recover overpaid temporary disability compensation is somewhat complicated by the fact that claimant advanced an argument at the hearing which she has failed to renew before the Board. Briefly, the facts pertinent to the overpayment issue are that the claim was initially closed by a Determination Order dated October 28, 1977, subsequently reopened and reclosed by a Determination Order dated September 25, 1980. This Determination Order awarded additional temporary total disability from March 14, 1980 through August 22, 1980. Thus, an overpayment was created by virtue of the insurer's payment of temporary disability between August 22, 1980 and September 25, 1980. Claimant apparently requested a hearing contesting that Determination Order, and on September 14, 1980 an Order of Dismissal was entered pursuant to the withdrawal of claimant's hearing request. That Order of Dismissal, signed by a Referee, dismisses claimant's request for hearing "without prejudice." In the meantime, the claim had been reopened, and it was later reclosed by a Determination Order dated November 27, 1981, which gave rise to the present proceeding. This last Determination Order awarded temporary total disability from January 11, 1981 through October 23, 1981. Thus, another overpayment arose as a result of the insurer's continued payment of temporary total disability pending claim closure. ORS 656.268(2).

At the hearing, the insurer sought to recover the overpayment arising under the November 1981 Determination Order and the September 1980 Determination Order. Claimant objected, raising a question concerning the insurer's ability to claim a 1980 overpayment in this proceeding. Claimant's attorney stated in part, "[I]f they're claiming an overpayment in 1980, do I also have a right to claim additional temporary disability other than what was awarded for that D.O. in 1980?"

The Referee decided that the insurer was entitled to recover the overpayment which arose under the 1980 Determination Order, as well as the more recent overpayment. She reasoned that OAR 436-54-320 allowed an employer/insurer to recover overpaid compensation in an accepted claim "from benefits which are or may become payable on that claim." She further reasoned:

> "The carrier's right to recover the overpayment is not tied to the Determination Order. Therefore, it is not necessary for the claimant to appeal a particular Determination Order for the carrier to recover its overpayment from additional compensation granted on that same claim."

The Referee authorized the insurer to recover its overpaid temporary total disability from "the additional compensation granted" by her order, i.e. from the additional 96° (30%) unscheduled permanent disability.

On review claimant asserts a single argument in opposition to that portion of the Referee's order allowing the insurer to recover its overpayment of temporary disability. That argument is couched in terms of a request that the Board reconsider its decision in Clarence Zwahlen, 35 Van Natta 229 (1983), wherein the Board affirmed a Referee's order upholding the validity of OAR

436-54-320 against a variety of challenges. Claimant apparently asserts that there is an issue presented in this case concerning the insurer's "right to offset alleged overpayments against reimbursable medical expenses pursuant to ORS 656.245 . . . ." The timeliness argument advanced at the hearing is not renewed on review.

Since this case was decided by the Referee and briefed by the parties, there have been some significant changes in the law governing recovery of overpaid benefits. Forney v. Western States Plywood, 66 Or App 155, 160 (1983) held OAR 436-54-320 invalid insofar as it permitted, or had been interpreted as permitting, an insurer or self-insured employer to reduce benefits without prior authorization from the Evaluation Division, a Referee or the Board. In addition, the claimant in Zwahlen petitioned for judicial review, and the Court of Appeals held that OAR 436-54-320 did not authorize a unilateral recovery of overpaid compensation, in reliance upon its Forney decision. Zwahlen v. Crown Zellerbach Co., 67 Or App 3 (1984). The Workers' Compensation Department has since promulgated a revised version of OAR 436-54-320 which simply provides, in pertinent part: "Insurers and self-insured employers may recover overpayment of benefits paid to a worker through the procedure specified by ORS 656.268(4)." OAR 436-54-320(1) (WCD Admin. Order 3-1984).

In Forney the court specifically left open the question whether an employer/insurer's right to recover an overpayment may be waived by unreasonable delay in raising the issue. 66 Or App at 160. See Ronald G. Hill, 37 Van Natta 14 (January 9, 1985). That was the question raised by claimant at hearing, but it is not presented on Board review. Because claimant has not advanced this argument on review, and the insurer has not had an opportunity to brief the merits of such an argument, we decline to rule on the overpayment issue on this basis.

Addressing the sole argument advanced by claimant, we find that it has no merit. This case does not present the same issues as Zwahlen and Forney simply by virtue of the fact that the insurer never attempted to recover its overpayment until authorization was obtained by order of the Referee. This is entirely consistent with the Forney decision. Furthermore, the Referee did not authorize the insurer to recover its overpayment out of any future compensation, such as temporary disability benefits or "related services"; rather, the Referee only authorized the insurer to offset overpaid temporary disability against the additional permanent disability awarded under the terms of her order. This is completely consonant with the rationale expressed in Forney. Finding no error in the Referee's allowance of the insurer's request, we affirm that portion of her order as well.

ORDER

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

ACE L. McELMURRY, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05729
February 27, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee Quillinan's order which set aside its denial of claimant's aggravation claim. Claimant argues that the Referee erred in upholding SAIF's denial insofar as it denied claimant's thoracic outlet syndrome.

The Board affirms and adopts those portions of the Referee's order which concern the compensability of claimant's alleged thoracic outlet syndrome.

Claimant compensably injured his right neck, shoulder and upper back on December 4, 1980. A C-8 radiculopathy was suspected but a myelogram was normal. Functional overlay was thought to be present. The claim was closed in April 1981 with no award for permanent disability. Claimant filed an aggravation claim in December 1981. The claim was initially denied, but was later accepted by a stipulation dated September 23, 1982 in which claimant was awarded 32° for 10% unscheduled disability. Claimant received no further medical treatment following the stipulation until January 1983 when he saw Dr. Norris-Pearce. Dr. Norris-Pearce performed a thermogram which indicated a cervical strain. Physical therapy and TNS treatments were then instituted.

In June 1983 claimant saw Dr. Norris-Pearce again. The doctor opined: "I feel that the claimant should have been on time loss in the period from approximately July 1982 through the present." SAIF denied the aggravation claim in August 1983.

The relevant inquiry in determining the compensability of claimant's aggravation claim is whether claimant's condition which is related to his compensable injury has worsened since the time of the last arrangement of compensation, the September 1982 stipulation. We find that his condition has not worsened and, therefore, reverse.

Claimant was examined by Orthopaedic Consultants in December 1981 and again in July 1983. They reported in July 1983:

> "I believe the patient's condition is medically stationary and is unchanged from December of 1981."
>
> . . . .
>
> "Based on today's examination, I find no evidence of loss of function of the cervical spine or shoulder girdle or the right arm as a result of the December 4, 1980 injury."

Dr. Patterson first saw claimant in December 1980 and treated claimant in January through March 1981. He examined claimant on September 15, 1983. In November 1983 Dr. Patterson reported:

> "In my opinion [claimant's] condition has not worsened. Based on the

electrodiagnostic studies performed on him here in this office, there is no electrophysiological evidence of a thoracic outlet syndrome. . . . In my opinion [claimant] is not permanently impaired from a neurological standpoint for performance of his regular work as a custodian from his industrial injury of December 4, 1980."

The Referee noted that, although there is scant objective evidence of a worsening, claimant's subjective complaints have changed. While it is true that claimant's subjective complaints may be statutorily sufficient to prove an aggravation claim, they may or may not be sufficient to carry claimant's burden of proof. Garbutt v. SAIF, 297 Or 148 (1984). Nearly every physician who has seen claimant has noted the lack of objective evidence to substantiate claimant's problems and has suspected a functional problem. We find that claimant's subjective complaints are not persuasive enough to carry his burden of proof.

ORDER

The Referee's order dated March 8, 1984 is affirmed in part and reversed in part. That portion of the Referee's order which found that claimant's alleged thoracic outlet syndrome is not compensable is affirmed. That portion of the Referee's order which set aside SAIF's denial of claimant's aggravation claim is reversed.

DESIREE (WALSER) RICHMOND, Claimant
Pozzi, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-03785
February 27, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee St. Martin's order which upheld a Determination Order awarding no unscheduled permanent disability for a back injury. We reverse.

Claimant suffered a compensable low back injury in July 1981. Her treating physician limited her to fifty pounds lifting and reported that she had some permanent impairment. Before closure, she exacerbated her injury in February 1982, and lost two weeks time from work. Her treating physician then lowered her lifting limit to ten pounds. Claimant testified that she was still limited by pain and that she could not return to the kind of computer installation and repair work that she was doing when she was first injured. The Referee found claimant credible.

Two orthopedic surgeons have examined claimant and found no disc or nerve root cause for her pain and have opined that no direct treatment was necessary. They found that she has some mechanical back pain which might respond to exercise therapy.

The Referee found and we agree that claimant has had to modify some personal physical activities and that she would experience significant discomfort if she had to do heavier work than she is now doing. Claimant is presently earning approximately twice the salary she was when injured. It appears that the Referee has placed too much weight on claimant's present earnings.

"Earning capacity must be considered in connection with a workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at any given time." Ford v. SAIF, 7 Or App 549 (1972).

The fact that an injured worker is able to obtain employment at a higher rate of pay than before the injury does not preclude a finding of permanent partial disability and the granting of an award. Jacobs v. Louisiana-Pacific, 59 Or App 1 (1982). In Jacobs, the court found that a claimant who returned to work for the same employer in a supervisory capacity since his injury and made more money than before his injury was not precluded from an award of permanent disability because he was unable to return to employment in farm labor, construction, and plywood millwork that he had performed before his injury.

It appears from the testimony and the Referee's findings that claimant has some permanent impairment resulting in slight disability which causes her to modify some life activities and precluding her from some occupations that were open to her before the injury. On that basis, after considering all of the evidence and the guidelines contained in OAR 463-65-600 et seq., we conclude that claimant would be most appropriately compensated by an award of 32° for 10% unscheduled disability.

ORDER

That portion of the Referee's order dated April 13, 1984, affirming the Determination Order which awarded no permanent disability is reversed. Claimant is awarded 32° for 10% unscheduled permanent disability. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3,000, as a reasonable attorney's fee for services at hearing and on Board review.

DONALD W. WILKINSON, Claimant
Roll, et al., Claimant's Attorneys
Macdonald, et al., Defense Attorneys

WCB 83-09551
February 27, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Quillinan's order which granted him an award of 128° for 40% unscheduled disability in addition to the 176° for 55% unscheduled disability previously awarded. Claimant contends that he is permanently and totally disabled. Extent of disability is the only issue on review.

Claimant is a 57 year old man who compensably injured his left hip and low back on February 25, 1980 when a log rolled into him. Claimant's impairment is rated moderate by Orthopaedic Consultants who believe that claimant could do sedentary work. Claimant twice attempted to return to work as a logger but failed.

Claimant's work experience is in physically heavy labor. Claimant has an eighth grade education. The Referee found, and we agree, that claimant has no transferable skills for sedentary work. The Referee also found, and again we agree, that claimant would have worked had he had the physical ability.

Claimant was evaluated for a vocational rehabilitation program in March 1984, however, at the time of the hearing the program had not begun. We must rate claimant's disability as of the time of the hearing rather than as he may be in the future. Gettman v. SAIF, 289 Or 609 (1980).

We find that claimant is physically precluded from performing all but sedentary work. He has no vocational skills which are transferable to sedentary work. He is motivated and would work if he could. We find that claimant is excused from searching for work because given his physical and vocational limitations such a search would be futile. Accordingly, we find that claimant is entitled to an award for permanent total disability to begin September 15, 1983 when claimant last became medically stationary.

ORDER

The Referee's order dated April 25, 1984 is reversed. Claimant is awarded permanent total disability to begin September 15, 1983. Claimant's attorney is awarded 25% of the increased compensation, not to exceed $3,000, for services at hearing and on Board review.

PEDRO G. ALCALA, Claimant
Gatti, et al., Claimant's Attorneys
Garrett, et al., Defense Attorneys

WCB 84-01427
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Seifert's order that set aside the Determination Order and remanded the claim to the insurer for processing until closure is authorized pursuant to ORS 656.268. The Determination Order declared claimant medically stationary as of January 12, 1984. The insurer asserts that claimant was medically stationary on November 29, 1983.

On September 24, 1983 claimant, a 26-year-old farm laborer, suffered compensable injuries when the pickup in which he and other members of his irrigation pipe changing crew were riding was rolled. Claimant was treated at the emergency room that day and, three days later, began treatment with Dr. Warner. His complaints included right shoulder and low back pain, right leg weakness, headaches and dizziness. Dr. Warner initially diagnosed acute traumatic cervical flexion, extension sprain with neuralgia, plus lumbar strain with secondary functional disturbances.

Dr. Bolin examined claimant at the insurer's request on October 21, 1983. He termed claimant's injuries "mild." He noted that claimant was recovering well, with only minimal residuals present during the examination. He observed mild to moderate impairment and interfering functional overlay with possible conversion hysteria. Dr. Bolin recommended continued chiropractic treatment, predicting that claimant should be able to return to work within 30 days but for possible problems due to functional overlay.

Claimant continued to treat with Dr. Warner, who referred him to Dr. Gallagher for examination. Dr. Gallagher's notes from his November 29, 1983 examination indicate an impression of lumbosacral strain with a paucity of objective findings. He recommended that claimant have ten physical therapy sessions and

return in two weeks. He stated that further chiropractic treatment was not indicated. While in Dr. Gallagher's office that day, claimant signed an 829 form indicating a desire to change treating doctors. Claimant credibly testified that he neither read nor understood the form. Dr. Gallagher indicated on the form that claimant was not medically stationary. The form bears Dr. Gallagher's signature dated December 12, 1983.

On December 7, 1983 Dr. Gallagher wrote the insurer that on November 29, 1983 claimant was medically stationary and able to return to regular work. He stated that he found no objective evidence to substantiate claimant's subjective complaints, no impairment and no disability. Upon receipt of said report, the insurer requested closure.

A second 829 form was completed in Dr. Warner's office on December 21, 1983 and received by the insurer that day. Dr. Warner indicated thereon that the first 829 was signed by mistake due to a language barrier. Dr. Warner also indicated that claimant was not medically stationary and estimated that treatment would extend an additional three to five months. In his January 4, 1984 report, Dr. Warner stated that claimant still presented with severe muscle spasms, pain, discomfort and headaches.

Claimant was evaluated by Drs. Berman and Abrams of Independent Chiropractic Consultants on January 12, 1984. Claimant told them that his shoulder had significantly improved, but that the headaches and low back pain were unchanged from the initial injury date. Claimant further stated that Dr. Warner's treatments seemed beneficial for but three or four hours, and that he felt better particularly when receiving the physical therapy. They reported claimant's activities as including jogging and horseback riding, but with some limitations since the injury. They noted that claimant moaned and groaned during a cervical palpation and range of motion testing, terming the reaction "emotional." The doctors also observed an apparent voluntary restriction of forward flexion. They opined that at the time of the examination, claimant was medically stationary and fully capable of resuming his regular employment activities, but stated that a gradual reintroduction might be appropriate due to recent inactivity.

A Determination Order issued on January 25, 1984, declaring claimant medically stationary as of January 12, 1984.

In early February 1984, claimant attempted to return to work as a tree planter, notwithstanding the fact that Dr. Warner had not released him. Claimant's back became sore on the first day and forced him to quit on the second.

Dr. Warner wrote on February 10, 1984 that he disagreed with a number of items in the Independent Chiropractic Consultants' report, but perhaps most significantly, with its notation of no apparent paraspinal muscle spasms. Dr. Warner testified that severe soft tissue injuries take one to three years to heal. He stated that unskilled farm labor is heavy work placing severe strain on the muscles of the spine, and that claimant's attempt to return to work in February set back his condition. Dr. Warner reasoned that since claimant was worse at the time of the hearing, he could not have been medically stationary in January 1984. He outlined the further progress he anticipated claimant would make.

Dr. Snider, an orthopedist, examined claimant on May 3, 1984. Claimant's complaints included low lumbar pain exacerbated by any activity, even sleeping, neck pain made worse by bending or lifting and recent episodes of partial loss of consciousness. Dr. Snider observed scattered and generalized tenderness to lumbar palpation, but he twice noted in his report that no focal areas of tenderness were reproducible. He found no objective findings to corroborate claimant's subjective complaints and concluded that claimant was medically stationary. Dr. Snider reported that he explained to claimant, through his wife who acted as interpreter, that he needed to return to work.

We do not agree with the insurer's position that claimant was medically stationary on November 29, 1983. Dr. Gallagher indicated on his 829 form that claimant was not medically stationary, and he prescribed therapy which claimant found beneficial. Nor do we agree with claimant's position that he was not medically stationary in January, 1984. We judge claimant's condition as of the medically stationary date set forth in the Determination Order. See Robert E. Alvarez, 35 Van Natta 1822 (1983); Lawrence M. Sullivan, 35 Van Natta 1383, 1385 (1983). That a subsequent work exposure may have set back claimant's condition adds little to claimant's argument that he was not medically stationary prior thereto. The medical evidence taken as a whole weighs strongly against claimant's position. We believe that the Determination Order correctly found claimant medically stationary on January 12, 1984, the date of the Independent Chiropractic Consultants' exam.

ORDER

The Referee's order dated June 4, 1984 is reversed. The Determination Order dated January 25, 1984 is reinstated and affirmed.

MIKE A. ALDRICH, Claimant
Forcum & Parker, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-08607
February 28, 1985
Order on Remand

This case is before the Board on remand from the Court of Appeals. The court has instructed the Board to order claimant's aggravation claim accepted and processed according to law and to determine penalties and attorney fees for the SAIF Corporation's unreasonable denial of claimant's claim.

Now, therefore, the SAIF Corporation is ordered to accept claimant's aggravation claim and to process it according to law. SAIF is further ordered to pay to claimant as a penalty 25% of the temporary disability benefits made payable as a result of acceptance of claimant's aggravation claim as well as an associated attorney fee in the sum of $350 to be paid to claimant's attorney.

IT IS SO ORDERED.

ERWIN L. BACON, Claimant
Galton, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
Rankin, et al., Defense Attorneys

WCB 83-11667 & 83-08519
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Riedel International, a self-insured employer, requests review of those portions of Referee Braverman's order which set aside its denial of claimant's claim for his present left knee condition and which upheld the denial of Providence Washington Insurance Company (the aggravation insurer) and which awarded claimant's attorney a fee of $3,734 for services in connection with the responsibility issue. The issues on review are responsibility and attorney's fees.

Claimant is a 60 year old former cement truck driver. Claimant has a long history of knee problems which date back to the 1940s. In May 1978, while working for Riedel's predecessor company which was insured by Providence Washington, claimant twisted his left knee while climbing into the cab of his truck. The claim was accepted. In June 1978 Dr. Schuler, claimant's treating physician, performed an osteotomy. In December 1978 Dr. Franks, a consulting physician, performed a left peroneal nerve exploration of the left knee. Dr. Schuler considered performing a total knee replacement, but in January 1980 concluded that the surgery should not be performed at that time. Dr. Schuler recommended vocational rehabilitation.

Claimant was found medically stationary in July 1980. A Determination Order issued in August 1980 which granted claimant an award for 35% loss of use of the left leg. A later stipulation increased the award to 70%.

In January 1981, claimant returned to work as a cement truck driver. At that time Riedel was on the risk. By April 1981, Dr. Schuler reported that claimant had pain and swelling in the left knee. Dr. Schuler stated: "I feel his condition is staying about the same." Sometime in early 1982 Dr. Schuler performed a laminectomy on claimant. The laminectomy was unrelated to claimant's knee injury. Following the laminectomy, claimant again returned to work as a cement truck driver with Riedel on the risk. In August 1982 Dr. Schuler reported that the left knee was bothering claimant again. He stated:

> "He elects to go back to work. I have advised that he do this....However, I feel that some time in the future, there is coming up total knee surgery for this patient, though so long as I can keep him working, he is only 60, we want to continue to do so as long as possible before this is considered."

In March 1983 claimant returned to see Dr. Schuler who reported:

> "[Claimant] returned to the office today...complaining of increasing pain and aching in his lower extremities between the

knee and the feet. He is developing more pain in his left knee which is a bad arthritic knee which has been cared for in the past."

In May 1983 claimant filed a claim against Riedel for his left knee problems. There is no indication that any particular incident while Riedel was on the risk is alleged to have worsened claimant's knee condition. Claimant went off work for gall bladder surgery in May 1983 and never returned to work because of the pain in his knee.

In August 1983 Dr. Schuler, after consulting with Dr. Zimmerman, recommended that claimant submit to total knee replacement surgery. In September 1983, Dr. Zimmerman performed the surgery.

In October 1983 Dr. Schuler reported: "It is my feeling that this patient's knee condition has been gradually worsening, especially since around August of 1980." In January 1984 Dr. Schuler stated:

> "[I]t is my opinion that the need for the left total knee replacement was brought about by a natural progression of the patient's preexisting degenerative arthritis. It probably would have been necessary regardless of his injury of May 3, 1978, though this injury caused a temporary aggravation of his preexisting condition."
>
> * * * * *
>
> "After the patient resummed [sic] his regular work in January of 1981, he elected to go back to his regular job where he worked on this truck in which [sic] he complained of the pushing in of the clutch, jumping in and out of the truck, placing his equipment and so forth, continued to cause his knee to feel worse. I agree that this could have contributed independently to the increase [sic] symptomatology in his knee.
>
> "In April of 1983, the patient was turning his foot into external rotation and developed an arch strain which necissitated [sic] an arch support because of the pain in his knee."

In January 1984 Dr. Zimmerman reported:

> "The operation would have inevitably had to have been done without the injury, but the injury brought forward or accelerated the time that he had to have the surgery."

In February 1984 Dr. Zimmerman reported:

> "The degenerative arthritis that Mr. Bacon

> suffered from and ultimately led to his total knee arthroplasty was a combination of many things.
>
> "As I stated in my letter of January 9, it started with a medial meniscectomy in the mid 1940's....Following this he had an episode in 1978 which aggravated the knee and then the daily walking or work after that would have contributed as well as the incident that he described to Dr. Schuler in April of 1983.
>
> "Degenerative arthritis is a gradual wearing out process that is contributed to by everyday walking and by each traumatic episode to the knee."

Although Dr. Zimmerman refers to an incident in April 1983, there is no evidence in the record that any such incident occurred. Perhaps he is referring to the fact that in March and April 1983 Dr. Schuler reported that claimant's left foot was turning out "because of the pain on the medial aspect of his knee."

The Referee found that claimant's work while Riedel was on the risk independently contributed to his underlying disease. He, therefore, assigned responsibility to Riedel under authority of Boise Cascade v. Starbuck, 296 Or 238 (1983). We disagree and reverse. We stated in Bill Dameron, 36 Van Natta 592 (1984):

> "We understand Starbuck to require evidence of an actual material contribution to claimant's disabling condition in order to relieve an employer potentially responsible for payment of the claim to a more recent employer or insurer. . . .
>
> "In cases presenting this factual pattern [an injury with insurer 1 and then a subsequent employment exposure with no identifiable traumatic incident], in order to 'shift' liability to a more recent employer/insurer, we believe it is consistent with fairness and proportional allocation of liability among employers . . . to require not merely evidence of a recurrence or exacerbation of symptoms, but to require persuasive evidence of a worsening of claimant's underlying condition." 36 Van Natta at 597-98.

We find no persuasive evidence that claimant's exposure while Riedel was on the risk materially contributed to a worsening of claimant's underlying arthritis. The most Dr. Schuler can say is that the work exposure "could have contributed independently to the increase [sic] symptomatology in the knee." Discounting Dr. Zimmerman's erroneous reference to an incident in April 1983, the most he says is that claimant's work contributed to his need for surgery in the same manner as daily walking. We do not consider such a contribution to be a material contribution.

Accordingly, we assign responsibility to Providence Washington as the last insurer on the risk when claimant's work independently contributed to his underlying arthritis condition.

On the attorney's fee issue, the Referee awarded claimant's attorney $3,734 for work performed in connection with Riedel's denial. Claimant took the position at hearing and takes the position on review that Riedel is properly responsible. In a responsibility case claimant's attorney is only entitled to attorney's fees if "he/she actively and meaningfully participated at the hearing in behalf and in defense of claimant's rights." OAR 438-47-090(1). We have interpreted active and meaningful participation to mean that claimant has advocated a position adverse to one of the employer/insurers and has prevailed. Adam J. Gabel, 36 Van Natta 575 (1984); Robert Heilman, 34 Van Natta 1487 (1982). Accordingly, claimant is entitled to no fee on the responsibility issue.

ORDER

The Referee's order dated March 22, 1984 is reversed. Riedel International's denial is reinstated and the $3,734 attorney's fee assessed against Riedel International is eliminated. Providence Washington Insurance Company's denial is set aside.

ROBERT R. CURRIE, Claimant
Michael Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-11160
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of that portion of Referee Howell's order that set aside its denial of claimant's claim for aggravation of his neck injury. Claimant cross-requests review of that portion of the order that denied his request for a penalty. The issues are compensability and penalties.

Claimant sustained a neck injury on September 28, 1977 when the street sweeper he was operating hit a hole, causing his neck to "snap." He was initially treated by Dr. Spady for pain in his neck and numbness in his left arm. Claimant later came under Dr. Melgard's treatment. Dr. Melgard treated claimant conservatively until March 1979 when he reported that claimant was medically stationary and without permanent impairment. A myelogram performed by Dr. Melgard in April 1978 was essentially normal.

Claimant's claim was closed by a Determination Order dated April 9, 1979 that awarded no permanent disability. There is no evidence that claimant sought any additional medical treatment for his neck until September 1983.

In September 1983 x-rays of claimant's cervical spine revealed degenerative disc disease. Dr. Melgard opined that claimant may have nerve root irritation at the C6-7 level. He further noted that if 10 days of conservative treatment did not cause claimant's condition to improve, he would recommend a myelogram to determine if claimant's condition could be improved surgically. On September 20, 1983 Dr. Melgard requested that SAIF reopen claimant's claim. Dr. Melgard again asked SAIF to reopen claimant's claim on October 21, 1983.

Dr. Melgard did not state that claimant was unable to work or that he was not working in either his September 20 or October 21 letters to SAIF. On November 1, 1983 SAIF wrote to Dr. Melgard advising that it had scheduled claimant for an evaluation by the Orthopaedic Consultants on November 10, 1983. SAIF also asked whether claimant was authorized time loss. On November 3, 1983 Dr. Melgard responded that he was authorizing time loss effective September 14, 1983.

On November 15, 1983 Dr. Tiley reported that claimant was suffering a significant loss of range of cervical motion and that a myelogram was strongly indicated.

On November 29, 1983 an Orthopaedic Consultants panel diagnosed osteoarthritis of the cervical spine and degenerative disc disease, both attributed to the natural aging process. The Consultants opined that claimant's 1977 ligamentous muscle strain had resolved. The panel concluded that claimant could return to his usual occupation as a truck driver.

SAIF denied claimant's aggravation claim on December 20, 1983. On February 9, 1984 Dr. Melgard disagreed with the Orthopaedic Consultants' opinion that claimant's condition would not be benefitted by surgery, although he did not then state that surgery was indicated. Rather, Dr. Melgard again requested that SAIF authorize a myelogram, suggesting that he would be able to determine if surgery was indicated only after that procedure.

On April 12, 1984 Dr. Melgard stated that claimant had some preexisting cervical osteoarthritis that he felt had become symptomatic after the 1977 injury. He was, however, unable to state the extent to which he believed claimant's present symptoms were related to the underlying degenerative process as opposed to residuals of the 1977 injury.

SAIF does not contest claimant's assertion that his symptoms are worse now than they were at the time of the last arrangement of compensation, which was the April 9, 1979 Determination Order. The question on review is whether those worsened symptoms have been established to be due to the 1977 compensable injury.

Dr. Melgard suggests that the compensable injury may be involved, either directly in the sense of a soft tissue strain or sprain that never fully resolved or indirectly in the sense of some contribution to the progression of underlying oesteoarthritis and degenerative disc disease. The Orthopaedic Consultants state that claimant's 1977 injury resolved without any contribution to the progression of the underlying disease(s). The Referee assigned greater weight to Dr. Melgard's opinions and found that claimant's worsened symptoms constituted an aggravation of the 1977 injury.

We disagree. The apparent hiatus in medical treatment between 1979 and 1983, during at least some of which time claimant led an active life, is some corroboration for Orthopaedic Consultants' position. Furthermore, it would seem that much of Dr. Melgard's later (1983-84) analysis is somewhat inconsistent with his own earlier (pre-1979) assessments. Claimant bears the burden of proving that his worsened condition is causally related to his compensable injury. ORS 656.273(1). We conclude that he has not done so by a preponderance of the evidence.

SAIF also contends that claimant is not entitled to the recommended myelogram under ORS 656.245 because the procedure could not determine whether claimant's worsened condition has anything to do with his compensable injury. We agree that claimant is not entitled to a myelogram at SAIF's expense, but for a different reason. Dr. Melgard states that his only reason for recommending a myelogram is to determine whether claimant would be benefitted by surgery. Even if claimant would be benefitted by surgery, that surgery would not be compensable because of our finding that claimant has not suffered a compensable aggravation.

ORDER

The Referee's order dated June 4, 1984 is affirmed in part and reversed in part. That portion of the order that set aside the SAIF Corporation's denial of claimant's aggravation claim is reversed. The SAIF Corporation's denial dated December 20, 1983 is reinstated and affirmed. The remainder of the Referee's order is affirmed.

JOHN R. DAYTON, Claimant
Schroeder & Hutchens, Claimant's Attorneys
Stunz, et al., Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Asst. Attorney General

WCB 83-03304
February 28, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The putative employer, Vance R. and Cheryl Dayton, request review of Referee Galton's order which set aside the denial issued in its behalf by the SAIF Corporation in its capacity as the claims processing agent pursuant to ORS 656.054. The issue is whether claimant was a subject worker and the putative employer a subject employer. The putative employer (hereinafter referred to as "the employer" or "the Daytons") argues that even if we agree with the Referee's conclusion that claimant was a subject worker (and, thus, that the employer was a subject employer), claimant's injury did not arise out of and in the course of his employment. In view of our disposition of the subject worker/ subject employer issue, we find it unnecessary to address the employer's alternative argument.

The Referee made the following finding concerning witness credibility: "Based upon very careful and close observation of all witnesses during the extremely protracted, almost 7-hour hearing, I find that claimant and his father, Roy L. Dayton, were essentially credible and reliable witnesses and that all other witnesses were not." Claimant's case in chief consisted of his testimony and his father's testimony. The "other witnesses" were the Daytons and their son, Richard. Their testimony was presented by the employer.

We normally defer to a Referee's findings concerning witness credibility, unless there is a strong basis to do otherwise. Donald W. Hardiman, 35 Van Natta 664 (1983). The ultimate issue in every case, however, is, giving due deference to the Referee's advantage in seeing the witnesses, can we honestly say we are persuaded by the evidence produced by the party with the burden of proof. Dale Donaldson, 34 Van Natta 1154 (1982), aff'd mem 63 Or App 529 (1983). Although a Referee's credibility finding,

particularly one based upon witness demeanor, generally is given considerable weight, it is not binding. Hannan v. Good Samaritan Hosp., 4 Or App 178, 192 (1970). We review the record de novo, and we must resolve the case as our independent judgment dictates. Bicknell v. SAIF, 8 Or App 567, 569 (1972). Although resolution of the issues in this case, to a certain extent, turn on witness credibility, we cannot ignore the other evidence in the record. Swanson v. Westport Lumber Co., 4 Or App 417, 421 (1971). Having said that, we will state our findings on de novo review.

At all times material herein, the Daytons owned a small dairy farm in Adrian, Oregon, about 30 miles from the Oregon-Idaho border. Mrs. Dayton had primary responsibility for the operation of this dairy, with the assistance of her children. Mr. Dayton worked full time for another dairy farmer nearby, Jim Thomas. His working day was split in two in order to accommodate the scheduled milking of the cows. He went to work at 4:30 a.m., and after finishing his morning shift, he would usually return home around 9:00 a.m. He returned to the Thomas dairy at or about 4:00 p.m. and returned home in the evening by 8:30 or 9:00 p.m. The Daytons' five children, Beaver, Richard, Dennis, Rupert and Ray (aka "Bubbs") were ages 18, 16, 13, 9 and 3 respectively at the time of hearing. All of the children, with the exception of Ray, had their daily chores to perform about the farm when they came home from school. The children were paid "wages," in the nature of an allowance, for performing their daily chores. The amount that they received varied, depending upon how much extra money the Daytons had after payment of their household expenses. In addition, the two oldest boys, Beaver and Richard, received "rental payments" for cows they owned, which apparently were used as part of the family dairy operation. The Daytons had 60 head of cattle. No more than 42 cows were ever being milked at any given time.

The children generally received payment from their mother in the form of a personal check drawn on an account jointly held by the Daytons and Mrs. Dayton's mother, who resided with the Dayton family. Some of these checks were made payable to the children individually, with the notation that they were for "labor." Some of these checks were made payable to the Stateline Store, a nearby grocery, with the notation that they were for "boys' labor" or "wages." Many of the checks made payable to the individual children were cashed at the Stateline Store.

Claimant is the same age as Richard Dayton, and they were in the same grade in school. Claimant and his siblings Mark, Russell (aka "Squirt") and Tanya or "Twania" are cousins of the Dayton children. Claimant's father was an employe of the South Board Water District. He was occasionally employed by the Daytons to perform specific duties about the dairy farm on weekends and some evenings after his regular work. Because claimant's father was not at home when school let out, claimant and all of his siblings regularly went home with the Vance Dayton children.

The Dayton children were responsible for performing their chores after school, generally before dinner. Claimant regularly assisted Richard in performing his chores. Richard's responsibilities consisted primarily of feeding the cows and cleaning the barn after feeding. He frequently was required to

break up bales of hay with a hay chopper. Claimant shared in these duties by assisting Richard.

When Richard received his "wages" or "allowance" from his mother, he and claimant usually would go to the Stateline Store, cash the check, and Richard would give claimant one half of the payment. Mrs. Dayton never became aware of the fact that Richard was sharing his money with claimant until long after claimant's injury, when his claim was filed. Mr. Dayton knew that Richard was sharing his money with claimant; however, he apparently did not try to stop this, taking the attitude, "Well, it's your money to do as you see fit."

On one occasion, Mr. Dayton was going to hire a hay mover to haul some hay to his dairy farm. Richard volunteered to haul the hay, and he and his father agreed that Richard would receive approximately one-half the cost that would be incurred by hiring a hay mover. Richard enlisted claimant's assistance in performing this task. Mr. Dayton knew that Richard was moving the hay with claimant's assistance, and he also understood that Richard had agreed to split his earnings with claimant. Therefore, when Mrs. Dayton wrote a check payable to Richard for "labor," she added claimant's name as a notation on the check when she was informed by Mr. Dayton of the boys' arrangement. Claimant testified that this check was one of many $70 payments he would split with Richard every two weeks, and that this particular check was not in payment for performance of a specific task. The checks that are a matter of record do not bear out claimant's testimony that he and Richard received $70 every other week. In addition, this testimony is somewhat inconsistent with claimant's earlier testimony that he received anywhere from $5 to $35 every two weeks.

On December 16, 1981 Mrs. Dayton wrote a series of consecutively numbered checks payable to each one of the Dayton children, with the exception of Ray, and their cousins, including claimant. In addition, Mrs. Dayton wrote a check to her mother for $20 with the notation that it was for "labor." Claimant testified that the check that he received in the amount of $20 was payment for working on the dairy and that it was not received as a gift. Mrs. Dayton testified that all of these checks were written as Christmas gifts to the children and were written in varying amounts depending upon each child's age. We believe it is more likely that this $20 payment to claimant was, in fact, a Christmas gift, and that claimant is simply mistaken in his assertion to the contrary.

I

ORS 656.027 states that all "workers" are "subject workers" unless they are specifically excluded as such. ORS 656.005(28) defines a "worker" as:

> "* * * [A]ny person, including a minor whether lawfully or unlawfully employed who engages to furnish services for a remuneration, subject to direction and control of an employer . . . ."

ORS 656.005(14) defines "employer" as:

> "* * * [A]ny person . . . who contracts to

pay a remuneration for and secures the right to direct and control the services of any person."

Every employer employing one or more "subject workers" in Oregon is a "subject employer." ORS 656.023.

The Referee concluded that the Daytons were a "subject employer" and that claimant was a "subject worker" when he was injured. We conclude that there is insufficient evidence of an employer-employe relationship in this case to substantiate the conclusion that the Daytons were claimant's "employer," or that claimant was a "worker."

There are two fundamental elements which must be present if an employer-employe relationship is to be found: a contract of hire between the parties, either express or implied; and a right of control. Hix v. SAIF, 34 Or App 819, 825 (1978); Oremus v. Ore. Pub. Co./Leibrand, 11 Or App 444, 446 (1972). If there is no contract, there can be no such relationship. Oremus v. Ore. Pub. Co./Leibrand, supra; Smith v. SIAC, 144 Or 480 (1933); Vient v. SIAC, 123 Or 334 (1927); Landberg v. SIAC, 107 Or 498, 502 (1923). In this case, we find no evidence of any contractual relationship -- no body of rights and duties -- existing between the Daytons and claimant.

It is clear to us that claimant never entered into an agreement with either Mr. or Mrs. Dayton whereby claimant agreed to perform services in exchange for the money he received. As claimant testified, he "got the job" helping around the farm when he started helping Richard with some chores. There was never any discussion between him and either one of the Daytons concerning "the job;" and he first knew that he was going to be paid for helping Richard with his chores when Richard told him that he would split his check with claimant. We do not attribute any significance to the fact that Mr. Dayton knew that his son was sharing his allowance with claimant, as the Referee apparently did. Nor do we agree that Mr. Dayton's failure to forbid his son from sharing his allowance with claimant amounts to a tacit approval of this arrangement. In any event, allowing claimant to remain on the premises and share Richard's daily chores, with the knowledge that Richard was sharing his allowance with claimant, does not amount to an implied contract between claimant and the Daytons.

Nor does the element of control exist. Although Mr. Dayton testified that he might occasionally tell claimant what to do or, as with most children, more frequently what not to do, we believe that this was not an employer's exercise of control over an employe so much as it was a father/uncle telling an adolescent how to behave.

We disagree with the Referee's conclusion that the employer furnished claimant with "special items" needed to perform his work. It is a fact that the Daytons purchased a pair of high boots, as well as a winter jacket for claimant to wear. The boots were kept at the Dayton residence and worn while claimant was playing, as well as "working," around the dairy farm. The reason that these items were purchased, not only for claimant but for his siblings as well, was that the winter was cold, the ground was muddy, and the children, including claimant, otherwise would not have had the proper attire for those conditions. Claimant's

apparent suggestion that the meals provided to him and his siblings at the Dayton home were in the nature of "wages," see ORS 656.005(27), only serves to highlight the weakness of his case. Because claimant and his siblings were present when the family sat down to its evening meal, they ate too. It is obvious that claimant was not regarded as an employe, but was regarded and treated as part of the Dayton family.

Although this case is not on all fours with Hix v. SAIF, 34 Or App 819 (1978), the court's statements concerning the lack of an employer/employe relationship in that case seem strikingly relevant in this case:

> "As we view the evidence, it establishes that claimant's performance of services was gratuitous . . . . [The employer] could . . . never rely in advance on the claimant's availability. While on the premises, it is true that the claimant performed various 'chores' and services for [the employer], some of them at [the employer's] request. However, [the employer's] expectation that his requests would be met was based solely upon the compliant nature of the claimant, not upon any belief on [the employer's] part that he had a right to direct or control the boy in any manner other than as an owner of the premises directing anyone on the premises." 34 Or App at 824.

As the court found in Hix, we find in this case that there is insufficient evidence to establish either an express or implied contract between claimant and the employer, or a right of control in the employer over claimant.

II

Even if we were to find sufficient evidence of an employer/employe relationship, thus making claimant a "worker," we nevertheless would be unable to conclude that claimant has established his status as a subject worker. As indicated above, ORS 656.027 provides that all workers are subject workers, except those specifically defined as nonsubject workers. ORS 656.027(3) exempts "casual workers" from the subject worker category. That provision states:

> "All workers are subject . . . except those nonsubject workers described in the following subsections:
>
> " * * * * *
>
> "(3) A worker whose employment is casual and either
>
> "(a) the employment is not in the course of the trade, business or profession of the employer; or
>
> "(b) the employment is in the course of the trade, business or profession of a nonsubject employer.

"For the purpose of this subsection, 'casual' refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than $200."

Construing the evidence in the light most favorable to claimant, the most money that claimant received in any 30-day period was $70. This would follow from claimant's testimony on cross-examination that Richard received $70 every two weeks and split the money with claimant. Thus, claimant never earned the statutory minimum of $200 in any 30-day period. There is no evidence that the Daytons employed any other subject workers. The record establishes that claimant's father performed work for the employer; however, the evidence also indicates that claimant's father performed work as an independent contractor, not as an employe. Claimant does not contend that the Dayton children were subject workers, and the record does not warrant any such conclusion. Thus, the Daytons' "total labor cost" was necessarily limited to the money received by claimant. See Rodney R. Leech, 36 Van Natta 1301 (1984).

Claimant's "employment" was "casual," and he, therefore, was not a subject worker. The record fails to establish that the Daytons employed any other individuals as subject workers. Thus, the Daytons were not subject to the Act as an employer. It necessarily follows that claimant was a "casual worker," to the extent he could be considered a "worker" at all, employed in the course of the business of a nonsubject employer. Therefore, claimant is not entitled to benefits under the Act. Bisbey v. Thedford, 68 Or App 200 (1984); Konell v. Konell, 48 Or App 551 (1980).

ORDER

The Referee's order dated December 28, 1983 is reversed and the SAIF Corporation's denial dated March 15, 1983 is reinstated and affirmed.

WINZEL L. HAMILTON, Claimant
Schwabe, et al., Defense Attorneys

WCB 83-09143
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant, who was not represented by counsel at hearing and is not presently represented on review, requests review of Referee Galton's order which affirmed a February 15, 1983 Determination Order, upheld the insurer's denial of claimant's aggravation claim and denied claimant's request for payment of temporary total disability for the period August 25, 1983 through September 4, 1983.

At the hearing claimant waived all issues other than his possible entitlement to the above-referenced temporary total disability benefits. On review, claimant reiterates that this temporary disability compensation is the only relief he is seeking.

An additional issue has arisen by virtue of claimant's tender of documentary evidence as part of his submission to the Board. This Board lacks authority to consider any evidentiary material not made a matter of record before the Referee. ORS 656.295(5); Bailey v. SAIF, 296 Or 41, 45 n. 3 (1983). Therefore, we regard claimant's submission as an alternative request to remand to the Referee for further evidence taking.

We have authority to remand if we determine that a case has been improperly, incompletely or otherwise insufficiently developed or heard. The decision to remand upon making such a finding is discretionary. One of the factors we consider in determining whether a case has been incompletely or insufficiently developed or heard is whether the proffered additional evidentiary material might change the result reached by the Referee. Considering the additional evidentiary material for this purpose only, we conclude that even if the Referee had the benefit of this evidence, his conclusion regarding claimant's entitlement to the temporary disability claimed would have been the same. Therefore, the record has not been improperly, incompletely or otherwise insufficiently developed or heard, and claimant's request for remand is denied.

On the merits of claimant's entitlement to temporary total disability from August 26, 1983 through September 4, 1983, we are constrained to agree with the Referee's conclusion that claimant has failed to establish entitlement to these temporary disability benefits. Accordingly, the Referee's order is affirmed.

ORDER

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

KENNETH D. KIRKWOOD, Claimant
Hayner, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 83-09857
February 6, 1985
Order of Abatement

The Board has received the employer's Motion for Reconsideration and Abatement of our Order on Review dated January 21, 1985.

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.

KENNETH D. KIRKWOOD, Claimant
Hayner, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 83-09857
February 28, 1985
Order on Reconsideration

The self-insured employer has requested reconsideration of the Board's Order on Review dated January 21, 1985. The Board issued its Order of Abatement February 6, 1985, requesting that claimant submit his response. On February 19, 1985 the Board received claimant's response along with an affidavit in support of his request that his attorney's fee award be increased.

Most of the employer's contentions center on the weight we accorded Dr. Holbert's opinion, as treating physician. This issue

has been thoroughly discussed and analyzed in the Board's Order on Review and will not be repeated. The fact that Dr. Holbert did not examine claimant until approximately 37 days after claimant's compensable right knee injury does not persuade us that Dr. Holbert should not be considered claimant's treating physician. Particularly where Dr. Holbert had treated claimant's right knee problems on a more or less continuous basis since 1967. In addition, the findings of Dr. Keizer, the physician who saw claimant shortly after the compensable injury, lend further support to the opinion of Dr. Holbert.

The employer also contends that the Board, in reversing the Referee's order, did not discuss the Referee's rationale for according greater weight to the opinion of Dr. Puziss over the opinion of Dr. Holbert. The Referee concluded that neither physician was aware of claimant's approximately three month return to work following the compensable injury. Consequently, the Referee found that this fact strengthened Dr. Puziss' opinion that the compensable injury did not materially contribute to the worsening of claimant's underlying condition and did not aid Dr. Holbert's opinion that the compensable injury had materially contributed.

We did not discuss the Referee's rationale in our previous order because we chose a different mode for analyzing the opposing medical opinions. Moreover, we are persuaded that both Dr. Puziss and Dr. Holbert were aware that claimant had returned to work for a short time following his compensable injury. Not only does Dr. Holbert record in his chart notes that claimant was returning to work, but it was Dr. Holbert who released claimant to return to regular work. Furthermore, Dr. Holbert subsequently opined that claimant had not worked "significantly since" the compensable injury, not that claimant had never returned to work. Finally, Dr. Puziss reports that he had reviewed claimant's medical record, which one would reasonably assume encompassed Dr. Holbert's chart notes and claimant's work release.

Based on the efforts expended and results obtained, we conclude that claimant's attorney's fee award is appropriate. OAR 438-47-010(2).

Accordingly, we grant the requests for reconsideration. On reconsideration, with the above supplementations, the Board adheres to and republishes its former order.

IT IS SO ORDERED.

HAROLD A. LESTER, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-08239
February 28, 1985
Order on Remand

This case is before the Board on remand from the Court of Appeals. The court has instructed the Board to determine the amount of a penalty and associated attorney fee to be awarded claimant and his attorney on account of the self-insured employer's unreasonable delay in submitting claim closure information to the Evaluation Division.

Now, therefore, the self-insured employer is ordered to pay to claimant a penalty in a sum equal to 25% of the permanent partial disability compensation awarded by the Determination Order

dated August 31, 1982. The self-insured employer is further ordered to pay to claimant's attorney a fee in the amount of $350, in addition to the penalty awarded.

IT IS SO ORDERED.

RAYMOND J. MARLIN, Claimant
Myrick, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-03188
February 28, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests, and claimant cross-requests, review of Referee Brown's order which awarded an additional 48° (15%) unscheduled disability on review of a Determination Order dated March 7, 1984 which awarded 48° (15%) unscheduled disability for injury to claimant's low back, and otherwise affirmed that Determination Order. SAIF contends that the Referee's additional unscheduled award is unwarranted and should be reversed. Claimant apparently contends that his "aggravation as of approximately February 25, 1984," warrants claim reopening for a worsened condition pursuant to ORS 656.273.

On the extent of disability issue, we affirm. On the "aggravation" issue, we affirm with the following comments.

At the hearing claimant made alternative contentions of premature claim closure/aggravation. The Referee found that claimant's exacerbation in early 1984 constituted a waxing and waning of his chronic low back condition consistent with his level of permanent disability. See also Billy Joe Jones, 36 Van Natta 1230, 1233-35 (1984); Kenneth L. Elliott, 36 Van Natta 1141, 1143 (1984). Therefore, the Referee denied the relief requested.

On review claimant contends that the evidence establishes an aggravation. Although it is not entirely certain, it appears that claimant's temporary, symptomatic flare-up occurred in late February/early March of 1984, at which time his claim had not yet been closed. Thus, if claimant's condition worsened at all, it worsened prior to claim closure and not sometime thereafter. Under these circumstances, the claim would not be one for an aggravation pursuant to ORS 656.273. Rather, any claim of entitlement to additional temporary disability for the period in question necessarily presents an issue arising under the Determination Order, which terminated temporary disability as of January 27, 1984.

Considering the issue in its proper procedural context, we find no persuasive evidence indicating that claimant's condition was anything other than medically stationary on March 7, 1984, the date of claim closure. See also Jeffrey Barnett, 36 Van Natta 1636, 1638 (1984). Nor do we find that the record otherwise establishes claimant's entitlement to additional temporary disability for any period immediately preceding claim closure.

ORDER

The Referee's order dated August 6, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, in connection with the extent of disability issue, to be paid by the SAIF Corporation.

DONALD D. MILLS, Claimant
Green, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-11411
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee St. Martin's order which refused to allow it an offset for overpaid temporary disability benefits. On review, the employer contends it should be allowed an offset for temporary total disability benefits paid claimant after his attending physician declared him medically stationary. We agree.

Claimant has had two compensable injuries involving his left knee. He has undergone two arthroscopies and a retinacular release. In February 1983, Dr. Kaesche, claimant's treating orthopedist, released claimant to return to his regular work. Claimant's regular work was termed "ground work" and required claimant to throw, handle and stack wood. Claimant returned to his "ground work" position, which also involved bending, squatting and stooping.

On May 13, 1983 claimant returned to Dr. Kaesche complaining of left knee difficulties. Dr. Kaesche noted more effusion in the knee, prescribed a foam rubber splint and instructed claimant to report back in one week. Claimant returned on May 16 and requested a description of his limitations. Dr. Kaesche provided a letter stating that claimant could walk for two hours and stand for 6-8 hours, but should avoid stairs if possible. Dr. Kaesche felt claimant could occasionally stoop, but should not do any repetitive squatting, stooping or heavy lifting. Claimant delivered the letter to the employer, who acknowledged receipt of it on May 19.

On May 18 claimant and Dr. Kaesche reviewed the job description of the "rollbuck" position. The "rollbuck" position primarily required pushing paper rolls which weighed approximately 2000 pounds. According to the job description, claimant would be on his feet 90% of the workday, 50% of the day walking and standing and 25% of the day stooping. Some lifting was involved. (25-50 pounds 50 times a day). Dr. Kaesche felt claimant would be able to handle the job because the lifting did not necessitate deep knee squats. Dr. Kaesche signed and wrote the words "OK W.C. Kaesche, MD 5/18/83" on a copy of the job description. The copy of the job description also contained Dr. Kaesche's conformed signature dated June 2, 1982, at which time the doctor had <u>not</u> released claimant to perform the "rollbuck" position.

Claimant delivered the signed job description to his employer. Requesting that claimant receive a second opinion, the employer arranged an independent medical examination for him with Dr. Rosenbaum. The examination took place on June 6, 1983. Noting obvious effusion in claimant's left knee, Dr. Rosenbaum opined that claimant's condition was not stationary. Dr. Rosenbaum predicted that claimant would be able to engage in any occupation that did not entail repeated bending of the left knee.

By letter dated July 6, 1983 Dr. Kaesche concurred with Dr. Rosenbaum's examination except he felt claimant was medically stationary. Dr. Kaesche ackowledged the left knee's continuing effusion, but felt claimant's condition had plateaued.

On July 19, 1983 the employer submitted Form 1503, requesting claim closure. The employer erroneously indicated that claimant had returned to work on July 12.

By letter dated August 11, 1983 Dr. Kaesche opined that claimant could attempt the "rollbuck" position. Dr. Kaesche noted that claimant had advised him that he had performed the position's duties before. Dr. Kaesche noted a significant difference between the job descriptions he had received on May 18, 1983 and July 25, 1983. The "July" description apparently was not introduced into evidence.

A Determination Order issued August 15, 1983, awarding claimant time loss benefits through July 6, 1983. Receiving a copy of the order on August 16, the employer terminated time loss payments effective that date.

At hearing the employer requested an offset for the overpaid time loss. The Referee disallowed the request, concluding that claimant was entitled to time loss benefits until August 16, 1983. The Referee reasoned that claimant was available for work and was prevented from doing so due to the employer's refusal, pending the acquisition of additional medical information.

We find that the employer is entitled to an offset. Claims should not be closed or temporary disability compensation terminated if the worker's condition has not become medically stationary. ORS 656.268(1). When the injured worker's condition has become medically stationary the employer shall notify the Evaluation Division and claimant and request that the claim be examined and further compensation, if any, be determined. ORS 656.268(2). If the attending physician has not approved the worker's return to regular employment, the employer must continue to pay temporary total disability until termination is authorized by the Evaluation Division. ORS 656.268(2).

Dr. Kaesche, as attending physician, has persuaded us that claimant's condition became medically stationary on July 6, 1983. Thus, the employer was justified in requesting claim closure. Although the employer incorrectly advised the Evaluation Department that claimant had returned to work on July 12, it continued to pay time loss until August 16, when it received notice that claim closure was authorized. Consequently, the employer's termination of temporary benefits was appropriate. Since an overpayment was created and the employer has requested prior authorization, it is entitled to an offset. Forney v. Western States Plywood, 66 Or App 155 (1983).

Claimant argues that by requesting a second opinion, after his attending physician had already released him to work, the employer is responsible for the resulting overpayment and should not be entitled to an offset. Moreover, he contends that the employer shirked its duty, under ORS 656.340, to assist the worker in returning to work. We disagree. Given the ambiguity concerning claimant's restrictions, we believe the employer was justified in seeking an independent opinion. Claimant had only returned to regular work for three months, when his left knee difficulties recurred in May 1983. Moreover, Dr. Kaesche's May 16 letter regarding claimant's limitations and the May 18 "rollbuck" job description diverge in several significant areas. Specifically, claimant's lifting, stooping, walking and standing

capabilities are inconsistent. Finally, Dr. Kaesche's signatures on the May 18 job description, one authorizing and one not, further contributed to the already ambiguous situation.

Under these circumstances we do not perceive the employer's actions as resisting claimant's return to work. Rather, we perceive the employer's actions as an entirely reasonable attempt to determine exactly what claimant's physical restrictions were and whether those restrictions could be accommodated within the "rollbuck" position.

ORDER

The Referee's order dated April 11, 1984 is reversed in part. The self-insured employer is entitled to an offset of $1,834.17 for overpaid temporary total disability benefits paid between July 6, 1983 and August 15, 1983.

CALVIN L. MUNYON, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07197
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Michael Johnson's order setting aside its October 5, 1983 denial of claimant's claim for medical benefits in connection with his 1983 left knee surgery. In addition, claimant contends that the Referee erred in upholding SAIF's July 20, 1983 aggravation denial.

The Board affirms and adopts that portion of the Referee's order upholding the July 20, 1983 aggravation denial.

Claimant was compensably injured when he slipped and fell on January 5, 1979, twisting his right leg and landing on his right kneecap. Dr. Kendall performed right knee surgeries in April and June 1979. Left knee problems were first mentioned in the medical report dated August 17, 1979. Dr. Kendall then wrote:

> "The patient now complains of pain also over the posterolateram [sic] aspect of the left knee which may simply be muscle strain/sprain along the ileotibial band and lateral hamstring secondary to favoring the right lower extremity, placing more stress on the left side.
>
> "Examination of the left knee is unremarkable."

Dr. Wilson reported that on September 20, 1979 he examined claimant concerning "an injury to his knees on the job on January 5, 1979." (Emphasis added.) He subsequently took over claimant's care and performed further surgery on the right knee in November 1979. Claimant attempted work as a night watchman in late 1981 and early 1982, but had to quit after about two months due to problems with his knees. A stipulation dated October 19, 1981 brought claimant's total awards in connection with the January 1979 injury to 35% unscheduled back disability, 60% scheduled right leg disability and nearly 13% scheduled left leg disability.

Following Dr. Wilson's retirement, Dr. Matthews took over claimant's care. In his October 26, 1981 report Dr. Matthews attributed most of claimant's difficulties to long-standing degenerative changes essentially unrelated to the 1979 industrial injury.

Claimant returned to Dr. Kendall's care in September 1983. Dr. Kendall noted that the right knee had apparently stabilized. He stated:

> "Current problem is locking, intermittent giving way and anteromedial joint line pain in the left knee, unrelated to a single episode of trauma."

Dr. Kendall diagnosed a probable degenerative tear of the medial meniscus of the left knee. A partial arthroscopic medial meniscectomy was performed on September 15, 1983. SAIF subsequently denied benefits with respect to the surgery.

Dr. Wilson reexamined claimant on January 17, 1984. He stated that the degenerative changes in both knees were in all probability post traumatic. Based on an examination and a review of the pertinent medical reports, Dr. Wilson opined that claimant's left knee condition was connected fairly definitely by history to his January 1979 injury. He stated: "There apparently has not been too much dispute about this from the various examining doctors and I thus would feel that it represents a part of the claim."

Dr. Matthews reported on February 15, 1984 that the probability was that the left knee symptoms were related to degenerative problems rather than to a 1979 injury.

Dr. Kendall reported on February 21, 1984:

> "To the best of my recollection in having reviewed all of my records regarding this individual, I find no reference to a single episode of trauma or industrial accident that might have caused the parrot-[b]eak tear of the medial meniscus, left knee, excised 9/15/83.
>
> ". . . .
>
> "I feel there is some justification for the patient's contention that his left knee problem might be related to additional stress placed on the extremity as a result of the multiple surgeries right knee performed 1979 through 1981. This may have advanced the otherwise age compatible degenerative changes he has of the left medial compartment and would, therefore, imply an indirect relationship between the January 5, 1979 injury to the right knee and the subsequent necessity for an arthroscopic medial meniscectomy, left

knee. However, I am unable to state with medical certainty that the left knee problem resulted from attempts to protect the right knee and suggest that the question is conjectural."

Dr. Matthews subsequently testified that he had no basis to disagree with Dr. Kendall's having not identified a traumatic injury to the left knee. Assuming that claimant did not bang or twist his left knee, Dr. Matthews stated that he would conclude that the symptoms were not related to the work injury.

We find Dr. Kendall's reports particularly persuasive. A number of the other medical reports, most notably those of Dr. Wilson, appear based on a false history of traumatic injury to the left knee in the January 5, 1979 fall. We accord those reports substantially less weight. See e.g., Steven F. Taafe, 36 Van Natta 1634 (1984). Claimant has not shown a material causal relationship between the work injury and the left knee condition requiring surgery in 1983. Accordingly, we reinstate SAIF's October 5, 1983 denial.

ORDER

The Referee's order dated August 24, 1984 is affirmed in part and reversed in part. The SAIF Corporation's October 5, 1983 medical claim denial is reinstated and approved. We affirm that portion of the Referee's order upholding SAIF's July 21, 1983 aggravation denial.

JOHN D. QUESINBERRY, Claimant
Carney, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-04157
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Tuhy's order which granted claimant an award for 48° (15%) unscheduled disability on review of a Determination Order which awarded no compensation for permanent disability in connection with claimant's low back injury. The insurer contends that claimant is entitled to no compensation for permanent disability.

On our de novo review, we find that claimant has established his entitlement to a minimal permanent disability award. We find the Referee's award excessive and modify his order accordingly.

Claimant was 21 years old at the time of hearing. He was employed by Kelly Services, Inc., as a temporary employe assigned to Galvanizer's Company. He had been working at Galvanizer's for approximately ten days when he sustained the injury in question. He was lifting a heavy metal plate, estimated to weigh between 100 and 200 pounds, when he felt a sharp pain in his lower back. Although he had experienced a "tired back" previously on occasion, he had no history of a prior back injury requiring medical attention or absence from work.

The claim was accepted as one for a disabling injury. Claimant initially sought treatment with chiropractor Blackman, who diagnosed lumbar sprain and spinal subluxations. He also sought treatment with Dr. Torres, a medical doctor who appears to specialize in "industrial/occupational medicine." Dr. Torres

became claimant's primary attending physician. He diagnosed low back myofascial strain and prescribed a back support, physical therapy and oral anti-inflammatory medication. Because claimant continued to be symptomatic, Dr. Torres referred claimant to Dr. Noall, an orthopedic physician, for evaluation and treatment.

Dr. Noall first examined claimant on October 4, 1982, approximately three months post-injury. He diagnosed lumbosacral strain with no objective findings. His assessment included the observation that claimant, "[I]s not a particularly big individual and it may be that he basically has an overuse type of syndrome. I think this is probably the most likely. I think he could do light work at the present time. * * * I would expect him to reach a medically stationary point within six weeks from now." Dr. Noall became claimant's attending physician.

On November 1, 1982, Dr. Noall released claimant for light duty as of November 15, 1982. No light duty was available through Kelly Services, however; therefore, claimant remained off work. On February 11, 1983, Dr. Noall reported to the insurer that he planned no further treatment for claimant. Since he did not perform closing evaluations for his own patients, he recommended an independent medical examination in order to effect claim closure.

Claimant was examined by Dr. Long on March 4, 1983. He found claimant's condition stationary with no objective findings "on which to base an estimate of permanent impairment." On the basis of claimant's continuing mild symptoms, however, he considered claimant as having sustained a "slight permanent impairment" as a result of his industrial injury. He also observed that claimant's "inability to return to normal and full activity may reflect factors [other] than simply the work exposure of July 1982." He indicated his belief that claimant's subjective symptoms did not reflect permanent impairment in excess of 1% of the "whole man."

The claim was closed by Determination Order dated April 5, 1983, with no award for permanent disability.

Dr. Post, an orthopedic surgeon who evaluated claimant on referral from Dr. Torres in October of 1983, indicated there was no permanent partial impairment on the basis of his examination. Dr. Post subsequently reported his suspicion that secondary gains might be a factor in claimant's continuing complaints. He formed the impression that claimant had experienced back problems prior to this industrial injury. As previously indicated, however, claimant's pre-injury back symptoms were not of significant measure.

The record reflects chronic low back symptoms of a relatively mild nature. Although present, claimant's injury-related impairment is very slight.

Claimant is not capable of returning to the heavy work which resulted in his back injury. However, we very seriously doubt that he was capable of physically performing that type of work in the first place. None of claimant's prior work history, of which there is little, involves employment that would be considered heavy in nature. Claimant has had a fair degree of experience in restaurant work, including work as a bus boy, a waiter and in food preparation. He also has had experience in a clerical, record-keeping capacity. Since his injury, he has been capable of working with his brother in commercial and residential painting.

We find that claimant is capable of performing work in the medium category. Furthermore, in view of claimant's slight build and the comments of several examining physicians concerning his work capabilities, independently of the considerations pertinent to his industrial injury, we find that even before this injury, claimant probably lacked the physical capacity to perform work of a heavy nature on a regular, sustained basis. The law requires that we consider claimant's capabilities before his industrial injury and compare them with his residual functional capabilities after his injury. ORS 656.214(5). In this case, claimant's prior work history and the statements of several examining physicians all tend to indicate that claimant's pre-injury functional capacity was for work in the medium category, and that the heavy work which led to this injury actually was beyond his capacity. Thus, claimant's post-injury residual functional capacity equals his pre-injury functional capacity. See OAR 436-65-605.

Nevertheless, the fact of the matter is that claimant did perform heavy work and, as a result of the excessive strain on his back, sustained a mild strain, the residuals of which are now chronic, albeit minimal. Combining this minimal impairment finding with relevant social/vocational factors, including the fact that claimant has a tenth grade education, we find and hold that claimant is entitled to an award of 16° for 5% unscheduled disability for this injury to his low back.

ORDER

The Referee's order dated June 15, 1984 is modified. In lieu of the Referee's award of 48° for 15% unscheduled disability, claimant is awarded 16° for 5% unscheduled disability for injury to the low back.

TIM A. ROSE, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 84-03928 & 84-05405
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Baker's order which upheld the SAIF Corporation's March 1, 1984 denial of claimant's new injury claim and directed that claimant's right knee condition continue to be processed as an aggravation of claimant's compensable 1978 injury.

Claimant, a timber cutter, compensably injured his right knee on May 20, 1978, when he twisted it while jumping off a log. A right medial meniscectomy was performed on January 9, 1979. On September 10, 1979 the treating doctor reported full range of motion and good muscle strength in the knee. He declared the knee rehabilitated and healed with essentially no limitations. A Determination Order dated October 10, 1979 awarded 5% scheduled disability for loss of the right leg.

Claimant returned to the woods. He performed essentially the same duties as before the injury without significant difficulty until late 1982 or early 1983, when he hyperextended his knee. Although he experienced some pain, after a weekend's rest he resumed his usual work. Claimant neither saw a doctor nor filed a claim at that time.

On about January 3, 1984 claimant slipped and fell against a steep bank, again twisting his right knee. He continued working for a few days. Due to increasing swelling and decreasing mobility, he then took a few days off. After returning to work he experienced a severe pain in his knee while sitting on his haunches.

Unable to continue working, claimant saw Dr. Freudenberg on January 9, 1984. Dr. Freudenberg performed arthroscopic surgery on January 17, 1984, removing a one centimeter oblong loose body and multiple smaller ones. On February 7, 1984 he reported:

> "From an objective point of view his intra-articular findings and x-ray findings show early degenerative joint disease of the radial compartment with spurring and the recent problem was that of a loose body noted in the knee. This was removed through the arthroscope and he is convalescing satisfactorily from this. He, however, has tried to go back to work in the woods. He worked for a half a day on February 2, 1984. Prior to working he felt that he could handle it, however, his knee was very painful especially in the medial aspect and he had to quit working because of pain and has not worked since. At the present time he is authorized for time loss from February 3 until his next appointment in three weeks. . . .
>
> "In my opinion his injury one year ago is probably an aggravation of his old problem from the five-year-old knee injury. The loose body which was present had been there definitely longer than one or two months, whether or not it was there from just one year's time or five year's time is impossible to say, however. The knee, however, is showing continued wear and tear changes related to his five-year-old injury, and especially related to the loss of the meniscal shock absorbing function. This is seen unfortunately all too commonly after medial meniscectomy."

SAIF denied the new injury claim on March 1, 1984, suggesting that claimant submit a written request that the 1978 claim be reopened. Claimant promptly requested reopening, noting that his bills were beginning to accumulate. SAIF granted the request.

The circumstances of the January 1984 injuries together with claimant's subsequent inability to work persuades us that these injuries contributed to claimant's condition. Although the treating physician did not find objective confirmation of such a contribution, that does not conclusively establish that there was no contribution. Claimant has met his burden of proof.

ORDER

The Referee's order dated August 27, 1984 is reversed in part and affirmed in part. The March 1, 1984 denial of new injury is set aside and benefits shall be paid according to law under the new claim. The Referee's order is affirmed in all other respects. Claimant's attorney is awarded $1,500 for services at hearing and on Board review relative to the denied claim, to be paid by the SAIF Corporation.

JOHN W. SMITH, Claimant
Peterson & Peterson, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-04038
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Shebley's order which approved the insurer's denial of claimant's low back aggravation claim. The employer cross-requests review of that portion of Referee Shebley's order which reversed its insurer's denial of compensability of claimant's medical treatment between December 1982 and June 1984.

Claimant was a construction worker who sustained a low back injury on April 16, 1980. Dr. Gripekoven released him for regular work on May 14, 1980, and reported that there was no permanent impairment from the injury. The claim was closed by Determination Order with no award for permanent disability on May 30, 1980. He returned to work for less than a month, then he went on vacation to Montana and "didn't do anything there a long time." When he came back from vacation in March 1981, he returned to work for the same employer. He worked about a month and his back "gave way" when he lifted a sheet of sheetrock to a ceiling. Claimant has not worked since. Claimant then moved to Montana. In October 1981, his family doctor in Montana reported that claimant had hurt his back in March 1981 due to a fall at work. The doctor reported that the 1981 incident had only aggravated claimant's 1980 injury and that he had lost no work time because of it. The physician reported that he had no evidence "other than the patient's history which would enable me to relate his current back injury to the specific injury which he describes as happening in Portland, Oregon in 1980." The aggravation claim was settled by stipulated order with no time loss and no permanent disability on December 8, 1982.

On December 17, 1982 claimant was examined by Dr. Chenault "for the purpose of reopening the claim of back injury." He reviewed claimant's history and discounted the contribution of the 1981 accident because "there was no pain other than what he was already feeling." Claimant presented new complaints about his legs. The doctor found a lumbar strain secondary to the 1980 industrial injury and early degenerative disc disease unrelated to the industrial injury. On March 31, 1983 Dr. Chenault reported that claimant's work restrictions were due solely to degenerative disc disease.

On March 28, 1983 claimant was examined by Dr. Fenton. He reported his diagnosis of "chronic lumbar and lumbosacral spinal strain-sprain with subluxations, accompanied by disc syndrome." He reported that there were not enough objective findings to substantiate the subjective complaints.

On April 12, 1983 the employer's insurer, SAIF, denied the aggravation claim and compensation for the current complaints on the basis that the current complaints were not related to the 1980 injury.

On May 10, 1983 claimant was examined by Dr. Stump. He reported his diagnosis of lumbosacral strain with persistent back tightness secondary to poor rehabilitation. He felt that a rehabilitation program with regular stretching exercises would be appropriate. The doctor made this conclusion based on claimant's report that claimant had been restricted to light duty and that claimant had returned to his work and worked continuously at the construction trade until the 1981 incident. The doctor referred claimant to a physical therapy program.

The therapist reported that claimant "will require this rehabilitation program for possibly up to 2 to 3 months to be able to return to employment." Physical therapy was performed three times a week from August 8 through November 7, 1983. On November 17, 1983 claimant returned to Dr. Stump and complained of worse pain and increasing symptoms in other parts of his body. Dr. Stump diagnosed lumbosacral strain by history and suspected possible fibrositis as an additional problem. No connection between fibrositis and the 1980 industrial injury was suggested. He prescribed an anti-inflammatory and an antidepressant. On follow-up examination, the doctor reported that claimant had not taken the drugs regularly "because he did not want to become dependent on the medications. . . . The times he did take the medication it did seem to be somewhat helpful in reducing his symptomatology." The doctor told claimant to take the medications "on a regular basis so we may assess whether they could reduce his symptomatology." The doctor also reported that "he shows little in the way of objective abnormality, but does complain of diffuse discomfort."

On December 12, 1983 Dr. Stump reported that claimant had been faithfully taking his medication and that there was a marked decrease in his diffuse joint pain, although claimant still reported considerable low back discomfort. He reported that fibrositis was now a probable diagnosis and that claimant should limit his repetitive bending and stooping, limit his lifting to 25 pounds, and he should change position freely from sitting to standing. The doctor did not relate the fibrositis to the 1980 injury.

On March 1, 1984 Dr. Stump reported that the limb and joint symptomatology presented at the last examination were unrelated to claimant's industrial injury, that the diagnosis of fibrositis was confirmed, the degree of disability had not changed during his observation period, and that he would attribute the low back pain to the industrial injury by claimant's history. He reported claimant's impairment to be "Category I of the Categories of the Dorsolumbar and Lumbosacral Impairments" of the Washington Administrative Code. A copy of the relevant rule was admitted and category one is: "No objective clinical findings. Subjective complaints and/or sensory losses may be present or absent." For comparison, category two is: "Mild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant x-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present."

On March 9, 1984 Dr. Bergman examined claimant. He reported

"a lumbar strain superimposed on factors of general lumbar disc degeneration." He agreed with Dr. Stump's work restrictions, agreed with the diagnosis of fibrositis, and agreed that the diffuse pain was not related to an industrial injury.

On April 3, 1984 claimant obtained a disability rating from Dr. Aflatooni. There is no report of an examination by this doctor in the record. The doctor rated claimant's low back pain problem as moderate, which was defined on the rating form as "a significant interference with one or more basic work-related activities." This report is accorded little weight because its conclusions are not supported by any observations or reasoning on the record submitted. Marjorie Hearn, 36 Van Natta 1300 (1984); Joyce F. Adair, 35 Van Natta 203 (1982).

In June 1984 Dr. Gripekoven, who had been claimant's attending physician at the time of the original injury and closure in 1980 and who had examined claimant last on May 14, 1982, reviewed claimant's medical files. He reported that there was no significant change in claimant's condition since the May 1982 examination, no evidence of material worsening, and no need for reopening the claim.

The Referee found that claimant's condition had not worsened since the last arrangement of compensation because of the preponderating weight of the medical evidence that there had been no worsening of claimant's injury-related condition. We agree with the Referee.

The stipulated order of December 8, 1982 affirmed the denial of the aggravation claim and time loss benefits but allowed payment for medical examinations and drugs. Dr. Chenault examined claimant on December 17, 1982, and opined in March 1983 that claimant's condition was due to natural progression of unrelated underlying disc disease, and suggested work restrictions in the medium category and exercise therapy with a physical therapist.

When Dr. Stump examined claimant on May 10, 1983 he did not take x-rays nor did he see Dr. Chenault's x-rays. He recommended physical therapy because of his impression that claimant's problems were secondary to poor rehabilitation from the 1980 injury. He believed that claimant had returned to work and had continued to work until February 1981. A three month, three times a week physical therapy program did not improve claimant's back condition and Dr. Stump later confirmed that claimant's problems were due to the unrelated fibrositis. Dr. Stump also agreed with the examination reports and limitation assessment of Dr. Chenault. Dr. Bergman agreed with Dr. Stump's assessment.

Because all of claimant's doctors appear to agree that his condition since the last arrangement of compensation is due to problems unrelated to his industrial injury, we find that claimant has not proven that the medical services which he obtained between December 1982 and June 1984 were related to his 1980 industrial injury. Therefore, we reverse that portion of the Referee's order which awarded compensation for medical services between December 1982 and June 1984.

ORDER

The Referee's order dated July 26, 1984 is reversed in part and affirmed in part. That part of the order which awarded

compensation for medical care and treatment between December 1982 and June 1984 is reversed. The denial of reopening for aggravation is affirmed.

MARY J. SPONTAK, Claimant
Blackhurst, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-06550 & 83-09006
February 28, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

EBI Companies request review of Referee Brown's order which: (1) set aside its denial of aggravation of claimant's mid-back and shoulder condition; (2) upheld Fred Meyer's denial of claimant's new injury claim; (3) awarded claimant a $300 penalty and associated $300 attorney fee, to be paid by EBI for unreasonable delay in providing medical reports; and (4) awarded claimant's attorney $1,000 for prevailing on the EBI denial.

ORS 656.262(10) authorizes the assessment of penalties and attorney fees for certain unreasonable conduct. Penalties awarded under that statute must be based on a percentage of amounts then due, however. Where all benefits have been timely paid during the pertinent period, neither penalties nor attorney fees can be awarded under that section. E.g., EBI v. Thomas, 66 Or App 105 (1983). EBI contends and we find that there were no "amounts then due" upon which a penalty could be assessed. Accordingly, we reverse that portion of the Referee's order awarding a $300 penalty and associated $300 attorney fee.

The Board affirms and adopts the order of the Referee in all other respects.

ORDER

The Referee's order dated August 7, 1984 is affirmed in part and reversed in part. Those portions of the order awarding a penalty of $300 and awarding claimant's attorney a fee of $300 relative to the penalty are reversed. The Referee's order is affirmed in all other respects.

CLARK H. WILLARD, Claimant
Evohl F. Malagon, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 83-00576
February 28, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Michael Johnson's order which denied an offset for permanent partial disability compensation paid pursuant to a December 16, 1982 Determination Order in excess of that awarded by a February 27, 1984 Determination Order issued after vocational rehabilitation ceased. Claimant cross-requests review of that portion of the Referee's order upholding the 1984 Determination Order award of 96° for 30% unscheduled disability for injury to his low back.

Claimant, a mill worker, compensably injured his low back in a fall on May 2, 1980. A microlumbar diskectomy at L4-5 was performed in April 1981. A second diskectomy and a fusion of L4, L5 and the sacrum were performed in November 1981. Claimant was

pronounced medically stationary by his primary treating physician, Dr. Corson, on November 15, 1982. He was awarded 45% unscheduled disability by a Determination Order dated December 16, 1982.

Claimant completed a seven month approved on-the-job training program in small engine repair in February 1984. Although claimant tried very hard and made much progress, the program was too short to provide claimant adequate training to qualify him for employment in the field. Due to his back condition, claimant was unable to lift much of his work to the bench and was unable to rope start professional type chain saws.

On February 6, 1984 Dr. Corson reported that claimant said that his back was pain free much of the time. He complained that pressure on his right thigh or buttock produced an electric-like sensation going down to his right foot. Claimant reported an unpleasant numbness over his right low back and into his buttocks. Claimant stated that although standing and walking for moderate distances did not bother him, his two mile walks to work were sufficient to bring on an aching in his hip. He also reported problems rope starting engines and putting on his shoes and socks.

On examination, claimant was able to bend slowly forward to 40 degrees and laterally to 30 degrees. Palpation of the low back revealed discomfort over the lumbosacral junction, iliolumbar angle and right sciatic notches. X-rays indicated no movement at the fusion sites. Dr. Corson declared claimant medically stationary with moderate disability. He cautioned against lifting and bending. He indicated that the disability restricted claimant from bending and carrying and affected him in such activities as pulling on a starter rope. Dr. Corson nonetheless released claimant to regular work as of February 20, 1984.

On February 27, 1984 a Determination Order issued stating in pertinent part:

> "On redetermination the Department finds your permanent partial disability award should be modified. The Department orders the named insurance company to pay you an award of compensation equal to 96 degrees for 30 percent unscheduled disability resulting from injury to your low back.
>
> " . . . The named insurance company is ordered to notify you of the number and amount of periodic payments you may receive as a result of this award. This award is in lieu of, and not in addition to, all previous awards made in this claim."

After a short period of part-time employment in small engine repair, claimant returned to work in the mill, but in a lighter job than he had previously held.

Dr. Daskalos examined claimant on February 29, 1984 and reported that claimant related that his present mill job stressed his back less than had his vocational training. Claimant stated that he experienced intermittent low back pain, particularly after

a full day's work, and that he was unable to get out of bed in the morning as fast as he used to. Dr. Daskalos reported that the lumbar spine exhibited decreased motion; extension being approximately 10 degrees, flexion being 22 degrees and side bending being with finger tips to the knee creases. He stated that although claimant could continue his present work status, he should be considered a very high risk for reinjury and should not lift over 50 pounds. He also recommended an exercise program.

The insurer notified claimant on March 14, 1984 that payments made on the 45% award totaled $3,607.06 more than the value of the 30% award, and that the alleged overpayment would be deducted from future benefits.

Claimant has an eighth grade education. At the time of the hearing he was working four ten hour shifts per week as a planer feeder. His job required that he stand watching boards go through a machine, periodically turning boards as they moved on a waist high chain and occasionally flipping and rolling broken boards off the chain. He was exhausted at the end of his shift. Claimant limits lifting to 20 pounds and does no bending.

On our de novo review of the record, considering claimant's permanent impairment as a result of the compensable injury together with the pertinent social/vocational considerations, see OAR 436-65-600 et seq., we determine that claimant would be most appropriately compensated for his permanent loss of earning capacity by an award of 45% unscheduled disability. As we award an amount identical to that awarded by the December 16, 1982 Determination Order, the insurer's request for offset if moot.

ORDER

The Referee's order dated August 17, 1984 is affirmed in part and modified in part. Claimant is awarded 144° for 45% unscheduled disability for his low back in lieu of all prior awards made in this claim. That portion of the Referee's order awarding claimant's attorney $400 for successfully defending at hearing against the insurer's effort to obtain an offset is affirmed. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3000 as a reasonable attorney's fee.

CAROL N. BROCK
Karol Wyatt Kersh, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 82-05494
March 6, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Wilson's order that denied claimant's request for a penalty and insurer-paid attorney fee for alleged unreasonable delay in providing medical services. We modify the Referee's order to award an attorney fee.

Claimant sustained an industrial injury in 1979. After a long regimen of conservative treatment, claimant was diagnosed as having thoracic outlet syndrome for which she underwent surgery. Her problems continued, and a recommendation was made that claimant be evaluated by an out-of-state specialist. There was

disagreement as to whether further surgery of the type used by the specialist was indicated. Based upon that disagreement, the insurer wrote claimant a letter on June 11, 1982 in which it stated that it declined to pay for the out-of-state consultation and possible surgery. The letter did not contain standard "denial" language. The letter did contain a settlement offer.

After receiving additional medical reports, the insurer agreed to pay for the out-of-state consultation and possible surgery on July 12, 1982. A hearing was eventually held at which the only issue was whether claimant was entitled to a penalty and associated attorney fee.

On de novo review, we conclude that the insurer's June 11, 1982 letter to claimant was a denial. Although we are persuaded that the insurer did not intend that the letter be a denial, it is reasonable that claimant would have viewed it as such. Under the circumstances, we believe the insurer was acting in good faith and not unreasonably. However, neither was it unreasonable for claimant to seek the services of an attorney.

The evidence further persuades us that claimant's attorney did meaningfully participate in the negotiations that led to the withdrawal of the denial. Under all the circumstances, we conclude that claimant's attorney should have been awarded an insurer-paid fee of $300. The Referee's order is modified accordingly.

ORDER

The Referee's order dated February 4, 1983 is modified to award claimant's attorney a fee of $300 for services in obtaining the withdrawal of the de facto denial. In all other respects, the Referee's order is affirmed.

ARBON J. BOOKER, Claimant
Kenneth D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 83-07899, 83-06990 & 83-0273M
March 13, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation and claimant request review of Referee Shebley's order which: (1) set aside SAIF's denial, insofar as it denied responsibility for claimant's continued low back medical treatment; and (2) recommended that the Board exercise its "own motion" jurisdiction and address the issue of claimant's entitlement to temporary and permanent disability compensation. On review, SAIF and claimant contend that claimant's current low back treatment is the result of a 1983 new injury, for which Fremont Indemnity Company is the responsible party. We agree and reverse.

Claimant was 50 years of age at the time of hearing. In 1969, while employed as a carpenter for SAIF's insured, claimant compensably injured his low back. His condition was diagnosed as mild, acute sprain. Treatment was conservative. He returned to work with the recommendation that he limit heavy lifting. Claimant received 16° for 5% unscheduled permanent disability.

Claimant sought chiropractic treatment in 1971 and 1972 for a flare-up of symptoms, precipitated by heavy lifting on the job. Around this time claimant changed occupations, entering the restaurant management field. There is no record of medical treatment between 1972 and 1978. On January 6, 1978 claimant received chiropractic back adjustments from Dr. Zimmerman.

Between February 8, 1980 and February 8, 1983 claimant treated with Dr. Zimmerman 21 times. Claimant received three low back adjustments from Dr. Zimmerman in 1983. Beginning on February 9, 1983, claimant received treatments from Dr. Pfeiffer, chiropractor. Dr. Pfeiffer provided conservative treatment on seven occasions from February 9 - 22, 1983.

On February 22, 1983 claimant experienced an immediate sharp low back pain while lifting an 80 pound box of frozen meat. Fremont was the insurer. Dr. Pfeiffer treated claimant twice on February 22, 1983. Once, prior to the lifting incident and, again, after the incident. Dr. Pfeiffer termed claimant's initial visit "a routine treatment." However, at claimant's second visit, the doctor noted that claimant exhibited considerable symptoms precipitated by the lifting incident. Dr. Pfeiffer reported that claimant's symptoms appeared to be considerably more intense than when he first began treating claimant on February 9.

The following day claimant sought emergency room treatment. Claimant was examined by Dr. Weeks, orthopedist, who prescribed bedrest, a heating pad and medication. When claimant's pain persisted, claimant returned to Dr. Weeks. Following further examination and testing, a herniated disc was diagnosed.

Dr. Weeks referred claimant to Dr. Gehling, neurologist, who performed, in March 1983, a hemilaminectomy, foraminotomy and discectomy at L-4, 5 on the right. During the surgery Dr. Gehling found bony disease, scar tissue, a bulging disc on the right side of L4-5 and a free disc fragment. Dr. Gehling reported that it appeared that claimant's lifting and rotating motion narrowed a foramen and crushed a nerve root, which possibly extruded more disc that had already been bulging. The doctor felt that claimant's current complaints were "certainly precipitated" by the February 1983 injury. However, Dr. Gehling opined that claimant likely had a predisposition for the problem. The doctor further opined that the injury caused an exacerbation of an already preexisting condition. Dr. Gehling concluded that claimant's current symptomatology represented a worsening of a preexisting condition.

Dr. Gehling was subsequently deposed. The doctor testified that the etiology of the bony disease was a long term degenerative process and was not worsened by the February 1983 incident. The scar tissue was a chronic inflammation, not caused by the incident. Based on scarring, Dr. Gehling concluded that the free disc fragment had been in existence before the February 1983 incident. The doctor could not predict how long the bulging disc had existed, but his surgical findings led him to believe that claimant was very significantly predisposed toward the problem. Dr. Gehling opined that claimant had an evolving chronic process, which had progressed to a point where it was now very noticeable. The doctor further opined that the February 1983 incident did not worsen claimant's condition, but merely caused the symptoms.

Dr. Weeks opined that the February 1983 incident was an independent material cause for claimant's hospitalization and treatment. The Orthopaedic Consultants, who examined claimant in July 1983, opined that his condition and worsening were the result of his preexisting condition, dating back to the 1969 injury, as well as the February 1983 injury. The Consultants concluded that the 1969 injury made him much more vulnerable to a further lifting injury. Dr. Reilly, neurologist, reviewed claimant's medical record. The doctor could not conceive that the 1969 injury, followed by an almost asymptomatic 10 year period could have caused the 1983 ruptured disc. Dr. Reilly concluded that it was more probable that claimant's condition was related to the February 1983 lifting incident.

Where a compensable injury at one employment contributes to a disability occurring during a later employment, the original employer remains liable unless the latter employment contributed to claimant's disability. Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1984). If the second incident contributes independently to the injury, the second insurer is solely liable even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition. Smith v. Ed's Pancake House, 27 Or App 361 (1976).

The preponderance of the evidence establishes that the February 1983 lifting incident independently contributed to claimant's disability. Consequently, we find that Fremont is the responsible insurer. Although Dr. Gehling, the treating surgeon, does support the theory that claimant's 1983 low back problems were an inevitable development of his 1969 injury, we do not conclude from his opinion that he totally disregarded the February 1983 lifting incident as an independent contributing factor to claimant's disability. The remaining medical opinions acknowledge the February 1983 incident's independent contribution which we believe is compatible with claimant's history. That history includes: (1) a 1969 low back sprain; (2) recurring symptoms, but infrequent medical treatment for approximately 10 years; (3) approximately 30 palliative chiropractic treatments for the next three years with no time loss; (4) a 1983 lifting incident followed by an immediate increase in low back pain; and (5) a diagnosis of a herniated disc.

ORDER

The Referee's order dated June 14, 1984 is reversed. The SAIF Corporation's denial dated October 20, 1983 is reinstated and affirmed in all respects. Fremont Indemnity Company's denials dated July 14, 1983 and August 3, 1983 are set aside. Fremont is ordered to reimburse SAIF for all claim costs, including attorney fees, paid or payable pursuant to the Referee's order. Claimant's attorney is awarded $500 for his active and meaningful participation on Board review, to be paid by Fremont.

LEONARD C. FOUTS, Claimant
Emmons, et al., Claimant's Attorneys
David J. DeNorch, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00187 & 84-02610
March 13, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Liberty Northwest Insurance Corporation requests review of that portion of Referee Seifert's order which overturned its denial of responsibility for claimant's 1983 low back injury and upheld the SAIF Corporation's denial of responsibility for aggravation of claimant's 1980 low back injury. The issue on review is responsibility.

The Board affirms and adopts the order of the Referee. Claimant's attorney took an active part on Board review and opposed the request of the insurer on the risk at the time of the new injury to assign responsibility to the aggravation insurer and is therefore awarded a fee for services on Board review. Robert Heilman, 34 Van Natta 1487 (1982).

ORDER

The Referee's order dated August 7, 1984, is affirmed. Claimant's attorney is awarded $350 for services on Board review, to be paid by Liberty Northwest Insurance Corporation.

LORETTA C. LOEHR, Claimant
W.D. Bates, Claimant's Attorney
Bullard, et al., Defense Attorney

WCB 83-10921
March 13, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Seymour's order which: (1) set aside its denial of claimant's left wrist tendinitis claim; and (2) assessed it a penalty and accompanying attorney fees for an unreasonable denial. On review, the insurer contends the claim is not compensable. We agree and reverse.

Claimant was 35 years of age at the time of hearing. She began work for her employer in May 1983 as a billing clerk. Her duties involved typing information into a computer terminal approximately six to nine hours per day. Other than a slow period in July and August, claimant worked full-time until October 20, 1983. On that date, while extending her little finger to touch the cancel button on her keyboard, claimant felt a sharp pain in her left wrist. This pain continued whenever claimant attempted to use her little finger.

The following day claimant sought treatment from Dr. Williams, her treating physician. Since Dr. Williams was unavailable, claimant was examined by Dr. Albright. Claimant gave a history of a painful left wrist which began hurting while typing the previous day. Dr. Albright noted that claimant had experienced a similar problem in May when she sought emergency room treatment and had received a diagnosis of acute strain. Dr. Albright diagnosed "typical tendinitis."

Dr. Williams examined claimant on October 25, 1983. In his initial medical report (Form 827), Dr. Williams diagnosed

flexor-ulnar tendinitis of the left wrist and forearm. The doctor indicated the condition was work-related.

On November 2, 1983 claimant was interviewed by a SAIF investigator. An excerpt of the tape of that interview was played at the hearing. A portion of that excerpt states as follows:

> "Q: So now, have you ever had an injury just before?
>
> "A: I have only -- no, I really haven't.
>
> "...Q: Therefore, you've never had another arm injury, as such, or wrist injury, as such?
>
> "A: No, I have never had tendinitis before."

On November 7, 1983 SAIF issued its denial, which was primarily based on insufficient evidence. In a November 23, 1983 letter to Dr. Williams, SAIF gave the following reasons for its denial: (1) the May 1, 1983 emergency room treatment, which occurred the day before claimant began work; (2) the similarity in complaints, which claimant had denied; (3) claimant's involvement in her own company which could possibly contribute to her problem; and (4) the lack of improvement in claimant's condition since she had been off work.

In his reply to SAIF's letter, Dr. Williams did not "quarrel with any of the points made." However, since claimant "very clearly indicated to [Dr. Williams] that she felt that her job as the biller was the reason for her distress," Dr. Williams opined that the injury was work related.

With his reply, Dr. Williams enclosed claimant's medical record which contained several references to wrist problems preceding claimant's employment. In an August 1979 chart note, which primarily concerned an unrelated condition, there is a reference that claimant's "left arm was a little bit uncomfortable with a vague feeling of distress without anything specific." In an October 1979 chart note claimant complained of a sore left ulnar styloid within the past 24 hours. Arthralgia was the diagnosis. The condition was treated with a splint and medication. On April 8, 1983 claimant was receiving treatment for an unrelated condition. At the time, she complained of a slight weakness in her right bicep, "even though she feels that her left arm is the more uncomfortable." In addition to the anti-arthritic medication she was already taking, Dr. Williams prescribed a pain pill and a muscle relaxant for claimant.

The May 1, 1983 emergency room report indicates that claimant experienced "sharp" pain in the left wrist area when a dinner plate had been quickly taken from her grasp. The report noted that claimant was "now better" and that she had "no previous trauma/problems." The report further noted that claimant was taking anti-inflamatory medication. The diagnosis was left wrist sprain. Claimant was instructed to use a volar splint for 4-5 days, elevate the wrist, take Tylenol for the pain and see Dr. Williams in one week.

At hearing, when asked if she had experienced previous left wrist problems, claimant testified, "No, I have typed for years and have -- never had tendinitis before." Claimant stated she went to the emergency room in May 1983 because she wanted to have the wrist taken care of before she started her new job the following night. She felt that her problems in May 1983 and October 1983 were not related at all in that the May 1983 problem felt like her wrist had "gone to sleep and it didn't want to go back in its normal position," did not last and was "more or less, almost in my mind." On the other hand, the October 1983 problem was a "real pain, and I still have it." In addition, she did not recall the October 1979 treatment for a "sore left ulnar styloid."

Claimant testified that she had a stroke "some years ago" and has experienced numbness on her left side since then. She considers the problem "only psychologically" in that examinations have found her to be perfectly healthy and "have remedied that situation by exercise."

Dr. Williams has referred claimant to two orthopedists. Neither doctor offered an opinion concerning the relationship between claimant's condition and her work. However, each doctor reported a slightly different history. Dr. Filarski noted that claimant experienced an insidious onset of left wrist pain while working at her billing computer. Dr. Phifer reported that claimant experienced pain in the ulnar aspect of her left hand and forearm when she hit the carriage return with the ulnar aspect of her left hand while typing at work. Claimant's computer terminal does not have a carriage return. Claimant denied this history, testifying that she told Dr. Phifer that she experienced her pain when she hit the cancel button with her left little finger.

Prior to, and during, her employment as a billing clerk, claimant owned a wholesale import distributorship which operated from her home. Claimant had a secretary, but admitted that on rare occasions she performed clerical duties. These duties included filing, typing and inventorying, in which she would remove merchandise from boxes. Claimant acknowledged that she had "lots of paperwork" prior to her work incident and had received an order prior to that time. However, she recalled October 1983 as a quiet time with no large orders. Claimant's supervisor testified that claimant had never complained to her about any left wrist problems prior to the October 1983 incident. The supervisor, who had done some work for claimant's import business, "vaguely remember[ed]" claimant receiving a lot of shipments around that time.

Relying on Dr. Williams' uncontradicted opinion, the Referee found the claim compensable. The Referee reasoned that Dr. Williams was the best interpreter of his own chart notes regarding claimant's past medical history and was well aware of her May 1983 problem. The Referee further stated that he had no reason to doubt the veracity of claimant in reciting her symptoms.

We do not find Dr. Williams' opinion persuasive. Considering claimant's medical history, we think it was incumbent upon her to submit an expert analysis of her prior left wrist problems, distinguishing them from her current complaints. Moreover, a discussion of the potential contribution, if any, from claimant's

"stroke" and import business duties would also have been enlightening. In the absence of a cogent analysis and conclusion from a medical expert on this complex and pivotal issue of causation, claimant's attempts at a distinction between her prior and current left wrist problems are unpersuasive.

Applying either an injury or occupational disease analysis, we are not persuaded that claimant has established that her work activities were either: (1) a material contributing cause of her disability; or (2) a major contributing cause of her condition or any worsening of a preexisting condition.

ORDER

The Referee's order dated May 31, 1984 is reversed. The SAIF Corporation's denial dated November 7, 1983 is reinstated and affirmed.

JEFFREY A. MILLS, Claimant
James P. O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05303
March 13, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seifert's order which upheld the SAIF Corporation's denial of claimant's aggravation claim. The issue is whether claimant's back condition has worsened since the last arrangement of compensation herein, an April 1982 stipulation; and assuming it has, whether it is related to claimant's November 1980 industrial injury. In May of 1984 Dr. Struckel recommended that a lumbosacral fusion and possible decompression procedure be performed for treatment of claimant's spondylolisthesis.

The condition for which claimant presently seeks treatment is the same condition which was the subject of prior litigation. Jeffrey A. Mills, 36 Van Natta 714 (1984). This litigation ultimately resulted in a Board order which held that claimant failed to establish a causal nexus between his back condition and either one of his 1980 industrial injuries, including this injury. Based upon the record before us, we find and hold that this prior adjudication precludes the present claim. See Lewis Twist, 34 Van Natta 52, 34 Van Natta 290, 292 (1982); compare Michael A. Ratliff, 35 Van Natta 83 (1983).

ORDER

The Referee's order dated August 29, 1984 is affirmed.

IGENE G. SHAW, Claimant
W.D. Bates, Jr., Claimant's Attorney
J.W. McCracken, Defense Attorney

WCB 83-09266 & 84-03931
March 13, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests, and claimant cross-requests, review of Referee Daron's order which awarded 112° (35%) unscheduled disability for injury to claimant's low back on review of a Determination Order which awarded no compensation for permanent disability. The issue is extent of disability. The

employer contends that the Referee's award is excessive and should be reduced to 64° (20%) unscheduled disability. Claimant contends that the Referee's award is inadequate and should be increased to 128° (40%) unscheduled disability.

In view of the manner in which this case has been briefed and argued to the Board, the issues on review are very narrow. The employer maintains that under the administrative guidelines for evaluating unscheduled permanent disability, claimant's bachelor's degree in sociology warrants a value of -20 for the education factor. OAR 436-65-603. In addition, the employer concedes that claimant's permanent impairment is in the mild category, suggesting that a value of +15 be assigned to this factor.

Claimant contends that because he has worked in the mill for ten years and has never vocationally utilized his sociology degree, he should be considered as having no more education than a high school graduate. Therefore, claimant contends that the appropriate value for the education factor is zero. OAR 436-65-603(2). In addition, claimant contends that the degree of his physical impairment warrants assignment of a +25 value, which would be considered in the mildly moderate category.

On our de novo review of the record, we agree with the employer's contentions. As to claimant's physical impairment, we find it to be of a mild degree. In addition, we believe the employer's suggestion of a +15 value is generous. With regard to claimant's education, it is clear that claimant, who may now find it necessary to enter the white collar world as a result of his industrial injury, is much more marketable than a high school graduate by virtue of his college degree. Of course, claimant is not in the same position as an individual who has been engaged in some form of social work, or a related field, since obtaining his undergraduate degree; however, claimant's suggestion that his bachelor's degree be completely disregarded is unrealistic.

We find that, as a result of his industrial injury, claimant has sustained a loss of earning capacity equivalent to 64° for 20% unscheduled disability. We modify the Referee's order accordingly.

ORDER

The Referee's order dated July 12, 1984 is modified. In lieu of the 112° for 35% unscheduled disability awarded by the Referee, claimant is awarded 64° for 20% unscheduled disability for injury to his low back.

SALLY CARDER, Claimant
Jerry Gastineau, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-07474
March 15, 1985
Order Denying Motion to Dismiss

Claimant, by and through counsel, has moved the Board for an order dismissing the SAIF Corporation's request for review on the ground that it was not timely filed. The Opinion and Order was published December 10, 1984. Subsequently, on December 21, 1984, the Opinion and Order was abated in order that the Referee could consider SAIF's request for reconsideration. On January 28, 1985 the Referee issued his Opinion and Order on Reconsideration, in which he republished the first order. SAIF requested review on

February 11, 1985. It is from the January 28, 1985 order that SAIF appeals. Its request is timely. ORS 656.289(3).

Claimant's motion is denied.

IT IS SO ORDERED.

HAROLD A. LESTER, Claimant
Hayner, et al., Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 82-08239
March 15, 1985
Order on Reconsideration

The employer has requested reconsideration of our Order on Remand issued February 28, 1985 in which we assessed a penalty and attorney fee based upon permanent partial disability ordered by a Determination Order. The Court of Appeals had instructed the Board to determine the penalty and attorney fee. Lester v. Weyerhaeuser Co., 70 Or App 307, rev den, 298 Or 427 (1984).

The employer argues that no penalty is permitted under EBI Companies v. Thomas, 66 Or App 105, 111 (1983). The employer made the same argument to the Court of Appeals and the Supreme Court. We are bound to obey the mandate of the Court of Appeals. See Rexnord, Inc. v. Ferris, 69 Or App 146, 148 (1984). We conclude that our acceptance of the employer's arguments, no matter how compelling they may be, would be contrary to the mandate.

Reconsideration is granted. On reconsideration we adhere to and republish our former order.

IT IS SO ORDERED.

JAMES A. POELWIJK, Claimant
Richard E. Fowlks, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-00300
March 15, 1985
Order Denying Dismissal

The employer has moved the Board for an order dismissing claimant's claim. The employer has, on the other hand, timely requested Board review of Referee Menashe's Opinion and Order entered in this matter on January 16, 1985. We view the pending request for review as raising the same issues as those raised by the employer's motion to dismiss the claim. We will review the employer's contentions in connection with our review of the Referee's order. The motion to dismiss is denied.

The employer has also requested that the Board consider claimant's deferred petition for own motion relief at the same time we review the Referee's order. Consistent with the Board's long-standing policy, we will do so. The employer has advanced no compelling reasons to support its request for expedited review, and that request is denied.

IT IS SO ORDERED.

GEORGE SCHUKOW, Claimant
James P. O'Neal, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-04748
March 15, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order that affirmed the Determination Order that granted claimant an award of 120° for 80% scheduled disability for loss of use of his right forearm (wrist). Claimant asserts that he is entitled to an award of unscheduled permanent partial disability for loss of earning capacity due to his psychiatric condition.

The Board affirms the order of the Referee with the following comment. The Referee correctly found that the evidence did not establish that claimant's flareup of symptomatology of post-traumatic stress disorder had any adverse effect on claimant's earning capacity. On de novo review we find further that there is no evidence to support the proposition that claimant's post-traumatic stress disorder symptoms have permanency.

ORDER

The Referee's order dated August 29, 1984 is affirmed.

ANTHONY A. BONO, Claimant
Greco & Escobar, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-11418
March 18, 1985
Order on Remand (Remanding)

This matter is before the Board on remand from the Supreme Court. The Board has been instructed to determine, "[W]hether claimant left work during the period from the date the claim was filed until the date [claimant] was notified of its acceptance by employer." Bono v. SAIF, 298 Or 405, 410 (1984). On its de novo review of the record in this case, the Court of Appeals stated that, "The evidence is inconclusive as to whether claimant was employed in any manner from August 26 to November 14, 1980. Bono v. SAIF, 66 Or App 138, 140 (1983). We are in complete agreement with the court's factual finding. We also note that the Supreme Court has instructed us to assess a penalty for SAIF's late acceptance of claimant's claim. We will be able to do so only if there is compensation "then due" upon which to assess the penalty. EBI Companies v. Thomas, 66 Or App 105, 111 (1983).

Accordingly, we are unable to comply with the Supreme Court's fact finding instruction on the record before us, and we are without authority to supplement the record ourselves. ORS 656.295(5). See Bailey v. SAIF, 296 Or 41, 45 (1983); Muffett v. SAIF, 58 Or App 684, 687 (1982). We must, therefore, remand this matter to the Hearings Division for the further taking of evidence.

This matter is remanded to the Hearings Division with instructions to reopen the record for the purpose of taking evidence relevant to the following question: Did claimant leave work on account of his compensable injury during the period August 26, 1980 through November 14, 1980? The Hearings Division is directed to forward all evidence taken pursuant to this order to the Board within 90 days from the date of this order.

IT IS SO ORDERED.

STEPHEN B. COX, Claimant
Francesconi & Cash, Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 83-12229
March 18, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of those portions of Referee Pferdner's order which: (1) set aside its de facto denial of claimant's aggravation claim; (2) awarded claimant interim compensation; and (3) assessed it penalties and accompanying attorney fees for its failure to pay interim compensation.

As a preliminary matter, the insurer has forwarded several documents to the Board for inclusion in the record. Most of the documents are copies of correspondence between the attorneys for the insurer and claimant, as well as responding letters from the Referee. We treat this submission as a motion to remand for the taking of further evidence.

We deny the motion for remand. Following our de novo review of the record, we are not persuaded that this case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5).

On review, the insurer contends claimant is not entitled to compensation. We agree and reverse.

Claimant was 44 years of age at the time of hearing. In April 1982, while working as a laborer for an oil refinery, claimant sustained a compensable injury to his neck, back, and hip. His treating orthopedist, Dr. Langston, diagnosed his condition as "musculoligamentous strain to the dorsal and lumbar area." On May 24, 1982 Dr. Langston found claimant medically stationary and released him to regular work. On June 25, 1982 the insurer issued a Notice of Closure, granting claimant approximately two months of time loss and no permanent disability. The Notice of Closure was not timely appealed.

On August 13, 1982 Dr. Langston issued a prescription note which stated that claimant would not be able to work for 60 days due to his injured back. The prescription note was addressed "To Whom It May Concern" and was without further identification, such as claim number, date of injury, or name of employer/insurer. There is no indication that the insurer received this note. The note was offered into evidence by claimant.

On August 17, 1982 Dr. Langston reported that claimant apparently worked at a local cafe from June 1 until voluntarily quitting on June 11. Dr. Langston stated that he had examined claimant on June 2, July 14, and July 20. As of the July 20 examination, claimant's back stiffness had improved from therapy, but his range of motion was 50% of normal. Although the doctor realized there were inconsistencies in claimant's examination, Dr. Langston opined that claimant might benefit from physical therapy for a reasonable length of time. However, the doctor did not think any other type of treatment was indicated. Dr. Langston did not mention the August 13 prescription note.

Claimant did not seek further medical treatment for approximately one year. On October 10, 1983 he was examined by Dr. Tyner, chiropractor. Dr. Tyner diagnosed "chronic lumbar

sprain with attendant sciatic extension neuralgia." In Dr. Tyner's opinion claimant's condition was not medically stationary, but he was released for work.

Claimant testified that in July 1982, while treating with Dr. Langston, he was "feeling sore," but that the therapy was "helping a lot." Since treating with Dr. Langston, claimant's condition is sometimes worse. Claimant thinks his condition has worsened, but concedes that his physical limitations are approximately the same.

After receiving the August 13 "60-day" note, claimant did not return to Dr. Langston. Claimant explained the circumstances surrounding the August 13 note as follows: "He [Dr. Langston] gave me the 60 days off until things got straightened out. I mean until everything - I had to go down to Welfare to get on - so I could get something coming in until everything was straightened out."

The Referee found that Dr. Langston's prescription note and report constituted an aggravation claim. The Referee also found that the claim was compensable. Inasmuch as the insurer had failed to accept or deny the claim within 14 days, the Referee further concluded that the insurer was required to pay interim compensation. Accordingly, the de facto denial was set aside and the insurer was ordered to pay interim compensation, penalties and accompanying attorney fees commencing August 13, 1982.

After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury. ORS 656.273(1). A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(3). An employer/insurer is required to process a claim as one for aggravation when information received from a claimant, doctor or attorney is sufficient to give reasonable notice that claimant is requesting further medical services or additional compensation for worsened conditions related to or resulting from the worker's original injury or occupational disease. Douglas Dooley, 35 Van Natta 125, 127 (1983).

We agree with the Referee that taken together, Dr. Langston's August 13 prescription note and his August 17 medical report would constitute an aggravation claim. However, we are not persuaded that the insurer received the prescription note. Without the supplementation of the prescription note, we conclude that the August 17 report is insufficient to establish a claim for aggravation.

The preponderance of the evidence suggests that the insurer did not receive the prescription note until immediately prior to the hearing. Moreover, the circumstances surrounding the issuance of the note persuade us that the note was used for purposes of obtaining welfare benefits and never was intended as a request for claim reopening. Dr. Langston's August 17 report supports this conclusion. Although Dr. Langston recommended additional physical therapy, he neither opined that claimant's condition had worsened nor mentioned the prescription note specifically or in substance. Furthermore, he did not contradict his earlier opinion that claimant was released to regular work and medically stationary.

The August 17 report supports continued medical treatment pursuant to ORS 656.245. However, neither Dr. Langston's findings nor his statements set forth gounds for reopening of the claim.

We also find that claimant was not entitled to interim compensation. Compensation is due within 14 days of notice or knowledge of medically verified inability to work resulting from the worsened condition. ORS 656.273(6). As discussed above, we again agree that Dr. Langston's prescription note, when combined with the doctor's subsequent medical report, would have constituted a medically verified inability to work resulting from claimant's back condition. However, we are not persuaded that the insurer received the prescription note until just prior to the hearing. Consequently, the insurer was not obligated to pay interim compensation and should not be assessed a penalty and accompanying attorney fees for its failure to do so.

Finally, following our de novo review of the medical and lay evidence, we find that claimant has failed to establish a compensable aggravation of his back condition. Neither the findings nor the opinion of Dr. Langston, claimant's treating orthopedist immediately before and after his last award of compensation, support a conclusion that claimant's back condition has worsened. Furthermore, claimant's testimony on this point is equivocal and unpersuasive. Accordingly, we reinstate and uphold the insurer's de facto denial.

ORDER

The Referee's order dated July 12, 1984 is reversed in part. The insurer's de facto denial of claimant's August 1982 aggravation claim is reinstated and upheld. Those portions which ordered the insurer to pay interim compensation, penalties and accompanying attorney fees are reversed. The remainder of the order is affirmed.

BOBBIE L. MACKI, Claimant
Kenneth D. Peterson, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 82-10850
March 18, 1985
Order on Remand

This case is before the Board on remand from the Court of Appeals. Macki v. EBI Companies, 71 Or App 567 (1984). The Board has been instructed to determine the amount of interim compensation, penalties and attorney fees due claimant under Bono v. SAIF, 66 Or App 138 (1983). We note that nine days after the Court of Appeals' opinion in this case was filed, the Supreme Court reversed the Court of Appeals' Bono case. Bono v. SAIF, 298 Or 405 (1984). Reconsideration of the Court of Appeals' decision in this case was not requested and the court's decision is now final. We are presented, therefore, with a conflict between what has become the law of the case and what is now the law generally. We conclude that we are bound to obey the mandate of the Court of Appeals. See Rexnord, Inc. v. Ferris, 69 Or App 146, 148 (1984).

Claimant was allegedly injured on September 6, 1982 and the employer was notified of the claim the next day. Claimant was off work on a prearranged leave of absence from September 8 through October 1, 1982. She did not return to work thereafter and was discharged November 8, 1982. Her claim was denied November 5, 1982.

Under the law of this case, i.e. the Court of Appeals' Bono case, claimant is entitled to interim compensation from September 8, 1982 through November 5, 1982, inclusively. The court has also mandated that we assess a penalty and attorney fee. We conclude that the insurer should pay claimant a penalty equal to 15% of the interim compensation due and unpaid. Claimant's attorney is entitled to an insurer-paid fee of $250.

IT IS SO ORDERED.

RAYMOND C. NORGAARD, Claimant
Pozzi, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 83-09014
March 18, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Shebley's order that set aside its denial of claimant's claim of aggravation of his left knee injury. The issue is compensability.

The principal determining factor in this claim is whether the evidence preponderates toward a finding that claimant had continuing pain in his left knee between June 26, 1978 and October 28, 1983 when he required additional medical treatment and surgery. The Referee specifically found that claimant was credible based upon his attitude, appearance, demeanor and responsiveness. We find in the record as a whole no basis upon which to do other than accept the Referee's finding. See Davies v. Hanel Lbr. Co., 67 Or App 35, 38 (1984).

The employer argues vigorously on review that there is no evidence that claimant mentioned any knee problems to any of the eight physicians who treated or examined him during the relevant interval. We find to the contrary. The original 801 form specifically related a knee injury, and Dr. Walker's report of June 27, 1978 reported swollen knees. In addition Drs. Anderson and Misko both noted knee injury by history in May 1980. That claimant's knee complaints may have been eclipsed by the much more severe back symptomatology does much to explain the deemphasis of the knee complaints.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated July 9, 1984 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the self-insured employer.

HERMAN E. STEPHAN, Claimant
David C. Force, Claimant's Attorney
Leister & Vallerand, Defense Attorneys

WCB 84-00046
March 18, 1985
Order on Review

Claimant has requested reconsideration of the Board's Order on Review dated February 25, 1984, asking that the Board strike the last full paragraph of the order. Claimant contends that, in effect, the Board issued a second denial of claimant's injury claim. The Board's order affirmed the Referee's order which found that claimant was not a subject worker. The Board order further stated that had claimant been a subject worker, the Board would not find claimant's low back claim compensable.

Claimant argues that the SAIF Corporation denied his claim entirely on the basis that he was not a subject worker. In actuality, the denial stated that the "subject worker" basis was the primary reason for denial, but SAIF did not waive further reasons for denying the claim. At hearing, SAIF contested compensability not only on the "subject worker" basis, but also questioned whether the injury occurred and whether the injury materially contributed to claimant's condition.

Although claimant claimed surprise at SAIF's tactics at hearing and the parties debated/discussed the possibility of continuing the hearing on the "medical issue" question, the Referee made no specific ruling and the hearing proceeded. During the hearing claimant testified to matters pertaining to his medical history. In addition, exhibits were admitted into evidence which concerned claimant's general medical history, as well as his back condition. There is no indication that the case was either continued or held in abeyance awaiting the Referee's decision on the threshold question as to whether claimant was a subject worker. Instead, the Referee closed the record, apparently without objection from either party, and issued his order.

In his order, the Referee stated that the issues were: (1) whether claimant was a subject worker; and (2) whether claimant's disability was job-related. Since the Referee found that claimant had failed to establish that he was a subject worker, the Referee apparently did not choose to address the medical issue.

In his appellant's brief, claimant concentrated his argument on the subject worker issue. SAIF's response addressed not only the subject worker issue, but also continued to raise, in the alternative, the medical issue. In reply, claimant responded that if the Board found that claimant was a subject worker, it should remand on the medical issue.

Although the evidence on the medical issue is not overwhelming, it is sufficiently persuasive for us to conclude that claimant's injury did not materially contribute to his disability. Moreover, we do not agree that the Board has issued a denial through its Order on Review. From our review of the record, it is apparent that: (1) in issuing its denial, SAIF did not waive further reasons for denying the claim; (2) SAIF contested medical causation at the hearing; (3) the hearing proceeded without a definitive ruling concerning a continuance; (4) testimony was taken at the hearing, and exhibits were offered into evidence, pertaining to the medical issue; (5) claimant did not object to the closing of the record without offering additional evidence on the medical issue; and (6) the Referee referred to the medical issue in his order.

Under these circumstances, we do not agree that claimant was prohibited from litigating the medical issue nor that the Board's order represents an additional denial of the claim. Instead, the record suggests that claimant was content to allow the hearing to proceed and the case to close without offering further evidence on the medical issue. The Referee's decision not to comment on the alternative issue, does not prohibit the Board from addressing it.

In conclusion, the Board's Order does not "preclude any chance of [claimant's] success on review" as claimant argues. The Court of Appeals is empowered to take any action that it deems

appropriate following its de novo review. ORS 656.298(6). That power could include finding the claim compensable or remanding for further evidence taking. The Court certainly is not required to honor any portion of the Board's order.

Accordingly, claimant's request for reconsideration is granted. On reconsideration, the Board adheres to and republishes its former order.

IT IS SO ORDERED.

RICHARD L. HOFFEE, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05860
March 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of those portions of Referee Quillinan's order which: (1) awarded claimant temporary partial disability from December 21, 1982 until June 11, 1983 and temporary total disability thereafter until claim closure; and (2) assessed SAIF a 25% penalty and accompanying attorney fees for SAIF's failure to process claimant's compensable ulnar neuropathy condition as directed by a previous Referee's order. On review, SAIF contends that claimant was not entitled to temporary disability compensation and that its conduct was not unreasonable. Claimant cross-requests review, contending the Referee was without authority to alter the previous Referee's order and that the Referee erred in reducing temporary total disability compensation to temporary partial disability compensation.

As a preliminary matter, claimant has moved that a portion of SAIF's reply brief be stricken. The portion in question concerns SAIF's contention that claimant's temporary disability compensation after his unemployment benefits expired should have remained as temporary partial disability rather than as temporary total disability. SAIF raises this issue for the first time in its reply brief. We shall not address this issue raised at this late date. Michael R. Petkovich, 34 Van Natta 98 (1982). Consequently, the Board grants claimant's motion.

We conclude that claimant was entitled to temporary disability benefits beginning July 12, 1982, the date his claim had been previously found to be prematurely closed. Therefore, we modify the Referee's order.

Claimant was 38 years of age at the time of hearing. In October 1981 he filed a claim for right wrist tendinitis, contending his condition was caused by his work activities as a sand blaster. The claim was accepted and subsequently closed by a December 4, 1981 Determination Order. Claimant received approximately two weeks of time loss and no permanent disability.

The claim was soon reopened for further wrist problems which were diagnosed as bilateral carpal tunnel syndrome. Release surgery was performed in May 1982. Dr. Streitz, claimant's treating orthopedist, found him medically stationary and released him for work as of July 12, 1982. However, Dr. Streitz advised claimant against initially engaging in heavy and repetitive gripping activities.

The claim was again closed by an August 5, 1982 Determination Order. Claimant was awarded time loss benefits through July 11, 1982.

Shortly after the Determination Order issued, claimant sought medical treatment complaining of symptoms which resembled an ulnar neuropathy. EMG and nerve conduction tests confirmed that claimant was suffering from bilateral ulnar nerve palsy.

On December 21, 1982 Dr. Young, orthopedist, requested authorization for ulnar nerve decompression surgery. However, upon further review of claimant's medical history, Dr. Young concluded that SAIF was not responsible for claimant's ulnar neuropathy. Dr. Young further opined that from the standpoint of claimant's carpal tunnel condition, claimant remained "capable of his previous employment and without disability."

In February 1983 Dr. Ellison examined claimant. Dr. Ellison opined that claimant's symptoms were consistent with claimant's work activities as a sandblaster. In addition, the doctor concluded that a later onset of symptoms was consistent with the disease or entrapment state. Dr. Ellison recommended that claimant undergo the ulnar surgery and that SAIF be held responsible.

In October 1983 Dr. Tsai, neurosurgeon, performed an independent medical examination. Dr. Tsai recorded a history that claimant had returned to landscaping work about six months previously, but was forced to terminate his work approximately three or four weeks prior to the examination due to his ulnar problems. Dr. Tsai concluded that based on claimant's history of his bilateral ulnar neuropathy symptoms his condition was an occupational disease. Dr. Tsai further opined that claimant's condition was not medically stationary and that the recommended surgery be performed.

The matter proceeded to hearing before Referee T. Lavere Johnson. Claimant contended that his bilateral ulnar neuropathy was compensable and that his claim had been prematurely closed. In a May 4, 1984 order, Referee Johnson agreed and remanded the bilateral ulnar neuropathy claim to SAIF "for acceptance as a compensable claim and for the payment of compensation to which claimant may be entitled as provided by the Oregon Workers' Compensation Laws." Referee Johnson declined to assess penalties, despite SAIF's failure to issue a partial denial, because "based on the somewhat conflicting historical and medical facts in the record, I am unsure whether there was legally any compensation due and owed claimant until issuance of the present Referee [sic] Opinion and Order."

Parenthetically, we note that the Board has affirmed Referee Johnson's order. Richard L. Hoffee, 36 Van Natta 1878 (1984) (memorandum opinion). The Board's Order was not appealed.

On May 30, 1984 claimant filed a request for hearing. Among the reasons for his request, claimant listed SAIF's refusal to process or pay benefits in compliance with Referee Johnson's order.

On June 6, 1984 SAIF advised claimant that it had received Referee Johnson's order. Since it appeared no physician had authorized time loss after Dr. Streitz had released claimant to

work, SAIF stated that time loss would be due and payable within 14 days of his admission to the hospital for surgery. SAIF requested that claimant provide it with the name of his treating physician and notify it when his ulnar surgery had been scheduled.

The matter proceeded to hearing before Referee Quillinan. Claimant had received no temporary disability since the issuance of Referee Johnson's order. He had not received medical treatment that was paid by SAIF since July of 1982. No ulnar nerve surgery had been scheduled. It was claimant's understanding that none of his doctors would take his case because he owed them money and had no money to pay them.

Claimant testified that he had not worked for pay since July 11, 1982. He attempted to help lifting Christmas trees "a couple of times," but the "jobs" lasted only a day due to claimant's inability to lift the trees. Claimant applied for unemployment benefits in December 1981 and renewed his application in October 1982. In submitting his applications, claimant indicated that he was not disabled, ill, injured or under doctor's care and nothing prevented him from beginning work immediately. Claimant received unemployment benefits until June 11, 1983.

Referee Quillinan concluded that claimant was entitled to temporary disability benefits from December 21, 1982 until claim closure. She awarded claimant temporary partial disability benefits for the period in which he received unemployment compensation. Noting that the entire previous record had not been incorporated into the present record, Referee Quillinan found that she could not determine claimant was disabled prior to December 21, 1982, the date Dr. Young implied that claimant was disabled due to his ulnar neuropathy.

Temporary disability benefits are due within 14 days of a litigation order. OAR 436-54-310(3)(e). The insurer's filing of a request for review shall not stay payment of compensation to a claimant. ORS 656.313(1). Temporary compensation generally continues until the worker returns to regular work, is released to return to work, or a Determination Order issues terminating the duty to pay time loss. Jackson v. SAIF, 7 Or App 109 (1971); ORS 656.268.

We agree with Referee Quillinan that SAIF was obligated to comply with Referee Johnson's order and pay claimant temporary compensation. However, we find that these temporary benefits should be due and payable from July 12, 1982, the date Referee Johnson found the claim was prematurely closed.

In concluding that the claim had been prematurely closed, Referee Johnson concurrently found that claimant's condition was not medically stationary on July 11, 1982, the date of claim closure. By subsequently requesting another hearing, claimant was not required to prove to Referee Quillinan that which had been previously found by Referee Johnson. Rather than attempting to relitigate the premature closure issue, claimant was merely seeking enforcement of Referee Johnson's order.

Accordingly, we find that SAIF was required to pay temporary disability benefits commencing from the date the claim had been found to be prematurely closed. Furthermore, pursuant to Jackson and ORS 656.268, SAIF must pay these benefits until claimant is

released to work, returns to work, or a Determination Order issues closing the claim. We are not persuaded that, following the claim's premature closure, claimant was either released to return to work or that claimant actually returned to work. Therefore, we agree with Referee Quillinan that temporary benefits should continue until termination of benefits is justified.

Inasmuch as the evidence suggests that claimant was receiving unemployment compensation between July 12, 1982 and December 21, 1982, we conclude that claimant should receive temporary partial disability during this period. Edwards v. Employment Division, 63 Or App 521 (1983); Daniel J. Cannon, 35 Van Natta 1181, 35 Van Natta 1623 (1983); Margaret L. Gray, 35 Van Natta 1706 (1983).

The Board affirms those portions of the Referee's order which assessed SAIF a penalty and accompanying attorney fees. Furthermore, the penalty shall apply to the temporary disability compensation made payable herein. Finally, the Board affirms that portion of the Referee's order which awarded claimant temporary partial disability for the periods of time claimant received unemployment compensation.

ORDER

The Referee's order dated August 3, 1984, as modified by her August 22, 1984 order, is affirmed in part and modified in part. Claimant is awarded temporary partial disability from July 12, 1982 until June 11, 1983 and temporary total disability thereafter until claim closure as provided by law. The SAIF Corporation is assessed a penalty of 25% of this temporary disability compensation. The remainder of the Referee's order is affirmed. Claimant's attorney is allowed 25% of the increased compensation awarded by this order, not to exceed $3,000. In addition, pursuant to OAR 438-47-055, claimant's attorney is awarded $700 for services on Board review, to be paid by the SAIF Corporation.

LUIS A. RODRIGUEZ, Claimant
Goldberg & Mechanic, Claimant's Attorneys
Noreen K. Saltveit, Defense Attorney

WCB 84-02821
March 22, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Pferdner's order which declined to set aside as premature a Determination Order dated February 29, 1984, found that a June 7, 1984 physician's report did not constitute a valid aggravation claim, and that claimant failed to establish a compensable worsening of his condition. Claimant contends that his condition was not medically stationary when the claim was closed, and that he is, therefore, entitled to additional temporary disability compensation; in the alternative, claimant contends that his claim should be reopened as of April 12, 1984.

The evidence fails to preponderate in claimant's favor on the premature closure issue. There is insufficient persuasive evidence to satisfy claimant's burden of proving that he was anything other than medically stationary, as defined by ORS 656.005(17) ("further material improvement"), when his claim was closed on February 29, 1984. Furthermore, the medically stationary date assigned by the Determination Order, February 16,

1984, is supported by the record. The issues surrounding claimant's employment termination, as they bear on his possible entitlement to additional temporary disability subsequent to February 16, 1984, are rendered moot. On the alternative issue of claim reopening for a worsened condition, there is a dearth of evidence to support claimant's contentions in this regard. Accordingly, we affirm the Referee's order.

ORDER

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

MICHAEL J. THOMAS, Claimant
Evohl F. Malagon, Claimant's Attorney
Brian Pocock, Defense Attorney

WCB 84-01400
March 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review and claimant cross-requests review of those portions of Referee Nichols' order which awarded claimant interim compensation, a 25% penalty and an associated $350 attorney fee for failure to pay interim compensation.

In order to receive interim compensation, a subject worker must have left work as that phrase is used in ORS 656.210(3). Bono v. SAIF, 298 Or 405, 410 (1984). We find that claimant did not leave work due to the hematuria for which he filed his claim and sought medical attention. Accordingly, he is entitled to neither interim compensation nor the associated penalty and attorney's fee awarded by the Referee.

ORDER

The Referee's order dated August 8, 1984 is reversed in part. Those portions of the Referee's order which awarded interim compensation, a penalty equal to 25 percent of unpaid interim compensation and a $350 attorney fee for failure to pay interim compensation are reversed. The Referee's order is affirmed in all other respects.

BOB L. FARRIS, Claimant
Cash Perrine, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06132
March 26, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seifert's order which awarded 16° for 5% unscheduled permanent partial disability in addition to the Determination Order award of 16° for 5% unscheduled disability for a low back injury and affirmed the Determination Order award of 6.75° for 5% scheduled disability of the left foot. Claimant also assigns as error the Referee's failure to accept a chartnote of the attending physician submitted after hearing but before issuance of the Opinion and Order. The issues on review are extent of unscheduled disability of the back, extent of scheduled disability of the left foot, and admission into evidence of the attending physician's chartnote submitted after hearing.

The proferred chartnote was written to record claimant's visit to his attending physician on August 17, 1984. The chartnote was received by the SAIF Corporation on August 23, 1984. The hearing was held and the record closed August 30,

1984. The chartnote was sent by SAIF on August 31, 1984 and received by claimant on September 5, 1984. Claimant forwarded the chartnote to the Referee on September 11, 1984 and asked that it be admitted into evidence. SAIF forwarded the report to claimant within the time required by the rules. Claimant is not entitled to rely on SAIF to produce medical reports from his own attending physician which claimant generates less than two weeks before hearing. The fact that SAIF received the chartnote on August 23 convinces us that the chartnote was available for either party by that date, and there has been no showing by claimant why he could not have obtained the chartnote before hearing and offered it; therefore, the Referee properly denied admission of the exhibit after hearing.

On the merits, the Board affirms and adpots the order of the Referee.

CLAUDIO E. GRANDJEAN, Claimant
Peter E. Baer, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-07033
March 26, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Knapp's order which upheld the SAIF Corporation's denial of his tinnitus and hearing loss claim and which awarded no penalties or attorney's fees for a late denial. The issues on review are compensability and penalties and attorney's fees.

The Board affirms and adopts the order of the Referee. Cf. Ford v. SAIF, 71 Or App 825 (1984) (claimant showed pattern of hearing loss was consistent with noise exposure); Guse v. Adminco, 70 Or App 376 (1984) (claimant showed hearing loss probably not consistent with aging process).

ORDER

The Referee's order dated August 17, 1984, is affirmed.

NONDA G. HENDERSON, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorney

WCB 84-05908
March 26, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Quillinan's order which: (1) affirmed the May 22, 1984 Determination Order that did not award additional unscheduled permanent disability for a right shoulder injury; and (2) found that the self-insured employer was entitled to collect overpaid temporary total disability from future permanent disability awards. On review, claimant contends: (1) he is entitled to an increase in his permanent disability award, in excess of the 25% (80°) unscheduled right shoulder permanent disability and 20% (38.4°) scheduled right arm permanent disability he has previously received; and (2) that the employer failed to prove the amount of the overpayment.

The Board affirms that portion of the Referee's order concerning the extent of permanent disability.

We modify that portion of the Referee's order which found

that the employer was entitled to an offset for overpaid temporary disability benefits totalling $1,840.56. The amount of the offset corresponds with the employer's representations at hearing that claimant received temporary disability from April 20, 1984, the date the Determination Order found claimant to be medically stationary, until June 1, 1984. The Determination Order also approved the insurer's request for deduction of overpaid temporary disability from permanent disability.

Although claimant did not contest the existence of an overpayment, he requested that evidence be presented demonstrating the amount. Prior to the taking of evidence, claimant made statements indicating that he recalled receiving temporary disability payments in May or June. However, no testimony was elicited on this issue. An inference can be made that the employer paid temporary disability until May 24, 1984, when it received the May 22, 1984 Determination Order. However, an inference is not evidence. The evidence in the record is the employer's "Determination Request," which indicates the employer had paid time loss through May 4, 1984.

Accordingly, the employer is granted an offset for overpaid temporary disability paid between April 21, 1984 and May 4, 1984.

ORDER

The Referee's order dated October 5, 1984 is affirmed in part and modified in part. That portion which found that the self-insured employer is entitled to a future offset is modified. The employer is entitled to offset temporary total disability payments made between April 21, 1984 and May 4, 1984 against future permanent partial disability awards. The remainder of the Referee's order is affirmed.

JOHN P. MONROE, Claimant
Rodriguez, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 84-02338 & 84-04742
March 26, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Podnar's order that: (1) granted claimant an award of 16° (5%) unscheduled permanent partial disability for injury to his neck, whereas the Determination Order had awarded no permanent disability; and (2) granted claimant 30° (20%) scheduled permanent partial disability for loss of use of his left leg (knee) in addition to the 45° (30%) granted by the Determination Order. The issue is extent of scheduled and unscheduled disability.

The Board affirms and adopts that portion of the Referee's order that addresses the issue of scheduled left leg (knee) disability.

Claimant was involved in a compensable motor vehicle accident on January 26, 1983. He complained of a "stiff neck." Dr. Wigle diagnosed a soft tissue strain. Claimant returned to work January 31, 1983. On February 15, 1983 Dr. Wigle reported point tenderness over the T6-T7 vertebrae and decreased range of motion on rotation and lateral bending. He prescribed a soft cervical collar. On March 10, 1983, in response to a partial denial of claimant's cervical spine problems, Dr. Wigle unequivocally

related claimant's neck complaints to the accident. On March 21, 1983 he reported that claimant complained of headaches when working overhead and that claimant's neck range of motion was still diminished.

The partial denial was set aside by a Referee in June 1983. Dr. Wigle reported on September 21, 1983 that claimant was medically stationary as of August 1, 1983 and that there was no permanent impairment of claimant's neck. Claimant was examined by the Orthopaedic Consultants on February 7, 1984. The panel noted in claimant's history that his neck did not interfere with his working, but that his knee did. The consultants opined that claimant's neck loss of function was zero.

In February 1984 claimant went to the Callahan Center for evaluation related to his knee condition. The examination related that claimant had full range of motion in his neck and complained of no pain. On April 16, 1984 Dr. Wigle again reported that claimant had full neck range of motion and exhibited no pain.

Claimant testified that he has occasional neck and shoulder pain when working overhead. On de novo review we find no persuasive evidence that claimant has any impairment of his neck. If there is no impairment, there can be no disability award. See OAR 436-65-600(2)(a). Accordingly that portion of the Referee's order that granted an award for claimant's neck must be reversed.

ORDER

That portion of the Referee's order dated August 27, 1984 that granted claimant an award for unscheduled permanent partial disability is reversed. The remainder of the order is affirmed. The attorney fee award granted claimant's attorney to be paid out of unscheduled disability compensation shall be adjusted accordingly. Claimant's attorney is awarded $300 for services on Board review in defending against the employer's appeal of the scheduled disability award.

BOB G. O'NEAL, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-01322
March 26, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests, and the self-insured employer cross-requests, review of that portion of Referee Nichols' order which: (1) increased claimant's unscheduled permanent disability award for a low back injury from 50% (160°), as awarded by an April 10, 1984 Determination Order and prior Determination Orders, to 90% (288°). Claimant contends he is permanently and totally disabled, either through total physical incapacity or through the so-called "odd-lot" doctrine. The employer contends claimant's permanent disability award should be reduced.

The Board affirms the order of the Referee with the following comment. Unrelated physical impairment that arises post-injury is not considered in determining permanent total disability. Emmons v. SAIF, 34 Or App 603 (1978). Moreover, if the compensable injury did not cause permanent worsening of a preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of injury. Frank Mason, 34

Van Natta 568, aff'd mem. 60 Or App 78 (1982); John D. Kreutzer, 36 Van Natta 284 (1984), aff'd mem. 71 Or App 355 (1984). The evidence preponderates that claimant's cervical condition either was not in existence at the time of the compensable injury or, if preexisting, was not worsened by the compensable injury. Accordingly, we have not considered claimant's cervical condition in determining whether claimant is permanently and totally disabled. However, had we considered the cervical condition, we would still conclude that claimant had failed his burden of proving permanent total disability.

ORDER

The Referee's orders dated July 27, 1984 and September 5, 1984 are affirmed.

JOYCE E. YATES, Claimant
Peter O. Hansen, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 83-08766
March 26, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Galton's order which: (1) found that claimant was entitled to temporary disability benefits based on a 40 hour work week; and (2) assessed the employer penalties and accompanying attorney fees for its unreasonable resistance and refusal to pay temporary disability at the 40 hour weekly rate. On review, the employer contends: (1) claimant's temporary disability benefits should be based on a weekly rate which reflects her actual loss of earnings; (2) its conduct was not unreasonable; and (3) it is entitled to an offset for temporary disability benefits paid at the 40 hour weekly rate.

Following our de novo review of the documents and testimony, we agree with the Referee that claimant was a regular employee as defined in ORS 656.210(2), in that claimant was required to be available on an 8-hour per day, 5-day and 40-hour per week basis. See, Eldon Britt, 31 Van Natta 141 (1981). Furthermore, the employer's conduct in unilaterally reducing claimant's temporary disability benefits was contrary to existing administrative rules and case law. Consequently, we agree that the employer's conduct was unreasonable and that penalties, as well as accompanying attorney fees, are warranted. Earl W. Andrews, 35 Van Natta 1582 (1983); Barbara Holder, 32 Van Natta 205 (1981); 34 Van Natta 5 (1982); ORS 656.262(10). Accordingly, we affirm the order of the Referee.

ORDER

The Referee's order dated July 31, 1984 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the self-insured employer.

PETER G. VOORHIES, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 82-04559
March 27, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Neal's order which dismissed his request for hearing as not timely filed. Claimant contends in the alternative: (1) that the insurer's denial was a

legal nullity in that it represented the period for filing a request for hearing as one day shorter than it actually was; (2) that the insurer's failure to deny the claim within 60 days of notice barred it from thereafter contesting compensability; (3) that certain alleged oral representations by the insurer's claims supervisor estopped the insurer from contesting the timeliness of claimant's request for hearing; and (4) that the circumstances of this case constitute good cause for claimant's not filing the request for hearing until the 61st day.

The Board affirms and adopts those portions of the Referee's order pertinent to the dismissal of the hearing request. Since dismissal is appropriate, we do not reach the merits of the claim.

ORDER

The Referee's order dated April 9, 1984 is affirmed.

JUAN ANFILOFIEFF, Claimant
Blair, et al., Claimant's Attorneys
Burt, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB TP-84014
March 28, 1985
Third Party Order

Claimant has petitioned the Board to resolve a dispute regarding the just and proper distribution of the sum of $14,500 paid by claimant's noncomplying employer to the Workers' Compensation Department. The Department, the SAIF Corporation and the employer all urge that we dismiss claimant's petition on the ground that we have no jurisdiction over the fund in question. We find that this is a case of first impression.

Claimant was injured in 1978. In bifurcated litigation, claimant's injury was held compensable, Anfilofieff v. SAIF, 52 Or App 127 (1981), and claimant's employer was found to be a subject noncomplying employer, In re the Complying Status of Pirfil Cam, dba Cam Construction Co., 34 Van Natta 676 (1982). Pursuant to the litigation orders, SAIF processed the claim. ORS 656.054(1).

Claimant elected to commence a civil action against his employer, ORS 656.020, and the Workers' Compensation Department pursued the employer for repayment of claimant's claim costs pursuant to ORS 656.054(3). Eventually, the employer and the Department reached a settlement whereby the employer paid the Department a total of $14,500, in exchange for a full release of all claims the Department had against the employer. The employer also reached a settlement with claimant whereby the employer agreed to employ claimant as a carpenter at $10 per hour for four years or until claimant had earned $30,000, in exchange for dismissal of the civil action and claimant's workers' compensation claim. From the context of the arguments we have received, it appears that claimant and his employer reached their settlement directly, without benefit of counsel.

On March 22, 1983 SAIF issued a release and approval of third party settlement, in which it purported to approve a gross settlement of $14,500. By a letter dated March 25, 1983 SAIF rescinded the release and approval, stating that the intent of the document had been merely to show that SAIF had no lien against the proceeds of any recovery claimant might obtain from his noncomplying employer. SAIF then annotated the release document executed by claimant and his employer to the effect that SAIF released all of its lien rights under ORS Chapter 656.

Claimant asserts that the $14,500 paid by the employer to the Workers' Compensation Department is subject to the distribution formula of ORS 656.593(1). The formula provides that out of the gross proceeds of an action against a noncomplying employer or third party the costs of collection, i.e. attorney fees and court costs, are paid first. Out of the balance claimant receives a statutory minimum of one-third of the balance, with the remainder being distributed to the employer/insurer in satisfaction of its lien. Any remaining balance, over and above the lien, is paid to the claimant. For the reasons which follow, we conclude that the $14,500 paid in this case to the Department is not subject to ORS 656.593(1).

ORS 656.054(1) provides that SAIF shall accept and process claims where the employer is not in compliance with ORS 656.017, i.e. is not a direct responsibility employer and has no workers' compensation insurance coverage. SAIF's duty to process a claim arises when the Workers' Compensation Department refers a claim to it. However, the ultimate liability for claim costs rests with the noncomplying employer. ORS 656.054(3) provides:

> "In addition to, and not in lieu of, any civil penalties assessed pursuant to ORS 656.735, all costs to the Industrial Accident Fund of a claim processed under subsection (1) of this section shall be a liability of the noncomplying employer. Such costs include compensation, reasonable administrative costs and any attorney fees awarded to the claimant, but do not include assessments for reserves in the Administrative Fund. The director shall recover such costs from the employer. The director shall provide by regulation for the Administrative Fund to reimburse, on a periodic basis, the Industrial Accident Fund for any costs it incurs under this section." (Emphasis added.)

The regulation implementing the statutory scheme is OAR 436-52-050. That regulation provides, inter alia, that the Department shall reimburse SAIF quarterly for all compensation, medical costs, insurer-paid attorney fees and reasonable administrative costs. The regulation also provides that SAIF must inform the Department of any actions against noncomplying employers and third parties and provide periodic status reports, and that any sums recovered by SAIF in actions against noncomplying employers and third parties must be reported to the Department and will be set off against reimbursement due to SAIF. Finally, the regulation provides that the Department's Administrative Services Division "is responsible for collecting from noncomplying employers those costs incurred by the Industrial Accident Fund for which the Fund is entitled to reimbursement from the Department under this section." OAR 436-52-050(5).

Claimant suggests that the third party procedure, ORS 656.576 to 656.595, "may be" the only mechanism by which the Department may recover claim costs from a noncomplying employer. We disagree. OAR 436-52-050 specifically treats that portion of the recovery that may be applied to SAIF's lien as an offset against

the total amount reimbursed to SAIF. As such, the regulation allows SAIF to assert a lien in an action against a noncomplying employer. SAIF need not, however, do so. If, for whatever reason, no funds are forthcoming to satisfy SAIF's lien, it will be paid in any event by the Department. The Department then is required to collect from the employer.

A noncomplying employer case is to be distinguished from a true third party case where the negligence or other tort of a third party causes claimant's injury. The employer has already satisfied his obligation by complying with ORS 656.017 and is thus shielded from liability, even if his tortious act combined with that of the third party to produce the injury. The insurer is not guaranteed that it will be fully reimbursed, and is as dependent upon the success of the third party action as is the claimant. It is the claimant's action that is being pursued, with the insurer standing by as a possible beneficiary.

We find that the Department's collection pursuant to ORS 656.054(3) and OAR 436-52-050 is totally divorced from the third party recovery statutes. The right of recovery belongs to the Department; the claimant has no standing to pursue that remedy. Indeed, the employer's liability is premised upon entirely different grounds. The noncomplying employer's liability to the Department is absolute and is established by statute. The noncomplying employer's liability to a claimant, however, must be based upon some actionable wrong. The claimant may, indeed, continue his civil action and would in fact benefit in most cases by the removal of SAIF's lien.

We are mindful that in this case the settlement entered into between claimant and his employer is such that it will be difficult for claimant's attorney to collect a fee. However, we see no evidence that either the Department or SAIF were involved in the particulars of the settlement. SAIF and the Department did nothing more than perform their statutory obligations.

Because we find that the $14,500 paid to the Department is a payment that is outside the purview of the third party statutes, we conclude that there are no proceeds subject to distribution under ORS 656.593(1). Accordingly, claimant's petition must be dismissed.

IT IS SO ORDERED.

CARL CHASTAIN, Claimant
Evohl F. Malagon, Claimant's Attorney
Brian L. Pocock, Defense Attorney

WCB 82-05492
March 28, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Daron's order which: (1) upheld the insurer's June 17, 1982 denial of claimant's claim for anemia and hematochezia; (2) refused claimant's request for interim compensation; and (3) refused claimant's request for penalties and attorney fees for an alleged unreasonable failure to pay interim compensation.

Claimant was struck in the left leg and right abdominal area on May 13, 1981, when the resaw feeder that he was working was accidentally reversed. In his written claim dated June 9, 1981, he described the nature of the injury as bruises and internal

bleeding. This Form 801 was marked accepted as a nondisabling injury on June 16, 1981.

Because of persistent positive stools for occult blood, various diagnostic tests were performed over the next several months, including a colonoscopy and an esophagogastroduodenoscopy. In a second colonoscopy and ileoscopy performed on March 5, 1982, a small angioma of the distal descending colon was cauterized, and an acute inflammatory ulcerating lesion was discovered in the distal ileum. The surgeon felt that the angioma did not represent a bleeding site. Surgery was performed on the ileum on March 10, 1982. In the April 7, 1982 hospital discharge summary, Dr. Walker, the treating doctor, indicated that the recurrent bleeding was most probably due to a recurrence of preexisting Crohn's disease, and that it was undetermined whether further surgery would be needed.

At the insurer's request, Dr. Haun examined claimant on May 5, 1982. On June 2, 1982 he reported that the trauma of the work accident was an unlikely source of claimant's anemia and blood loss. In his June 14, 1982 report, Dr. Walker reaffirmed his position that claimant's recurrent gastrointestinal bleeding was most probably related to Crohn's disease and not the industrial injury.

Notwithstanding its June 16, 1981 acceptance, the insurer issued a denial letter on June 17, 1982 which, in pertinent part, stated:

> "You submitted a claim alleging that you incurred anemia and hematochezia on May 13, 1981, while employed with Davidson Industries.
>
> "It is the opinion of Argonaut Midwest Insurance Company, upon reviewing the information which has been obtained subsequent to the establishment of your claim, that there is insufficient evidence that you incurred a compensable incident, injury or occupational disease, which arose out of or occurred within the course and scope of your employment. Therefore, without waiving additional questions of compensability, we hereby deny your claim in its entirety."

The Oregon Supreme Court has ruled such backup denials impermissible. In Bauman v. SAIF, 295 Or 788 (1983), the court said:

> "ORS 656.262(6) gives the insurer or self-insured employer 60 days after notice of the claim in which to accept or deny the claim. If, as in this case, the insurer officially notifies the claimant that the claim has been accepted, the insurer may not, after the 60 days has elapsed, deny the compensability of the claim unless there is a showing of fraud,

misrepresentation or other illegal activity. 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." Id at 793-94.

We find that the condition requiring surgery in March 1982 was either the same condition accepted in June 1981 or cannot be separated from the accepted condition. See Joji Kobayashi, 36 Van Natta 1558 (1984). Accordingly, the compensability of claimant's anemia and hematochezia is resolved by the June 1981 acceptance.

The Board affirms and adopts those portions of the Referee's order relating to interim compensation, penalties and associated attorney's fees.

ORDER

The Referee's order dated June 8, 1984 is affirmed in part and reversed in part. The insurer's June 17, 1982 denial is set aside and the claim is remanded to it for processing and the payment of benefits according to law. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded a total of $1,500 for services at hearing and on Board review, to be paid by the insurer.

WALTER L. KEENEY, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-09760
March 28, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of that portion of Referee Quillinan's order which awarded claimant 160° for 50% unscheduled permanent disability for his right inguinal hernia. The Determination Order did not grant an award for unscheduled disability.

Claimant, a 53-year-old heavy construction worker, suffered a compensable right foot injury in 1978. The injury has required four surgeries and has resulted in scheduled awards totalling 101.25° for 75% loss of the foot. While hospitalized for the second foot surgery in February 1980, claimant developed severe coughing, causing a right inguinal hernia. The hernia was surgically repaired in March, 1980, but pain persisted. In a second hernia surgery on April 1, 1982, the ileoinguinal nerve was resected and the inguinal floor was reenforced with mesh. The hernia site remains symptomatic, however.

Claimant was examined by Drs. Yerby, Donahoo and Snodgrass of Orthopaedic Consultants on June 24, 1983. They listed claimant's right groin pain as the second of his three chief complaints. The pain was described as a constant dull ache localized in the right groin, increased by coughing, sneezing, rolling over in bed, straining for a bowel movement or lifting more than 50 pounds. They found tenderness to palpation over the length of the right inguinal scar. They concluded that the loss of function due to the hernia and hernia repair was minimal.

Dr. Meharry reported on November 9, 1983 that since the second hernia surgery, there had been no demonstration of a hernia, although claimant continued to have pain, especially on the inner aspect of the scar. Dr. Meharry noted that the pain might possibly be aggravated by claimant's leg. He reported claimant's restrictions and limitations secondary to the hernia repair as follows:

> "I don't believe that he is in any condition to do any work. He can't put any strain on his abdominal muscles because of the severe amount of discomfort he has in the right inguinal region. Therefore, he will be unable to do any work that would require lifting or sitting for any period of time. He has to lie down every couple of hours in order to get relief from the leg and the groin pain. Considering just the inguinal region, he should never do any lifting of over 15 pounds."

Dr. Meharry subsequently explained that the restrictions were based on pain in the inguinal area to deep palpation and claimant's subjective complaints.

The Referee found claimant's testimony to be credible, but occasionally inconsistent. Based upon claimant's testimony we find that any significant walking or lifting brings on pain at the hernia site, as does long periods of sitting. Claimant experiences discomfort on a daily basis. Considering claimant's testimony, Dr. Meharry's 15 pound lifting restriction is reasonable in light of claimant's inguinal impairment.

Claimant graduated from high school. His job experience has been in heavy logging and construction work, which he can no longer perform. Although his vocational coordinator noted difficulty in finding transferrable skills that could be readily usable in a current position, the job search effort undertaken in claimant's behalf certainly suggests to us that claimant is not without regular earning capacity in the broad range of general occupations. Considering claimant's physical impairment due to his right inguinal condition, together with all pertinent social/vocational considerations including age, education, training, skills, work experience and adaptability to less strenuous labor, see OAR 436-65-600 et seq., we rate claimant's loss of earning capacity due to the hernia at 25%. The Referee's order is modified accordingly.

ORDER

The Referee's order dated June 18, 1984 is affirmed in part and modified in part. Claimant is awarded 80° for 25% unscheduled permanent partial disability for his right inguinal hernia in lieu of the 160° for 50% unscheduled disability awarded by the Referee. Claimant's attorney's fee is modified accordingly. The Referee's order is affirmed in all other respects.

GEORGE J. KORONAIOS, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys
Rankin, et al., Defense Attorneys

WCB 83-07906 & 84-01435
March 28, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Dillingham Ship Repair, a self-insured employer, requests review of Referee Galton's order which set aside its denial of claimant's occupational disease claim for hearing loss. On review, Dillingham contends that the credible medical evidence does not establish that claimant sustained a ratable hearing loss and, therefore, the claim is not compensable. Claimant has cross-requested review to preserve his alternative position that Cigna Insurance Co., as insurer for a subsequent employer, is responsible. Cigna contends the claim is not compensable, but, if found compensable, the claim is the responsibility of Dillingham.

We find the claim not compensable. Accordingly, we reverse the Referee's order.

Claimant was 61 years of age at the time of hearing. He has been employed as a general machinist at the same facility for the past 27 years. The facility was owned by Dillingham, until 1979, when it was purchased by Cigna's insured.

Beginning in 1972, hearing tests were administered to claimant at the work site on approximately an annual basis. In 1978, claimant was referred to Dr. Epley, a medical consultant for Hearing Evaluation and Acoustic Research, Inc. Dr. Epley evaluated claimant's recent audiometric test and recommended that claimant start wearing ear protection. Thereafter, claimant was custom fitted with earplugs.

In April 1983 claimant returned to Dr. Epley for another examination. Dr. Epley, who had last examined claimant in 1978, noted that claimant's hearing was "down slightly." However, the doctor concluded that claimant had excellent discrimination in both ears. Thereafter, claimant filed his hearing loss claim.

Dr. Epley reported that claimant's discrimination score was 100% in the right ear and 96% in the left ear, which was well within the normal range. Although claimant demonstrated some obvious loss of left ear hearing in the high frequencies, hearing in the lower frequencies in the left ear was adequate and his right ear hearing was good. Dr. Epley concluded that when the standard formulas were applied, the degree of claimant's hearing loss was not of sufficient degree to justify a hearing loss claim.

Dr. Myers, otolaryngologist, examined claimant and testified at the hearing. It was Dr. Myers' opinion that claimant had normal right ear hearing acuity and mild sensorineural left ear hearing impairment. Dr. Myers believed that occupational noise contributed to some of claimant's hearing loss, even though the pattern was atypical. However, after applying the generally accepted formulas and measuring methods for the calculation of hearing loss, Dr. Myers concluded that claimant had no ratable hearing impairment nor handicapping hearing loss in either ear.

Dr. Myers testified that there was a "range of normal" hearing between 0 and 25 decibels which was generally accepted by

major medical societies and specialities. None of claimant's twenty audiograms administered since 1972 were outside of this "normal" range. The doctor was unaware of any professional societies which recognized a "line of normal" hearing rather than the "range of normal" hearing.

Claimant was examined by Dr. Korn, otolaryngologist, who also testified. It was Dr. Korn's opinion that claimant had a permanent neuro sensori hearing loss in both ears, for which the major contributing cause was noise trauma at claimant's work place. Dr. Korn did not accept the "range of normal" hearing opinion. According to Dr. Korn, "normal" was zero decibel hearing loss. Consequently, he would classify the great bulk of the population as abnormal. The doctor admitted that his opinion of "normal" was contrary to the opinion held by the American Medical Association, the Oregon Medical Association and the American and Oregon Academy of Otolaryngology. Furthermore, Dr. Korn acknowledged that his method of measuring claimant's hearing loss was not accepted by the Oregon Academy of Otolaryngologists or the American Medical Association.

The Referee found Dr. Myers and Dr. Korn to be credible, reliable, thoughtful, complete and persuasive experts. Reasoning that both doctors had found some permanent hearing loss, the Referee concluded that claimant had established "by an overwhelming preponderance of the evidence" a compensable occupational disease.

We find Dr. Myers' opinion that claimant's hearing is within a normal range to be more persuasive. Consequently, claimant has failed to establish compensability. Dr. Myers' opinion is not only supported by Dr. Epley, but is in accord with the generally accepted opinions and measurement procedures of national and state medical societies and specialities. Even Dr. Korn has acknowledged the uniqueness of his contrary opinion and measurement procedures.

Our decision is in accord with Kenneth E. Schmidt, 35 Van Natta 592 (1983). In Schmidt, we found an occupational disease claim compensable where claimant's hearing loss required medical services or resulted in disability. ORS 656.005(8)(a) and 656.804. We reasoned that the medical services could take the form of a prescription for hearing aids, as well as the medical services leading to the prescription. Here, the credible medical evidence not only establishes that claimant's hearing is normal, but it also concludes that hearing aid amplification is not warranted. Furthermore, the record is silent concerning potential time loss.

ORDER

The Referee's order dated May 17, 1984 is reversed. Dillingham Ship Repair's denial issued January 16, 1984 is reinstated and affirmed.

BARBARA A. LUSEY, Claimant
Doblie & McSwain, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-09389 & 83-08870
March 28, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee Podnar's order which set aside its denial of claimant's occupational disease claim for psychological stress. The issue on review is compensability.

Claimant was a psychiatric aide at a state training facility. She compensably injured her knee in November 1982. Her job was modified to allow her to continue to work within her limitations while she recovered from the knee injury. She had tardiness and attendance problems unrelated to her compensable injury which led to disciplinary proceedings and a possibility that she would be terminated from her job. Claimant perceived that she was being treated in some ways differently from the other aides and in other ways she was being treated equally with the other aides. Claimant believed that her supervisor was engaged in a campaign of harassment and sought psychiatric counselling to deal with feelings of anger and resentment. The treatments enabled claimant to develop the insight to recognize that the supervisor was not harassing her and claimant was able to return to work.

The Referee relied on his reading of McGarrah v. SAIF, 296 Or 145 (1983), and found that the events and conditions capable of producing stress in this claimant objectively existed and that claimant "honestly perceived" that work-related stress caused her disease. We do not believe that claimant's "honest perception" of work-related stress as the cause of her need to seek medical treatment is the test set forth in the McGarrah case, by which the compensability of such claims is measured. Rather, we believe that the appropriate test is: (1) whether there were objectively real events or conditions of employment, (2) which were capable of producing stress, (3) which were the major contributing cause that this claimant (4) suffered a mental disorder. See also Leary v. Pacific Northwest Bell, 67 Or App 766 (1984).

The Referee also relied on Dr. Mead's opinion that claimant's working conditions had caused her need to seek medical treatment. We find that Dr. Mead's report of claimant's history makes his conclusions less persuasive. He relied on claimant's perceptions of stress and harassment at work to relate the work to the need for medical treatment. Claimant admitted at hearing that her perceptions were incorrect. Therefore, Dr. Mead's opinion, which relied on the incorrect perceptions of claimant, is not as persuasive as the more comprehensive report of Dr. Holland who opined that other stressors in claimant's life were the major cause of her problems. See, Miller v. Granite Const. Co., 28 Or App 473 (1977). We find that claimant has not carried her burden of proof that there were objectively real events or conditions at work that were capable of causing stress and that were the major contributing cause of her problems, and, therefore, we reverse the order of the Referee.

ORDER

Those portion of the Referee's order dated February 28, 1984 which set aside the SAIF Corporation's denial of claimant's psychological stress claim and awarded claimant's attorney an associated fee are reversed and the SAIF Corporation's denial is reinstated.

MICHAEL L. McKINNEY, Claimant
Cash Perrine, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 84-08202
March 28, 1985
Order Denying Motion to Close

Claimant has moved the Board for an order closing the record on Board review. Claimant's opening brief was filed February 20, 1985. The employer's responding brief has not yet been filed. The employer's failure to file a brief is due to the failure of the hearing reporter to transcribe the record of closing arguments, which was requested by the employer. We have been informed that the transcript of the closing arguments has now been received by the employer and claimant.

Now, therefore, claimant's motion to close the record is denied. The employer's brief shall be due not later than 20 days from the date of this order. Claimant shall be allowed ten days from the filing date of the employer's brief to file his reply. Thereafter this matter shall be docketed for Board review.

IT IS SO ORDERED.

RAY A. RIDDELL, Claimant
Burt, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys
Miller, et al., Defense Attorneys

WCB 83-11652 & 84-01280
March 28, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The International Paper Company requests review of those portions of Referee Michael Johnson's order in WCB Case No. 84-01280 which held it solely responsible for claimant's low back condition and which awarded 48° for 15% unscheduled disability in addition to the 32° for 10% unscheduled disability awarded by Determination Order for claimant's low back. Georgia-Pacific Corporation requests review of that portion of the Referee's order in WCB Case No. 83-11652 which awarded 64° for 20% unscheduled disability in addition to the 64° for 20% unscheduled disability awarded by Determination Order for injury to claimant's central nervous system.

Claimant, an electrician, fell three to four feet off a ladder onto his buttocks on May 15, 1979, while employed by International Paper (hereinafter IP). He also sustained compensable injuries to his low back at IP on June 23, 1979 and November 26, 1979.

On October 26, 1979 Dr. Smith noted claimant's complaint of intermittent low back pain brought on by leaning forward. X-rays showed a slight narrowing of the L5-S1 disc space, without apparent degeneration. He diagnosed claimant's condition as a lumbosacral strain with intermittent disability, to be treated conservatively.

The range of fluctuation of claimant's low back condition as a result of the IP injuries is well illustrated by a comparison of the results of Dr. Smith's October 26, 1979 and April 15, 1980 examinations. In October 1979 claimant could bring his fingertips to within two inches of the floor on bending forward. All other lumbar motions were within the normal range and none were painful. In April 1980 he could bring his fingertips only to the

patellar level on forward bending. The reversal of lumbar lordosis caused left low back pain. Extension was limited to but a few degrees. Right and left lateral flexion was two-thirds normal, as was right and left rotation. Considerable tenderness was present from about L5 to S1 at and to the left of the midline.

Claimant's employment at IP ceased on January 27, 1981. Early in November 1981, claimant started working for Georgia-Pacific Corp. (hereinafter GP). On November 30, 1981, claimant compensably injured his head and wrists when he fell 16 to 18 feet off a ladder onto a concrete floor. Emergency surgery was performed for a right temporal depression skull fracture, subdural hematoma and brain laceration.

Dr. McGee noted on March 24, 1982 that claimant had been aware of low back pain for the last several weeks as he increased his activities. Claimant did not inform Dr. McGee of the IP injuries. Dr. McGee's impression was a probable strain of the left sacroiliac joint, related to earlier trauma. He released claimant to return to work on May 3, 1982. He noted on May 19, 1982 that there was no major back tenderness and that claimant could bend forward at the waist and touch his toes.

Dr. McGee referred claimant to Dr. Brooks for neurological consultation, and claimant was seen on July 27, 1982. Dr. Brooks noted complaints of headaches and decreased memory. An electroencephalogram was performed with abnormal results. The headaches were treated with medication.

A closing examination on the IP claim was performed by Dr. Smith on January 10, 1983. Although claimant had been employed as a construction electrician for the prior several months, he told Dr. Smith that he was unable to work as an electrical construction worker because of back pain. He did not inform Dr. Smith of his GP injuries. Dr. Smith's findings on examination were substantially consistent with those he reported in 1979. His impression was of chronic mechanical low back pain with episodes of exacerbation and remission. He stated that although claimant might have times when he has more trouble, overall his condition was stationary.

Dr. McGee performed a closing evaluation in regard to claimant's neurological status on January 19, 1983. The doctor reported that claimant had returned to full time work as an electrician and noted no major problems with his work activities. Dr. McGee listed claimant's permanent neurological impairments as some recent memory impairment, loss of sensation over the right side of the face and some mild imbalance regarding the left leg. He also noted an impairment of perhaps 50% in opening the jaw and that the headaches were under reasonable control.

Claimant worked as a construction electrician for GP without apparent problems from his release in May 1982 until January 1983, when he was bumped to a shift electrician position. The latter job required that he ride a three-wheeled cart and respond to breakdowns as they occurred. The job involved frequent interruptions and distractions.

Dr. Luce took claimant off work on September 6, 1983, following an exacerbation of his low back due to a lifting incident at GP. A CT scan suggested minor disc bulging at L5-S1.

On September 19, 1983, Dr. McGee recommended continued conservative care and that claimant avoid lifting over 50 pounds or riding in the cart, as it bounced his spine. Dr. Luce released claimant to return to work on September 26, 1983 with a 35 pound lifting restriction.

Claimant returned to work, but was fired on October 3, 1983 for safety violations. Claimant appears to attribute these violations at least in part to memory problems. Based on examinations and evaluations by Dr. Brooks, Dr. Holland and psychologists Ackerman and Lewinshon, we find that the injuries resulting from the GP fall diminished claimant's ability to remember in the short term, particularly relative to what he hears and especially following distraction. Claimant's attention span for visual information is also reduced, as is his information processing speed. The injury has also caused mild difficulty in sequencing activities. On the other hand, claimant retains at least normal intelligence, excellent problem solving ability, superior math skills and the ability to concentrate if he is not disturbed. Claimant's ability to remember what he hears is still very good if he is given adequate time to create semantic and visual associations to the material. Although claimant's central nervous system impairments preclude employment as a shift electrician or in any other setting involving rapid information processing or frequent distractions, these impairments would probably not preclude work as a construction electrician in settings where claimant could plan and complete tasks with few interruptions, using diagrams and written prompts.

Finally, Dr. Rosenbaum examined claimant for GP on March 19, 1984. He was the first doctor to be made aware of both the IP and GP injuries. He noted three chief complaints: (1) difficulty with memory, (2) pain in the low back, and (3) pain in the right wrist. Claimant told Dr. Rosenbaum that his back had stayed approximately the same over the past year, but that it was significantly worse than when he had worked for IP. Claimant told Dr. Rosenbaum that he believed that his back condition would not preclude him from working as an electrician. Dr. Rosenbaum stated:

> "I have reviewed the medical records with regards to the 1979 injuries to Mr. Riddell's low back and at the present time find not (sic) objective evidence that there has been a significant increase over and above the 10% unscheduled disability to the low back. Subjectively, Mr. Riddell states that there has been some increase in his discomfort, but that is all within the diagnosis of chronic lumbosacral strain and not remarkable."

Claimant was nearly 40 years old at hearing. He has completed approximately two and a half years of post-high school training, primarily in mathematics and electronics, and is a journeyman electrician. He has also attended specialized training sessions in electronics, hydraulics and computers. At least some of this training is now obsolete, however, due to technological advances. Claimant experiences pain in his low back, increased by lifting. Dr. McGee's and Dr. Luce's lifting restrictions of 50 and 35 pounds respectively are reasonable in light of claimant's condition. Despite his limitations, claimant's activities include

light electrical and handyman work for neighbors, some light car repairs and fishing. He is able to split firewood and throw a baseball.

This case is made more difficult by claimant's selective editing of the information provided to doctors in medical histories. The Referee concluded that claimant also slanted his testimony.

We affirm the Referee's finding that IP is solely responsible for claimant's low back condition. The Referee's holding is based in part upon the procedural considerations that IP did not issue an express denial of responsibility for the back condition and did not request a hearing on the low back claim's Determination Order. Procedural issues aside, however, the weight of the evidence is that the GP employment did not contribute to claimant's low back disability.

In our de novo review of the record, we disagree with the Referee's assessment of claimant's permanent loss of earning capacity due to the compensable head and back injuries. Taking into account claimant's physical impairments to his low back and central nervous system and weighing the pertinent social/vocational considerations, see OAR 436-65-600 et seq., we conclude that claimant would be more appropriately compensated by awards of 15% unscheduled disability for his low back and 25% unscheduled disability for his central nervous system. The Referee's orders are modified accordingly.

ORDER

The Referee's orders dated May 18, 1984 are affirmed in part and modified in part. The order in WCB Case No. 84-01280 is modified to award claimant an additional 16° for 5% unscheduled disability for his low back condition in lieu of the additional 48° for 15% awarded by the Referee, making a total award of 48° for 15% unscheduled disability for that condition. The order in WCB Case No. 83-11652 is modified to award claimant an additional 16° for 5% unscheduled disability arising out of the injury to his central nervous system, in lieu of the additional 64° for 20% awarded by the Referee, making a total award of 80° for 25% unscheduled disability for that condition. Claimant's attorney's fees are modified accordingly. The Referee's orders are affirmed in all other respects.

JAMES R. VINING, Claimant
David C. Force, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 84-00479 & 83-09064
March 28, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Foster's order which set aside its denial of claimant's aggravation claim for injury to his back and ordered payment of travel expenses from Coquille to Eugene for claimant's chiropractic treatment. Claimant cross-requests review seeking a penalty and attorney fee. The issues are: (1) compensability; (2) reasonableness of medical treatment; and (3) penalties.

Claimant sustained an industrial injury while working in the

woods on March 31, 1980. His principal complaint was a broken rib, however he also complained of mid-back pain. He was treated by Dr. Carlock, a Eugene chiropractor. Claimant resides in the Coquille/Coos Bay area.

Claimant's claim was closed by a Determination Order dated March 24, 1981 that granted no award of permanent disability. A second Determination Order dated March 30, 1983 also granted no disability award. On August 1, 1983 Referee Danner awarded claimant 32° for 10% permanent partial disability. The order was not appealed.

Dr. Carlock reexamined claimant on August 8, 1983. His report states that x-rays revealed a malposition of the fifth and sixth cervical vertebrae. He opined that claimant continued to have symptoms related to his March 31, 1980 injury and that further medical testing was indicated. On August 30, 1983 Dr. Carlock advised SAIF that claimant was medically stationary, in language that expressed the concept in terms of ORS 656.005(17), but that claimant should continue to receive temporary total disability benefits until a mid-thoracic spine problem could be found and corrected.

SAIF wrote to Dr. Carlock asking for further explanation of his August 30, 1983 report. Dr. Carlock responded that claimant was not medically stationary. SAIF denied claimant's aggravation claim on September 14, 1983. On November 14, 1983 SAIF wrote to claimant stating that it would no longer pay travel expenses for claimant to travel to Eugene for treatment by Dr. Carlock.

On December 13, 1983 claimant was examined by Dr. Campagna, neurosurgeon, who noted that subjectively claimant reported that he had been doing well until March of 1983 when his condition became worse. Dr. Campagna suggested a myelogram, which was performed December 20, 1983. The myelogram results were within normal limits. On December 28, 1983 Dr. Campagna reported that claimant's condition was stationary and that no further treatment was indicated. He recommended that claimant undergo psychiatric and vocational evaluations.

On January 6, 1984 SAIF issued another denial of claimant's aggravation claim. On January 10, 1984 Dr. Carlock wrote to SAIF's attorney in response to an inquiry. Dr. Carlock stated that claimant was not medically stationary, because he needed evaluation of his mid-thoracic spine. However, in the next sentence, Dr. Carlock stated that claimant was stable in that further treatment and time would not enhance healing. Finally he said that chiropractic examination had not revealed a material worsening of claimant's condition in the nine months previous to his most recent treatment, "although I suspect that there has been a material worsening which the chiropractic examination does not reveal."

The Referee apparently accepted Dr. Carlock's opinion that there had been a worsening of claimant's condition and on that basis set aside SAIF's denial. We are unable to agree. The very most that Dr. Carlock said was that he thought there might have been a worsening, but that what he suspected was not confirmed by his own examination. Dr. Carlock's basis for stating that claimant was not medically stationary (which was contradicted in the same letter) was that claimant needed to have his mid-thoracic spine checked. That had been done, with negative results, by Dr. Campagna before Dr. Carlock wrote the January 10, 1984 letter.

There is no persuasive evidence that claimant's condition worsened or that such worsening as there may have been resulted from the March 1980 injury. ORS 656.273(1). Claimant has not proven by a preponderance of the evidence that he has suffered an aggravation.

With regard to the propriety of SAIF's refusal to pay claimant's travel expenses from Coquille to Eugene, we agree with claimant and the Referee that SAIF did not comply with OAR 436-54-245(4), in that claimant was not provided with a list of providers in his geographical area. That portion of the Referee's order that set aside SAIF's denial of travel expenses will be affirmed.

ORDER

The Referee's order dated June 22, 1984 is affirmed in part and reversed in part. That portion of the order setting aside the SAIF Corporation's denial of travel expenses is affirmed. Claimant's attorney is awarded $450 for services on Board review in connection with the travel expense denial, to be paid by the SAIF Corporation. That portion of the order setting aside the SAIF Corporation's denial of claimant's aggravation claim is reversed and the SAIF Corporation's denial dated January 6, 1984 is reinstated and affirmed.

JAMES C. WELCH, Claimant
Brown, et al., Claimant's Attorneys
Brian Pocock, Defense Attorney

WCB 82-01160
March 28, 1985
Order on Remand

This matter is before the Board on remand from the Court of Appeals. The Board has been instructed to determine the amount of the attorney fee to which claimant's attorney is entitled.

Claimant was awarded 48° (15%) unscheduled permanent partial disability by a Determination Order. Claimant requested a hearing at which the Referee increased claimant's award to one for permanent total disability. The Board modified the Referee's award to 192° (60%) permanent partial disability. James C. Welch, 35 Van Natta 1794 (1983). Claimant's attorney was granted a fee of 25% of the increase in the award over that granted by the Determination Order (144°), not to exceed $2,000, payable out of claimant's compensation. Claimant sought judicial review. Attorney fees awarded out of claimant's compensation are paid pending review by the court. ORS 656.313(2); Candy J. Hess, 37 Van Natta 12 (1985); Robert G. Perkins, 36 Van Natta 1050 (1984).

The Court of Appeals reversed the Board and reinstated the Referee's award of permanent total disability. Welch v. Bannister Pipeline, 70 Or App 699 (1984). Claimant's attorney petitioned the court for an attorney fee award and the court has remanded to the Board for determination of a fee. See ORS 656.382(2); 656.386(2).

When a claimant appeals an extent of disability issue to the Court of Appeals and prevails, the claimant's attorney shall be awarded a fee of up to 25% of the increased award. OAR 438-47-045(1); see Zoi Sarantis, 36 Van Natta 1634 (1984). Fees awarded under our rules are not established in any mandatory amount; the rules are suggestive. ORS 656.388(4); OAR 438-47-005; Morris v. Denny's, 53 Or App 863, 866 (1981). This system for awarding attorney fees in workers' compensation cases recognizes the contingent nature of attorney fees, stressed by claimant's

attorney in his fee petition. Claimant's attorney's petition seeks an extraordinary fee; however, it is admitted that this is not an extraordinary case. Claimant's attorney's fee shall be paid from the increased compensation awarded by the court. ORS 656.386(2); Gainer v. SAIF, 51 Or App 869 (1981); Zoi Sarantis, supra. Claimant is presumed to have already received at least part of a $2,000 fee after Board review. The Board has sufficient information to form the basis for awarding fees before the Court of Appeals.

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 $3,000. Any fees paid pursuant to the Board's previous order shall be a credit against the attorney fee granted by this order.

IT IS SO ORDERED.

MELVIN W. ANDERSON, Claimant
Allen & Vick, Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-00822
March 29, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Galton's order which increased claimant's total award for a low back injury from 10% (32°) unscheduled permanent disability, as awarded by a January 18, 1984 Determination Order, to 30% (96°). On review, the employer contends the award is excessive. We agree and modify the award.

Claimant is a 53 year old mixer at a bakery. He has worked in bakeries for approximately 30 years. Except for a two year stint as a welder, claimant has worked for the employer since 1964.

In January 1982 claimant compensably injured his low back while lifting 100 pound sacks of flour. His treating chiropractor, Dr. Ferrante, diagnosed his condition as "lumbar sprain strain with associated Grade II myofascitis. Slight L5 facet-jamming syndrome." Claimant remained working until April 1982, when he suffered an exacerbation while pushing a trough at work. From April 1982 through March 1983, claimant continued to receive conservative treatment from Dr. Ferrante and was off work approximately eight months.

In October 1983 Dr. Ferrante opined that claimant would suffer a partial permanent impairment of "approximately 15%." Although Dr. Ferrante felt claimant would be able to perform his regular duties, the doctor advised against any work activities in excess of an eight-hour day.

In December 1983 Dr. Ferrante authored a further medical report. The doctor reported that claimant continued to experience pain when sitting, standing, lifting, bending and walking for prolonged periods. Dr. Ferrante placed claimant on a 25 pound lifting restriction and continued to restrict claimant to an eight-hour day. In this report Dr. Ferrante opined that claimant would suffer a 25% partial permanent impairment.

The January 18, 1984 Determination Order awarded claimant 10% unscheduled permanent disability. Claimant requested a hearing.

In April 1984 Dr. Langston, orthopedist, performed an independent medical examination. Dr. Langston diagnosed degenerative disc disease of L5-S1 with instability, dorsal spine kyphoscoliosis (not work related) and bilateral limitation of motion of shoulders (not work related). Dr. Langston felt the initial activity of lifting the sack had made claimant's underlying low back condition symptomatic. The doctor concluded that claimant's permanent impairment was not due to his work activity. Dr. Langston expressed his frustrations at attempting to apportion claimant's permanent impairment between claimant's underlying condition and that portion contributed by claimant's work. However, he opined that claimant's entire condition was "at least within the category of 25% permanent partial impairment." Dr. Langston opined that the amount attributable to claimant's injury was 10%.

Claimant credibly testified that since his return to work in March 1983 he has been performing the same job as he held before his injury. The job entails walking, moving around, lifting, sitting and a minimal amount of bending. In addition, he is required to push and pull both dough troughs and sponge troughs, which are mounted on wheels and weigh approximately 1800 to 2000 pounds. About every 15 to 20 minutes, claimant pushes the dough troughs roughly 45 feet and pulls the sponge troughs about 8 to 10 feet. He generally has a helper move the sponge troughs. Approximately five times per shift claimant must lift both 50 pound gluten sacks and 80 pound salt sacks.

Claimant experiences nearly constant low back pain. The pain is usually worse by the end of the shift. Upon returning home from a shift, claimant soaks in his hot tub for 40 minutes. Whether on or off work, he wears a back support belt about half of each day. Claimant takes nonprescription medication and continues to receive conservative chiropractic treatment from Dr. Ferrante on a weekly basis. Due to his back pain, claimant gets at most two hours of sleep per night. He has also curtailed his recreational activities, such as golf, jogging and basketball.

Claimant has a GED. He spent four years in the Air Force as a weapons mechanic. Claimant has also completed a one year community college course in welding and received a degree.

We think claimant has established that he is entitled to a larger disability award than he was awarded by the Determination Order. However, we find that the Referee's award was excessive.

Post-injury earnings are relevant to, but not determinative of an appropriate award of unscheduled permanent disability. Jacobs v. Louisiana-Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549 (1972). Although claimant's post-injury earnings are not determinative of claimant's disability award, in reaching our determination we find it significant that claimant has returned to his regular job, without limitations. Moreover, he has apparently been able to adequately perform duties which periodically require heavy physical labor.

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 attributable to the compensable injury, including disabling 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 20% unscheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated July 30, 1984 is modified. In lieu of the Referee's award, and in addition to the 10% (32°) unscheduled disability awarded by the January 18, 1984 Determination Order, claimant is awarded 10% (32°) unscheduled disability for a total award of 20% (64°) unscheduled disability for his low back injury. Claimant's attorney fees shall be adjusted accordingly.

SHELBEE J. BATES, Claimant
Allen & Vick, Claimant's Attorneys
Bottini & Bottini, Defense Attorneys

WCB 84-01846
March 29, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee McCullough's order which: (1) awarded claimant 10% (32°) unscheduled permanent disability for a low back injury, whereas a February 8, 1984 Determination Order had awarded no permanent disability; and (2) declined to authorize an offset for public assistance benefits claimant allegedly received while she was also receiving temporary disability benefits.

We find that claimant failed to prove permanent disability attributable to her compensable injury. Consequently, we reverse.

Claimant was 37 years of age at the time of hearing. In August 1982, while working in a cannery, claimant slipped and fell, landing on her back and buttocks. The employer accepted her claim for a bruised right hip. Since her injury claimant has received numerous modes of conservative treatment from a number of medical and chiropractic physicians.

In his most recent report, Dr. Tiley, claimant's former treating orthopedist, diagnosed claimant's condition as lumbosacral strain, without objective evidence of major dysfunction, which had been very long in resolving. The doctor noted that claimant tended to be part histrionic in terms of her physical activities. Although Dr. Tiley had earlier theorized during claimant's rehabilitation that claimant's permanent impairment "from an objective point of view will be rather minimal," the doctor ultimately concluded that claimant suffered no permanent impairment.

Dr. Whitmire, claimant's treating chiropractor, agreed that claimant suffered a lumbosacral strain, but also concluded that claimant had a sprain that involved the ligamentous structure of her spine. The doctor reported that testing had indicated a disc bulging or weakness. Dr. Whitmire also felt that claimant had some nerve root pressure and irritation. In a March 1984 report, Dr. Whitmire stated that he had released claimant to regular work in December 1983. The doctor did not mention any restrictions or limitations at that time. Furthermore, Dr. Whitmire advised that claimant's condition would be greatly benefited by weight loss. However, in an April 1984 report, Dr. Whitmire opined that claimant would have a permanent weakness in the lumbar spine due

to a disc injury. The doctor further placed claimant under a 20 pound weight limitation and restricted her bending, lifting and sitting. Dr. Whitmire offered no explanation for this change in his opinion.

Dr. Bolin, chiropractor, performed an independent medical examination, issued a report and testified at the hearing. The doctor reported that the present physical findings showed no evidence of soft tissue injury residual. It was Dr. Bolin's conclusion that claimant suffered from a facet syndrome problem which was not related to her compensable injury. Claimant's inefficient postural mechanics and her on-going obesity were contributing to her back complaints. Dr. Bolin further noted several inconsistencies in the examination which demonstrated claimant's extreme sensitivity. However, the doctor opined that this reaction was not related to a disc or nerve root problem.

In his report Dr. Bolin opined that claimant's permanent impairment attributable to her compensable injury was "zero to minimal." However, at hearing the doctor concluded that claimant suffered no residual impairment. The doctor acknowledged that trauma could aggravate a facet syndrome and that there was no information in claimant's medical history to contradict her assertion that her low back was basically asymptomatic prior to her compensable injury. Although he further conceded that claimant was not without pain, Dr. Bolin felt claimant tended to exaggerate her symptoms.

Claimant was off work until August 1983, when she obtained part time work performing cooking and shopping errands for a Catholic rectory. Her hours are three hours a day, five days a week. Claimant receives an hourly wage of $5. Since April 1984 she has also worked at a flower shop designing floral arrangements and performing clerical services. She works about six hours a day, generally six days a week, and receives a monthly salary of $300.

Claimant experiences constant low back pain, which is aggravated by sitting and standing for prolonged periods of time. Claimant felt she could sit for about 30-45 minutes without experiencing pain. She is unable to do much lifting and has given up many of her recreational activities.

Unlike the Referee, we are not persuaded that claimant has established that she suffered permanent low back impairment as a result of her compensable injury. Consequently, we find that she is not entitled to an award of permanent disability.

In reaching our decision, we find Dr. Tiley's opinion persuasive. As claimant's former treating orthopedist, Dr. Tiley concluded that claimant suffered no permanent impairment. Furthermore, Dr. Bolin agreed with this conclusion. Although Dr. Bolin conceded trauma could aggravate a facet syndrome, it is relatively clear that the doctor attributed claimant's problem to excessive weight and not to her compensable injury. In addition, both doctors referred to claimant's tendency to exaggerate her symptoms. We do not find the opinion of claimant's treating chiropractor, Dr. Whitmire, persuasive. Dr. Whitmire opined that claimant suffered from "permanent weakness" in the lumbar spine and did ultimately place claimant under a weight limitation and

restrictions. However, the doctor did not explain what had precipitated this recent change from his opinion reported just one month previous in which he had released claimant apparently without limitation with a recommendation to lose weight. Under these circumstances, claimant's testimony concerning her constant pain and limitations does not persuade us that she has sustained permanent impairment as a result of her compensable injury.

We affirm that portion of the Referee's order which declined to authorize an offset for welfare assistance allegedly received by claimant while she was receiving temporary disability benefits. Not only do we question whether claimant must repay these temporary benefits, but the evidence suggests that claimant is under court order to make restitution for the welfare assistance she has received. Thus, if the employer was allowed an offset, claimant would be forced to pay twice.

ORDER

The Referee's order dated July 20, 1984 is reversed in part and affirmed in part. That portion which awarded claimant unscheduled permanent disability is reversed. The remainder of the Referee's order is affirmed.

DAVID F. BRAINERD, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 82-08311 & 82-07045
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

EBI Companies requests review of those portions of Referee Mulder's order which set aside both its denial of claimant's left knee injury claim and its partial denial of claimant's right knee and low back condition. On review, EBI contends that responsibility for claimant's left knee condition lies with the SAIF Corporation and that the responsibility for claimant's right knee and low back condition, if compensable, also lies with SAIF.

The Board affirms the order of the Referee concerning responsibility for claimant's compensable left knee and low back conditions. However, we do not find claimant's current right knee condition compensable.

Claimant was 53 years of age at the time of hearing. He has an extensive history of right knee problems. This right knee history includes a football injury as a teenager, a medical discharge from the Army prompted by a diagnosis of osteoarthritis, a 1963 car accident resulting in a sprain, and a 1967 fall in which the knee struck a rock or rail. Claimant has experienced discomfort in his knee since the football injury. However, all treatment had been conservative. Possible surgical intervention to combat the knee's degenerative changes was discussed beginning in the early 1960's. Finally, in September 1978, claimant underwent partial knee replacement surgery. The surgery was covered by claimant's private insurer. Dr. Kaesche, claimant's treating surgeon, diagnosed claimant's right knee condition as degenerative arthritis.

In March 1978 claimant sustained a compensable left knee injury while employed by SAIF's insured. In September 1979 Dr.

Kaesche performed an arthroscopy and partial lateral menisectomy of the left knee. Although reports generated during this time also mention claimant's right knee complaints, a January 1980 Determination Order awarded only 5% left leg permanent disability. This award was subsequently increased to 25% by virtue of a January 1981 stipulation.

In August 1980 claimant began working for EBI's insured as a maintenance repairman. In February 1981, while performing his work duties, claimant slipped on the ice, twisting his left knee and landing on his right knee. Approximately one week later, claimant returned to Dr. Kaesche, who had last seen claimant in June 1980. Claimant complained of increasing pain after falling on both knees the previous week. The doctor noted claimant's previously diagnosed degenerative changes. Dr. Kaesche further noted that there was no evidence of any loosening of claimant's right prosthesis. Dr. Kaesche prescribed anti-inflammatory medication and released claimant to work. Claimant sought no further treatment.

Claimant's "twisted left knee and bruised right knee" claim was accepted by EBI as a non-disabling injury. Claimant missed no time from work and returned to his regular job. However, his co-workers covered for him by doing the harder, heavier work. Claimant felt that his inability to perform his regular work stemmed from both his left and right knee problems. Claimant lost his job through budget cuts in May 1981. In the fall of 1981 claimant obtained employment as a substitute custodian working approximately twice a month.

In June 1982 claimant returned to Dr. Kaesche, complaining of catching and popping in the left knee. Claimant had not sought treatment since the February 1981 examination. The doctor noted that the right knee was doing fairly well, although claimant experienced occasional dull aching. Dr. Kaesche requested that the claim be reopened.

In September 1982 a ".307" order issued, designating EBI as the paying agent.

In November 1982 Dr. Duff, orthopedist, performed an independent medical examination. The doctor recorded a history of very little change in the right knee following the February 1981 injury. Dr. Duff diagnosed bilateral osteoarthritis and status post-hemiarthroplasty on the right. In Dr. Duff's opinion, claimant's right knee had not appreciably changed due to the February 1981 injury.

The February 1981 claim was eventually closed by virtue of an April 20, 1983 Determination Order. Claimant received 15% permanent disability for the left leg (knee).

On April 15, 1983 claimant sought treatment from Dr. Buttler, chiropractor. Among claimant's complaints were right knee pain and stiffness. Dr. Buttler diagnosed "right knee sprain and strain of a persistent nature with concurrent arthritic changes and an artificial joint." Dr. Buttler attributed claimant's knee problems to the February 1981 injury.

Dr. Buttler's report was sent to SAIF, who forwarded the report to EBI. In May 1983 EBI denied responsibility for

claimant's current treatment, contending, among other things, that the February 1981 injury did not cause any worsening of his right knee condition.

In May 1983 Dr. Kaesche reported that he found nothing in his evaluations subsequent to the February 1981 fall to indicate any significant right knee injury. Consequently, Dr. Kaesche opined that the February 1981 fall was not a factor in any of claimant's current right knee complaints.

The Orthopaedic Consultants examined claimant in December 1983. Claimant reported to the Consultants that both knees bothered him following the February 1981 injury. However, the right knee "calmed down." Although the right knee occasionally bothered him at night, claimant advised the Consultants that he felt the February 1981 injury had not permanently affected his right knee condition. The Consultants diagnosed degenerative arthritis and post-operative hemi-right knee replacement. In the Consultant's opinion, claimant experienced no increase in right leg disability as a result of the February 1981 injury.

Dr. Kaesche testified via deposition. The doctor felt that the February 1981 injury had caused a temporary flare-up of claimant's right knee symptoms. When advised that claimant received assistance from co-workers following the February 1981 injury, Dr. Kaesche opined that the injury contributed to claimant's disability, if one considered the inability to perform work as a disability. Finally, Dr. Kaesche reconfirmed his earlier opinion that the February 1981 injury was not a factor in claimant's present right knee complaints.

Claimant credibly testified that following the February 1981 injury his right knee pain was very severe and more frequent. Although he had experienced pain in the right knee since his teens, following the 1981 injury the pain was sharper and localized in the area where he landed.

At all material times, claimant has continued to perform the activities necessary to maintain his 20 acre farm, which includes a barn and a garden. He also raises some sheep and chickens. Claimant attempts to limit his activities, primarily with the assistance of his two teenaged daughters and his wife.

Concluding that Drs. Buttler, Kaesche and the Orthopaedic Consultants either directly or impliedly related the February 1981 fall to claimant's current right knee condition, the Referee set aside the denial.

Generally, to establish compensability of an underlying disease the claimant must prove a worsening. Weller v. Union Carbide, 288 Or 27 (1979). However, the Weller requirement applies only in occupational disease claims. Boise Cascade v. Wattenbarger, 63 Or App 447 (1983); Jameson v. SAIF, 63 Or App 553 (1983). An injury which produces symptoms of a preexisting underlying condition may only obligate the insurer to pay for the symptomatic worsening without rendering the underlying condition itself compensable. Roy L. Bier, 35 Van Natta 1825 (1983).

We are persuaded that the 1981 injury merely caused the onset of symptoms in claimant's underlying arthritic right knee condition, without causing a pathological change and without contributing to the further continued progression of the disease

process. Consequently, claimant's underlying degenerative right knee condition is not compensable. EBI was responsible for the accepted nondisabling "bruise" and the temporary worsened symptoms which claimant experienced in February 1981. We are persuaded that soon after claimant's February 1981 fall claimant's underlying arthritic right knee condition returned to its premorbid status. Claimant's failure to seek further medical treatment for approximately 16 months and his subsequent medical histories support this conclusion.

The medical opinions are nearly unanimous in their conclusion that the February 1981 incident did not appreciably change claimant's underlying right knee condition and that he suffered no residuals. We find the opinion of Dr. Kaesche, as treating physician, to be particularly persuasive. It was Dr. Kaesche's opinion that claimant experienced a temporary flare up of symptoms and that the 1981 injury was not a factor in claimant's current right knee condition.

Dr. Kaesche did concede that the February 1981 injury contributed to claimant's disability if claimant required assistance from his co-workers. However, there is no medical opinion in the record which specifies for which problem(s) claimant was receiving assistance. We are left with claimant's lay testimony that the assistance was required for both his left and right knee problems. This lay opinion is unpersuasive because we are attempting to analyze a complex, medical question which should be resolved by competent medical evidence. Uris v. Compensation Department, 247 Or 420 (1967). Moreover, the opinion is not supported by claimant's subsequent medical histories which indicate that following the February 1981 injury the majority of his problems concerned his left knee and that the right knee symptoms had been short in duration.

Dr. Buttler did feel claimant's current condition was related to the February 1981 injury. However, he had just begun treating claimant, it is not clear whether he based his opinion on claimant's entire medical record, and his opinion is conclusory. Consequently, the doctor's opinion is unpersuasive.

ORDER

The Referee's order dated April 6, 1984 is affirmed in part and reversed in part. That portion which set aside EBI Companies' partial denial of claimant's right knee condition is reversed. EBI's denial dated May 18, 1983, insofar as it partially denies responsibility for claimant's right knee condition, is reinstated and affirmed. The remainder of the Referee's order is affirmed. For services on Board review pertaining to the successful defense of the compensability of claimant's current back condition, claimant's counsel is awarded $150, to be paid by EBI Companies.

KENNETH L. FRISBY, Claimant
Cramer & Pinkerton, Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 82-11013 & 83-05341
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order that approved the self-insured employer's denials of claimant's claim of aggravation and/or occupational disease claim for his osteoarthritis of both hip joints. The issue is compensability.

In 1976 claimant sustained a herniated disc injury to his low back when he fell from a log he was bucking on the hot deck. About four weeks after his injury he underwent a discectomy at L5-S1. Claimant returned to his usual occupation as a bucker on the landing in May of 1977. Following a claim closure examination by Dr. Bernson on January 5, 1978 in which it was noted that claimant was tolerating his work with only slight discomfort, the claim was closed. A Determination Order issued January 30, 1978 granted claimant an award of 32° for 10% low back unscheduled disability. That award was increased by another 32° (10%) by a stipulation approved on March 30, 1978.

Claimant did not again seek medical attention until March 25, 1981, when he complained to Dr. Eckman, a neurologist, of increasing pain in his left hip extending down his left leg and localizing in his left knee. Dr. Eckman could find no neurological deficits associated with claimant's prior back injury to explain the hip, leg and knee pain on the basis of radiculopathy. However, on September 8, 1982 Dr. O'Brien, another neurologist, took claimant off work due to his increasing complaints of left hip and leg pain and weakness.

On November 12, 1982 claimant submitted a Form 801 that stated in a somewhat conclusory fashion that his "condition [had] worsened since the last adjustment of compensation and throughout [his] employment at [employer]." The portion of claimant's body referred to in the 801 was his low back and leg (right or left not specified). The employer issued its denial on November 24, 1982 on the ground that, according to the medical reports, there had been no worsening that was attributable to the 1976 injury.

On December 1, 1982 a CT scan of claimant's low back revealed no significant abnormalities. On January 24, 1983 Dr. Eckman emphatically opined to claimant's attorney that claimant showed no worsening and that his neurological examination remained "entirely normal!" (Emphasis in original.) From the medical reports up to this point it is clear that all of the treating and examining physicians were looking to claimant's low back to explain the left leg symptoms.

On April 5, 1983 claimant began treating with Dr. Sulkosky, an orthopedic surgeon. Dr. Sulkosky diagnosed that claimant had degenerative hip disease bilaterally, with the left much more severe than the right, that would probably require a total hip arthroplasty at some time in the future. In claimant's history, Dr. Sulkosky reported that claimant's left leg and knee pain complaints began within several weeks of his previous back surgery and had continued since then, growing worse over time. In the history related by Dr. Sulkosky, claimant reported that he had had no problems with his left leg or knee before his 1976 injury. On

the basis of this history and his objective findings, Dr. Sulkosky opined that claimant's osteoarthritic hip condition was either caused by or aggravated and made symptomatic by the trauma resulting from the 1976 industrial injury.

The Orthopaedic Consultants examined claimant on July 5, 1984 and reported a history of left knee pain onset shortly after the 1976 injury. The panel's diagnosis was consistent with Dr. Sulkosky's as to claimant's disease process and degree of severity. The panel opined that claimant "undoubtedly" had degenerative hip disease before 1976, and that the injury may have irritated claimant's hips. However, the Consultant's opined that it was more likely that claimant's osteoarthritis was aggravated by the inactivity forced upon claimant by the convalescent period following his 1976 discectomy.

Claimant submitted a claim for an occupational disease on May 4, 1983 and the employer denied the claim on June 2, 1983. The Referee affirmed the denial of claimant's occupational disease claim. Although we view the case as somewhat closer than the Referee called it, we affirm that portion of the order. Dr. Sulkosky's deposition testimony cuts against claimant's case and the other evidence of claimant's left hip loading is only one of three possible explanations, in an occupational disease context, of claimant's present condition.

We believe, however, that claimant has proved that his current osteoarthritis represents a worsening of his condition since the last arrangement of compensation. ORS 656.273(1). The Referee rejected claimant's aggravation claim on the ground that there was no reference in the medical reports that claimant had complained of left leg and knee pain any earlier than March of 1981, when he sought treatment from Dr. Eckman. The Referee stated that he had no reason to question claimant's truthfulness, however, he found claimant to be a poor historian. Nevertheless, Dr. Sulkosky's and the Orthopaedic Consultants's opinions, both of which support compensibility, do depend upon the history received from claimant. If claimant's rendition of his history is suspect, so are the medical findings based upon that rendition. See Moe v. Ceiling Systems, 44 Or App 429 (1980).

The Board (see, e.g., Donald W. Hardiman, 35 Van Natta 664 (1983)) and the court (see, e.g., Wilkins v. SAIF, 66 Or App 420 (1984); but see Mendoza v. SAIF, 61 Or App 177, 180 (1982)) ordinarily will defer to a Referee's opinion of a witness's credibility. This practice is not, however, a substitute for weighing the evidence. Cf., Richard L. Schoennoehl, 31 Van Natta 25, aff'd mem 51 Or App 998 (1981). Moreover, the Referee's "credibility finding" is ambiguous. On the one hand, the Referee states that he has no reason to question claimant's truthfulness. We interpret this to mean that there was nothing about claimant's demeanor to suggest that claimant was evasive or untruthful. On the other hand, the Referee states that claimant is a "poor historian," and it is upon this finding that the Referee rejects the opinions of claimant's treating physician and the Orthopaedic Consultants.

This record is hardly unusual in that it reflects inconsistencies in the reporting of significant, and not so significant, events over a nine year period. Given claimant's educational level, work history and claim history, we refuse to

attach a pejorative connotation to the phrase, "poor historian." This Board is equally suited to review the record and evaluate the effect, if any, of inconsistencies therein as is the Referee. Frank L. Taylor, 36 Van Natta 650, 654 (1984).

On de novo review we find that the omission from the contemporaneous medical reports of complaints of what it is now agreed was referred pain from claimant's left hip have been convincingly explained. The preponderance of the credible evidence is that claimant began experiencing symptoms now known to be caused by his left hip osteoarthritis contemporaneously with the compensable 1976 low back injury. The preponderance of the uncontradicted medical opinions is that claimant's symptomatology resulted either directly from the trauma of the 1976 injury or as the sequela of convalescence from back surgery, which was a natural and direct consequence of the 1976 injury. See Smith v. Brooks-Scanlon, 54 Or App 730, 735 (1981), rev den 292 Or 450 (1982); Wood v. SAIF, 30 Or App 1103, 1108 (1977), rev den 282 Or 189 (1978). The uncontradicted lay and medical evidence persuades us that claimant's condition has worsened since the last arrangement of compensation. Claimant's left hip osteoarthritis condition is compensable as an aggravation of his 1976 industrial injury.

ORDER

The Referee's order dated August 20, 1984 is reversed in part and affirmed in part. That portion of the order that affirmed the denial of claimant's left hip aggravation claim is reversed, and claimant's left hip claim is remanded to the self-insured employer for processing according to law. The attorney fee agreement between claimant and his attorney is approved. Claimant's attorney is awarded a fee of $1,250 for services at the hearing and an additional $500 for services on Board review for securing the overturning of the denial, to be paid by the self-insured employer. That portion of the Referee's order that affirmed the self-insured employer's denial of claimant's occupational disease claim and right hip osteoarthritis claim is affirmed.

JOHNNIE M. HASTINGS, Claimant
Doblie & McSwain, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-08523
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Braverman's order that granted claimant an award of 112° for 35% unscheduled permanent partial disability for injury to her low back in addition to the 64° for 20% granted by the Determination Order. Claimant cross-requests review, contending that the Referee's award was insufficient. The issue is extent of unscheduled disability.

Claimant, a licensed practical nurse, sustained a compensable low back injury while moving a patient on February 15, 1982. Although claimant was treated conservatively at first, Dr. Johnson, neurosurgeon and claimant's treating physician, suspected that claimant had a herniated disc. After two CT scans and a myelogram indicated that claimant had cauda equina syndrome secondary to lumbar stenosis, Dr. Johnson performed surgery on February 22, 1983. During the surgery, Dr. Johnson's suspicion of a herniated disc was confirmed. He performed a laminotomy and

nerve root decompression at the L5-S1 level and removed the herniated disc material from the L4-L5 space.

Although claimant has not returned to work, claimant does not contest that she has been medically stationary since July 1, 1983. On that date, Dr. Johnson opined that claimant's impairment as a result of her low back condition was 10-12% of the whole person, based upon the AMA guidelines for rating disability. On August 12, 1983 the Determination Order granted claimant an award of 64° for 20% unscheduled permanent partial disability. Claimant appealed the Determination Order.

Dr. Pasquesi examined claimant on behalf of the insurer on October 24, 1983. He opined that claimant's impairment was 20% of the whole person, based upon her surgery, chronic pain and the absence of a left Achilles reflex. Claimant has also been treated by Dr. Kip Kemple, who has not given his opinion of claimant's impairment. All three physicians, however, agree that claimant is not physically capable of returning to work as a licensed practical nurse.

On de novo review we agree that claimant is more disabled by her injury than indicated by the 20% awarded by the Determination Order. At the hearing, counsel for the insurer conceded that claimant was entitled to an increased award. On review, however, the insurer asserts that the 35% increase awarded by the Referee is excessive. We agree.

The Referee did not explain in his order how he reached the figure of 35% as an increase in claimant's award. In Barbara Kessler, 36 Van Natta 195, 196 (1984) we said:

> "We see no need in this case to depart from the guidelines for the rating of unscheduled permanent disability. [OAR 436-65-600 et seq.] The Referee pointed to no factors which are not considered in the guidelines, and our review of the record reveals none."

The situation is the same in this case, and we approach this case as we approached Kessler. We find that claimant was 52 years old at the time of the hearing. She is a high school graduate with one year of nursing school beyond high school. Considering these factors and claimant's experience, adaptability and the labor market findings with all of the evidence in the record, including claimant's testimony relative to her chronic low back pain, we conclude that claimant is most appropriately compensated by a total award of 128° for 40% unscheduled permanent partial disability due to her low back condition. See Goldie M. Dallman, 36 Van Natta 696 (1984); Joyce Groshong, 36 Van Natta 323 (1984); Eugene A Page, 36 Van Natta 288 (1984).

ORDER

The Referee's order dated June 19, 1984 is modified. Claimant is granted an award of 64° for 20% unscheduled permanent partial disability for injury to her low back. This award is in addition to that granted by the Determination Order dated August 12, 1983. Claimant's attorney's fee shall be adjusted accordingly.

WILLIAM W. HUGHES, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Lindsay, et al., Defense Attorneys

WCB 83-02314 & 83-10466
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Thye's order which awarded an additional 16° (5%) unscheduled disability for injury to claimant's right shoulder, awarded additional temporary total disability, less time worked, for the period April 13, 1981 through June 15, 1981, and otherwise affirmed an October 8, 1982 Determination Order. The Determination Order awarded temporary total disability for the period March 8, 1982 through June 7, 1982, 32° (10%) unscheduled disability for injury to claimant's right shoulder and 9.6° scheduled disability for a 5% loss of use or function of claimant's right arm. On review claimant contends that he is entitled to increased awards for unscheduled and scheduled disability, and additional temporary total disability from the date of his injury through the date he was released to regular work by Dr. Tiley (June 7, 1982), less time worked and less amounts previously paid.

On our de novo review, we agree with the Referee's determination that a preponderance of the persuasive evidence fails to establish claimant's entitlement to an additional award of scheduled disability for loss of use or function of his right arm. Furthermore, we agree with the Referee's determination that, as a result of his industrial injury, claimant has suffered a loss of earning capacity equal to 15% unscheduled disability. With regard to the issue of claimant's entitlement to additional temporary disability, we agree with claimant, although only to a limited extent.

The medical evidence in support of claimant's contention that he is entitled to the time loss in issue consists of a typewritten statement prepared by claimant and signed by Drs. Needham and Tiley, two of claimant's treating physicians since his original injury in December of 1980. The statement is:

> "In my opinion, the patient has not been medically stationary since he first undertook treatment with Dr. Needham on February 23, 1981, and has not been fit to return to regular duty at least until released by Dr. Tiley June 8, 1982 [sic]."

This statement was not signed by Drs. Melgard or Schwarz, two other physicians who had rendered treatment for conditions stemming from claimant's injury. The Referee found this signed statement insufficient to sustain claimant's burden of proving that he was entitled to additional time loss. He reached this conclusion in view of the facts that claimant had been released to return to work by Dr. Melgard after recovering from his carpal tunnel surgery in June of 1981; that he had, in fact, returned to work and subsequently terminated his employment for reasons related only in part to his injury; and that there was no medical report evidencing claimant's inability to work after Dr. Melgard's release in June of 1981 (other than the quoted statement signed by Drs. Needham and Tiley after claim closure). In addition, the Referee attached significance to the fact that Dr. Melgard failed to sign this prepared statement but did sign another accompanying

prepared statement concerning the causal connection between claimant's original injury and his shoulder and arm problems. Although the prepared statement is conclusory and it was not signed by Dr. Melgard, we believe that the circumstances surrounding claimant's injury and his ensuing shoulder problems, which eventually resulted in surgery, support the conclusion that claimant is entitled to additional time loss.

When Dr. Melgard released claimant to return to work in June of 1981, he indicated that claimant was continuing to experience "a lot of pain and aching," but that he believed claimant should make the attempt. In fact, even before this release by Dr. Melgard, claimant had returned to work for the employer. Claimant testified that his early return to work was a result of pressure from the employer who, according to claimant, was not understanding of claimant's continuing medical problems. It was necessary for claimant's wife to assist him in the performance of his work activities. It was partly as a result of claimant's personal feelings concerning the continuing need for assistance from his wife which led him to terminate his employment.

When claimant returned for examination by Dr. Melgard in August of 1981, it was noted that he was continuing to experience problems with his right shoulder. Dr. Melgard's subsequent office note entry of November 16, 1981 reflects continuing shoulder problems of a significant degree, which prompted the referral to Dr. Tiley. This office note entry also indicates that claimant had made a "good recovery" from his hand surgery.

Dr. Tiley first examined claimant on December 1, 1981. After a course of conservative treatment of claimant's shoulder condition, it was decided that surgery for acromioclavicular joint arthroplasty would be performed. Surgery was performed, and claimant's shoulder condition improved. Dr. Tiley declared claimant medically stationary on August 3, 1982.

The evidence indicating that claimant continued to experience difficulties with his shoulder, and eventually submitted to surgery, after he attained maximal recovery with regard to his hand/arm condition lends credence to the two physicians' post-closure concurrence with claimant's prepared statement. We agree with the Referee that Dr. Needham's signature on the prepared form is entitled to little weight; however, we attach more significance to Dr. Tiley's signature, since he treated claimant's shoulder condition and performed surgery. The absence of Dr. Melgard's concurrence is not significant, since he was primarily concerned with treatment of claimant's carpal tunnel syndrome and referred claimant to Dr. Tiley for treatment of his continuing shoulder difficulties. Since Dr. Tiley first examined claimant on December 1, 1981, we believe that claimant has established entitlement to temporary total disability from that time until he was released to return to regular work by Dr. Tiley on June 7, 1982, less time worked and less time loss previously paid. See Daniel J. Cannon, 35 Van Natta 1181, 1185 (1983); cf. David Cheney, 35 Van Natta 21 (1983).

ORDER

The Referee's order dated May 24, 1984 is modified in part. In addition to the additional temporary disability awarded by the

Referee's order, claimant is awarded temporary total disability from December 1, 1981 through June 7, 1982, less time worked and less amounts previously paid, and the Determination Order dated October 20, 1983 is so modified. The remainder of the Referee's order is affirmed. In addition to the attorney's fee allowed by the Referee's order, claimant's attorney is allowed 25% of the temporary disability compensation made payable herein, not to exceed $750, to be paid out of claimant's compensation and not in addition thereto.

DAVID KRISTUFEK (Deceased), Claimant
January Roeschlaub, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-09434
March 29, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant's beneficiaries request review of Referee Seifert's order that upheld the SAIF Corporation's denial of a claim for widow's benefits and denied claimant an award for unscheduled permanent partial disability. In its respondent's brief, SAIF argues that the Referee's award of 60° for 40% scheduled loss of the hand was excessive and should be reduced to the 30° for 20% loss of the hand granted by the Determination Order.

The Board affirms and adopts the order of the Referee on the issues of widow's benefits and unscheduled disability. We modify the Referee's award of scheduled permanent partial disability.

Claimant's right hand was caught in an auger on February 12, 1980. He sustained soft tissue injuries to the right index and ring fingers. His right middle finger was seriously fractured at the proximal interphalangeal (PIP) and distal interphalangeal (DIP) joints and the middle phalanx. During the course of his treatment, claimant underwent two PIP arthroplasties in which the PIP joint was replaced with plastic prostheses. In addition, the DIP joint was surgically ankylosed at 45° of flexion. The PIP surgeries resulted in reduction in range of motion of that joint to 20° to 25° of flexion.

By Determination Orders issued June 9, 1981 and republished June 24, 1981 claimant was awarded 30° for 20% loss of the right hand (finger). Between June and October of 1981 claimant worked as a painter in Newport, Rhode Island. He returned to Oregon on or about October 12, 1981. On October 14, 1981 claimant and his treating physician agreed that the right middle finger would be amputated. The operation was scheduled for October 23, 1981. On October 17, 1981 claimant committed suicide.

OAR 436-65-515(3) provides that 100% loss of the middle finger is equal to 20% loss of the hand, or 30°. Scheduled injuries are compensated purely by the statutory schedule. Drawing the inference that Dr. Mayhall's decision to amputate the right middle finger meant that the finger was totally useless, we conclude that claimant in fact suffered a 100% loss of the finger. According to the statutory scheme, he was entitled to no more than the Determination Orders awarded. It was, therefore, error to grant an increased award.

ORDER

The Referee's order dated August 17, 1984 is modified. The Referee's award of an additional 30° scheduled permanent partial

disability is set aside and the Determination Orders dated June 9, 1981 and June 24, 1981 are reinstated and affirmed. The award of attorney fees to claimant's attorney shall be adjusted accordingly. In all other respects the Referee's order is affirmed.

JOY F. NELSON, Claimant
W.D. Bates, Jr., Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 84-04304
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Howell's order that granted claimant an award of 144° (45%) unscheduled permanent partial disability for injury to her low back in addition to the 48° (15%) awarded by the Determination Order. The employer urges that the award granted by the Determination Order be reduced. The issue is extent of disability.

On February 17, 1983 claimant, who was age 63 at hearing, consulted Dr. Carter, an orthopedic surgeon, complaining of pain in her hip. She stated that the pain had begun the day before, while she was working as a dry belt grader. Dr. Carter's diagnosis was lumbar strain. Dr. Carter reported on April 26, 1983 that claimant's back condition was work related and her claim was accepted. On May 9, 1983 a myelogram disclosed mild bulging of the L3-4 and L4-5 discs, with no herniation.

Dr. Carter reported on June 23, 1983 that he had released claimant for return to work effective June 6, 1983. He imposed no restrictions, and in fact recommended that claimant continue to work. In August 1983 Dr. Carter opined that claimant was not medically stationary because she had persistent low back pain, however, he stated that claimant should continue working.

In January 1984 claimant was examined by Dr. Hockey, who opined that claimant had a chronic strain syndrome without evidence of disc herniation. He noted that all there was to treat were symptoms and that, in his opinion, so long as claimant continued her heavy mill work the symptoms would continue. Dr. Carter expressed his agreement with Dr. Hockey.

On February 17, 1984 Dr. Carter opined that claimant's condition was medically stationary. He further stated that although in his opinion claimant would have subjective symptoms for so long as she worked at her mill job, there was no good reason that claimant should quit working.

Claimant saw Dr. Carter again briefly on April 2, 1984. His chart note reflects that claimant's condition was unchanged. Claimant had seen no other physicians as of the hearing. She retired April 6, 1984. On April 10, 1984 a Determination Order awarded claimant 15% unscheduled low back disability.

We agree with the Referee that the evidence is that claimant's physical impairment is minimal and is based totally on subjective complaints. However, Drs. Hockey and Carter both expressed their opinion that claimant's back pain interfered with her ability to work at the mill. We conclude, then, that claimant's pain is disabling. See Harwell v. Argonaut Ins. Co., 296 Or 505 (1984).

We disagree, however, with the Referee's disability award. Using the guidelines found at OAR 436-65-600 et seq., we note that claimant is 63 years old and has an eighth grade education. Claimant's work at the mill was classified as medium, however, neither Dr. Carter nor Dr. Hockey expressed that claimant had any specific limitations other than that she probably would become symptomatic if she twisted and bent. We assume that by this they meant that claimant should not work in the mill. Based upon the guidelines and all of the evidence, we conclude that claimant would be most appropriately compensated by an award of 80° for 25% unscheduled permanent partial disability for her low back condition, in lieu of all previous awards.

ORDER

The order of the Referee dated September 27, 1984 is modified to grant claimant an award of 80° for 25% unscheduled permanent partial disability for injury to her low back, in lieu of and not in addition to all previous awards. That portion of the order that granted claimant's attorney fee shall be adjusted accordingly.

DONALD S. O'DELL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05083
March 29, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Seymour's order that claimant's claim had been prematurely closed by the Determination Order issued May 5, 1983, granted claimant an increased award of temporary total disability and awarded a penalty and carrier-paid attorney fee. The issues are: (1) premature claim closure; (2) unreasonable claims processing; and (3) penalty and attorney fees.

Claimant sustained a compensable right knee injury in September 1982. After several months of conservative treatment by Dr. Degge, claimant was declared medically stationary. After the issuance of several procedurally defective Determination Orders, claimant's claim was finally closed May 5, 1983 with a scheduled permanent disability award of 15° for 10% loss of the right leg (knee).

Claimant continued having problems with his knee. He began seeing Dr. Donald Jones in July 1983. Subsequent to Dr. Jones' request, SAIF authorized diagnostic right knee arthroscopy. The procedure was performed on September 30, 1983. In the course of the arthroscopic procedure, Dr. Jones discovered a synovial tag, which he believed may have been the cause of claimant's knee pain. He removed the synovial tag. Dr. Jones stated that he would not be able to render an opinion as to the relationship between claimant's knee pain and the synovial tag until claimant's convalescence ran its course, that is, Dr. Jones would base his opinion upon whether the removal of the synovial tag coincided with a decrease of claimant's symptoms.

On December 2, 1983 SAIF denied further benefits on the theory that claimant had not established an aggravation. On January 3, 1984 Dr. Jones rendered his opinion that the synovial

tag had been pinched in claimant's original knee injury and had been the cause of claimant's continuing symptoms. He reported that claimant had become totally asymptomatic and was medically stationary.

Evidently SAIF withdrew its December 1983 denial, because a Determination Order was issued February 21, 1984. The order granted no additional permanent disability and reflected the same aggravation rights expiration date as the previous Determination Order. We conclude that the February 21, 1984 order was issued on the basis of an accepted aggravation.

The Referee concluded, and on de novo review we also conclude, that claimant was not medically stationary until after his recovery from the arthroscopic surgery in which the synovial tag was removed. It follows that claimant's claim was, in fact, prematurely closed in May of 1983. Claimant requested a hearing on the May 1983 Determination Order, raising as one of the issues for hearing that of premature claim closure.

Because claimant requested a hearing on the issue of premature closure, he was not required to show that his condition had worsened since the first Determination Order. The preponderance of the evidence persuades us that claimant's claim was first closed on the basis of an incomplete diagnosis. Claimant requested a hearing on this issue and prevailed, resulting in an increased temporary disability award.

The Referee awarded attorney fees based upon three grounds of recovery. He first awarded claimant's attorney 25% of the increased temporary total disability compensation, not to exceed $750. We fully agree with this award. Next, the Referee awarded an insurer-paid fee of $1,000 for prevailing on an aggravation denial associated with a $50 penalty for delay in paying interim compensation. We reverse that portion of the order that awards a penalty and insurer-paid fee.

SAIF delayed paying the first installment of interim compensation by about fifteen days. We do not believe that under the circumstances of this case such delay was unreasonable; therefore, no penalty-associated fee is warranted.

The Referee also relied upon claimant's attorney's assistance in having the aggravation denial set aside as a ground for awarding the insurer-paid fee. We are only inferentially able to tell from the record that the denial was withdrawn, there being no direct evidence that it was. Assuming that it was, there is no evidence as to what role, if any, claimant's attorney played toward that end. Based upon the available record, we find that the hearing was on the premature closure issue, not on any issue of overcoming a denial. We see no evidence that would warrant an insurer-paid fee, and we reverse that portion of the Referee's order.

ORDER

Those portions of the Referee's order dated June 6, 1984 that awarded an insurer-paid attorney fee and a penalty are reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $400 for services on Board review for prevailing on the premature closure issue, to be paid by the SAIF Corporation.

ROBERT E. REYNOLDS, Claimant
Pozzi, et al., Claimant's Attorneys
Bottini & Bottini, Defense Attorneys

WCB 83-02654
March 29, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which: (1) found that the claim was not prematurely closed; (2) approved an offset; (3) declined to assess a penalty and associated attorney's fee against the self-insured employer for failing to process a claim; and (4) granted claimant an award of 144° for 45% unscheduled disability in lieu of the 112° for 35% unscheduled disability previously awarded. The issues on review are: (1) premature closure; (2) the propriety of allowing an offset; (3) a penalty and associated attorney's fee; and (4) extent of disability.

The Board affirms those portions of the Referee's order concerning extent of disability and a penalty and associated attorney's fee. In view of our decision on the premature closure issue, the offset issue is moot.

Claimant is a 51 year old former mechanic with the Portland Water Bureau. Claimant compensably injured his back in December 1979 and again in June 1982. Claimant's treating physician since 1982 has been Dr. Duckler of the Kaiser Department of Industrial Medicine. In October 1982 Dr. Duckler began to suspect a herniated disc. On October 23, 1982 Dr. Tilson, also of the Department of Industrial Medicine, reviewed the medical record and examined claimant. He agreed with Dr. Duckler that claimant probably had a herniated disc. He recommended conservative treatment before surgery was considered. Throughout October and November 1982, Dr. Duckler continued to report that claimant's condition was not medically stationary.

On November 24, 1982 Dr. Yerby evaluated claimant. He too opined that claimant had a herniated disc. He stated:

> "I feel that this gentleman needs a course of vigorous conservative therapy, even though that may sound somewhat contradictory. He has not had a course of strict bedrest and I suggest that this be performed and patient then be reevaluated for possible surgical intervention for his herniated nucleus pulposus."

On December 16, 1982 claimant was evaluated by Kaiser's Intensive Diagnostic Advisory Board. Dr. Tilson was on the examining panel. The Board opined that claimant would not benefit from surgery and that he was medically stationary. On December 17, 1982 Dr. Duckler filled out a form on which he indicated that claimant was not medically stationary. A Determination Order issued on January 12, 1983 which found claimant medically stationary as of December 14, 1982.

On January 28, 1983 Dr. Duckler referred claimant for a myelogram. Claimant was seen at the Northwest Pain Center on February 24, 1983. The center staff opined that claimant was medically stationary and recommended conservative treatment. Dr.

Duckler indicated that he disagreed with the Northwest Pain Center's opinion that claimant was medically stationary. The employer reopened the claim as of January 31, 1983 and requested closure on March 22, 1983. A Determination Order issued on April 8, 1983. It specifically found that claimant again became medically stationary on February 24, 1983. On April 12, 1983 Dr. Duckler again noted that claimant was not medically stationary.

On May 10, 1983 Dr. Duckler reported:

> "When I saw him I was under the impression that the IDAB report was correct and appropriate and I concurred with the findings of the examination of December 14, 1982....
>
> ".....
>
> "[I]t was the changing of symptoms and signs in the patient that prompted me to change my concern as to whether he was or was not medically stationary and whether he did or did not need a more radical approach for his continuing lumbosacral pain which had a more radiating quality than it had in the previous times on which he had been followed and examined. This went on to prompt concern and then explain why he was referred to the department of neurosurgery and why a subsequent myelogram was done, as the signs and symptoms of his herniated intervertebral disc became more apparent and more disturbing."

On May 12, 1983 claimant was referred to Dr. Ordonez for a consultation. Dr. Ordonez opined that claimant's chronic left leg pain might be caused by a herniated disc. He recommended an EMG of the lower extremities as well as an x-ray of the left hip.

On June 15, 1983 Dr. Tilson summarized the Kaiser medical record for the employer. He noted that by mutual agreement between him and Dr. Duckler, the decision on whether claimant was medically stationary was left up to Dr. Duckler.

On July 27, 1983 Dr. Duckler reported that claimant was medically stationary as of June 7, 1983. He explained:

> "It was my feeling that he needed continuation of his time loss because I was unable to evaluate whether he is a candidate for myelography and laminectomy, and the only mechanism by which I could make this judgment is to follow the patient and treat him conservatively over a long period of time. His objective findings, however, have remained unchanged and I do not feel that he is a surgical candidate or needs a more radical approach to his degenerative disc disease at this time."

On November 23, 1983 Dr. Duckler wrote to claimant's attorney:

> "I still consider the diagnosis to have been a herniated intervertebral disc that has resolved without necessity for surgical intervention."

The treating physician, Dr. Duckler, consistently opined that claimant was not stationary between December 14, 1982 and June 7, 1983. He and most other experts suspected a herniated disc. Dr. Duckler wished to attempt conservative measures and perform more diagnostic tests before recommending surgery. Several other doctors agreed that conservative measures and further testing was in order. When Dr. Duckler finally decided that surgery was not in order he found claimant medically stationary and indicated treatment was palliative. Based on this record we conclude that claimant was not medically stationary between December 14, 1982 and June 7, 1983.

ORDER

The Referee's order dated April 5, 1984 is affirmed in part and reversed in part. Those portions of the Referee's order concerning extent of disability and penalty and associated attorney's fee are affirmed. Those portions of the Referee's order concerning premature closure are reversed. Claimant is awarded temporary disability benefits for the period of December 14, 1982 to June 7, 1983 less amounts already paid. Claimant's attorney is allowed 25% of the increased benefits awarded under this order.

MICHAEL D. SORENSEN, Claimant
Peter Sheely, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-08229
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Galton's order that granted claimant an award of 40° for 12.5% unscheduled permanent partial disability for injury to his low back in addition to the 32° (10%) unscheduled permanent partial disability awarded by the most recent Determination Order. The issue is extent of unscheduled disability. The insurer contends that the 10% disability awarded by the Determination Order is excessive and should be reduced.

In January 1976 claimant sustained a compensable injury to his low back while employed by a different Oregon employer. In September 1976 his claim was closed by a Determination Order that granted him an award of 48° (15%) unscheduled permanent partial disability. That Determination Order was not appealed. Claimant continued in the same line of work in the wood products industry as a puller and stacker on the chain.

On February 18, 1981 claimant sustained the low back injury that is the subject of this claim while employed by the presently responsible employer. Claimant's treating osteopathic physician, Dr. Sirounian, diagnosed a lumbosacral strain. Later in the course of claimant's treatment Dr. Ho, also an osteopath, became his treating physician. In addition to reports by Drs. Sirounian

and Ho, the record contains reports of independent examinations by Dr. McKillop, orthopedic surgeon, Dr. Parvaresh, psychiatrist, and the Orthopaedic Consultants, who examined claimant twice. The medical evidence is in accord that claimant's subjective complaints are consistent with the objective medical and psychiatric findings. The Orthopaedic Consultants twice opined that claimant's impairment solely from the 1981 injury was in the mild category. Doctors Sirounian and Ho ultimately agreed with the Orthopaedic Consultants. We find no conflict in the evidence as to claimant's physical impairment resulting from the 1981 injury.

The first of three Determination Orders in this claim was issued July 15, 1981 and it granted claimant an award of 16° (5%) unscheduled permanent partial disability. That order was set aside on September 10, 1981 due to a finding that claimant was not medically stationary. A second Determination Order was issued November 27, 1981 granting claimant an award of 48° (15%) unscheduled permanent partial disability.

Between January 4, 1982 and July 14, 1983 claimant participated in a program of vocational rehabilitation that trained him for employment in waste water treatment management. Claimant successfully completed this program and obtained employment as a waste water treatment operator. On August 18, 1983 claimant's disability was redetermined pursuant to ORS 656.268(5), resulting in a Determination Order that granted him 32° (10%) unscheduled permanent partial disability in lieu of the previously awarded 48° (15%). Claimant's disability award was thus reduced by 16° (5%). Claimant appealed the last Determination Order.

The Referee found that claimant was entitled to an increased award of disability equal to 40° (12.5%) over that awarded by the last Determination Order. As an aside, the Referee questioned the propriety of the reduction of claimant's disability upon redetermination. We find that such a reduction is clearly authorized by ORS 656.268(5). Hanna v. SAIF, 65 Or App 649, 652 (1983). Against this increased award the Referee allowed the insurer to offset a temporary disability overpayment and the overpayment created by the reduction in claimant's disability award, for a total of $2,548. 96. Claimant does not protest the offset.

The insurer argues that ORS 656.214(5) requires that previous disability awards must be considered when rating subsequent disability. We agree that that statute does require that previous disability be considered. Consideration, however, does not mean a strict arithmetic offset. Cascade Steel Rolling Mills v. Madril, 57 Or App 398, 402 (1982).

We have considered claimant's 1976 disability award in light of the clear preponderance of medical evidence that claimant has a mild physical impairment solely as a result of the 1981 injury. Our interpretation of Cascade Steel Rolling Mills v. Madril, supra, is that the court clearly contemplated the possibility of a case in which a claimant had completely recovered from a previous injury only to be reinjured and suffer a future loss of earning capacity. We find this to be just such a case. To the extent claimant's earning capacity is impaired, it is impaired only as a result of the 1981 injury. We rate claimant's disability on that basis.

We find that claimant is 27 years old, has completed six terms of college and has had an actual and successful return to gainful full-time employment. Claimant's functional capacity has been reduced and he is now restricted to performing medium to light work where he formerly regularly did heavy work. Considering all of these factors and using the relevant guidelines found at OAR 436-65-600 et seq., we conclude that claimant was fully and appropriately compensated by the 32° (10%) unscheduled permanent partial disability award granted by the most recent Determination Order.

ORDER

The Referee's orders dated May 2, 1984 and May 16, 1984 are reversed in part and affirmed in part. That portion of the Referee's orders that granted claimant an increased disability award are reversed and the Determination Order dated August 18, 1983 is reinstated and affirmed. The remainder of the Referee's orders are affirmed.

BILL M. STURTEVANT, Claimant
Cummins, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07658
March 29, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of those portions of Referee McCullough's order which set aside its denial of claimant's current left leg and back conditions and awarded a $3,915 insurer-paid fee for prevailing on this denied claim. In his respondent's brief, claimant challenges those portions of the Referee's order which declined to award interim compensation or impose a penalty/attorney's fee in connection with an additional aggravation claim filed in claimant's behalf post-hearing.

We affirm and adopt those portions of the Referee's order relevant to the issues raised by claimant. We affirm that portion of the Referee's order which set aside the aggravation claim issued in connection with claimant's February 1981 left leg injury. We modify the Referee's award of attorney fees.

The substantive issue in this case presents a fairly complicated question of medical causation, as noted by the Referee. In order to complete the testimony presented by SAIF's medical witness, Dr. Reilly, it was necessary to take his deposition after the hearing. Portions of Dr. Reilly's depositional testimony, however, were addressed to the issue raised by claimant's post-hearing aggravation claim. This additional aggravation claim was denied by SAIF, and SAIF's denial was upheld by the Referee. Services rendered in connection with this portion of the proceeding, therefore, should not be taken into account in assessing a reasonable attorney's fee.

The hearing consumed an entire afternoon. Claimant presented three witnesses and extensively cross-examined Dr. Reilly. Claimant submitted extensive written argument in support of his contentions before the Referee, some of which prevailed, others of which did not.

Claimant's attorney submitted an affidavit of services in support of his claim for a reasonable attorney's fee. The Referee solicited SAIF's response to counsel's affidavit; none was

forthcoming. The Referee apparently considered SAIF's failure to respond as a concession that the requested fee was reasonable, and he awarded the amount requested. SAIF thereafter moved for reconsideration challenging the Referee's award as excessive. On reconsideration, the Referee refused to modify the award.

The Referee intimated, and claimant now argues, that by SAIF's failure to respond to the Referee's request for input on the attorney fee issue, SAIF waived its right to challenge the amount awarded. In addition, claimant maintains that the post-order challenge by way of a request for reconsideration is procedurally improper. Neither contention is correct. The Board's rules of practice and procedure provide for reconsideration "upon the referee's own motion or upon a motion by a party showing error, omission, misconstruction of an applicable statute or the discovery of new material evidence" at any time prior to filing a request for review or expiration of the statutory thirty-day period. OAR 438-07-025(1) (formerly OAR 436-83-480(1)). SAIF's request for reconsideration was timely, and it assigned error in the form of an attorney's fee which was considered excessive. Claimants' attorneys frequently request reconsideration of a Referee's award of fees, claiming the award is inadequate. There is no reason to conclude that under our rules of practice and procedure, employers and their insurers should have fewer procedural rights.

It would have been preferable for SAIF to have responded to the Referee's solicitation. It was not obligated to do so, however, and its failure to state a position does not constitute a waiver of the right to challenge the award. Counsel's affidavit is a very good indicator of the efforts expended in claimant's behalf; however, it must be considered in the context of the usual range of attorney fees awarded for prevailing on denied claims.

Considering the efforts expended, as evidenced in part by counsel's affidavit, and the results obtained in claimant's behalf, we do not believe that the extraordinary fee awarded by the Referee is justified. See generally OAR 438-47-020(1); 438-47-010(2). The record, however, does evidence counsel's entitlement to a fee in excess of that warranted for prevailing on the "average" denied claim.

ORDER

The Referee's orders dated April 25, 1984 and May 24, 1984 are modified in part. Those portions which awarded claimant's attorney $3,915 as a reasonable attorney's fee for prevailing on a denied aggravation claim are modified, and in lieu of the Referee's award claimant's attorney is awarded $2,000. The remaining portions of the Referee's orders are affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the SAIF Corporation.

JUAN ALONZO, Claimant
Allen, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 81-09123
February 20, 1985
Order of Abatement

The Board has received the employer's motion for abatement and reconsideration of our Order on Review dated January 25, 1985.

In order to allow sufficient time to consider the motion, the above referenced Board order is abated. Any party in opposition to the motion is requested to file a response to the motion within ten days. The request for oral argument is denied. OAR 438-11-010(2).

IT IS SO ORDERED.

DALE A. MIKOLAS, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00698
March 1, 1985
Order of Abatement

The Board has received claimant's request for reconsideration of our Order on Review dated January 31, 1985. In order to allow sufficient time to consider the motion, the above referenced Board order is abated. The party opposing the motion is requested to file a response to the motion within 10 days.

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
February 28, 1985
Order of Abatement

The Board has received claimant's motion for reconsideration or clarification of our Order on Review dated February 22, 1985.

In order to allow sufficient time to fully consider the motion, the above referenced Order on Review is hereby abated. Opposing parties are requested to submit a response to claimant's motion within 15 days from the mailing date of this order.

IT IS SO ORDERED.

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

Own Motion 82-0210M
February 28, 1985
Own Motion Order of Abatement

The Board has received claimant's motion for reconsideration or clarification of our Own Motion Order dated February 22, 1985.

In order to allow sufficient time to fully consider the motion, the above referenced Own Motion Order is hereby abated. Opposing parties are requested to submit a response to claimant's motion within 15 days from the mailing date of this order.

IT IS SO ORDERED.

ERWIN R. MUSTOE, Claimant
Emmons, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 76-00610 & 78-04474
March 22, 1985
Order of Abatement

The insurer requests that the Board reconsider its Order on Review issued February 21, 1985. In order to allow sufficient time to fully consider the insurer's request, the aforesaid order is hereby abated. Claimant is requested to file a response to the insurer's request within ten days of the date of this order.

IT IS SO ORDERED.

LEOKADIA W. PIWOWAR, Claimant
Francesconi & Cash, Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 82-09391
January 17, 1985
Order of Abatement

The Board has received claimant's motion for reconsideration of our Order on Review dated January 9, 1985.

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

IT IS SO ORDERED.

DONALD W. WILKINSON, Claimant
Roll, et al., Claimant's Attorneys
Macdonald, et al., Defense Attorneys

WCB 83-09551
March 13, 1985
Order of Abatement

The SAIF Corporation has requested that we modify our Order on Review issued February 27, 1985 to permit it to offset permanent partial disability benefits previously paid against the permanent total disability award benefits due pursuant to our previous order. We treat SAIF's request as a request for reconsideration of our prior order.

In order to allow sufficient time to fully consider SAIF's request, the aforesaid order is hereby abated. Claimant is requested to file his response to the request within ten days from the date of this order.

IT IS SO ORDERED.

CLARK H. WILLARD, Claimant
Evohl F. Malagon, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 83-00576
March 18, 1985
Order of Abatement

The Board has received the employer/insurer's request for reconsideration of our Order on Review dated February 28, 1985.

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 fifteen days.

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
Michael R. Harman, Claimant.

HARMAN,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(82-02979 & 82-03232; CA A31630)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 3, 1984.

Mike Stebbins, North Bend, argued the cause for petitioner. With him on the brief was Hayner, Waring, Stebbins & Coffey, North Bend.

Darrell E. Bewley, Appellate Counsel, Salem, argued the cause for respondent. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Donna Parton Garaventa, Assistant Attorney General, Salem.

Before Gillette, Presiding Judge, and Warren and Young, Judges.

GILLETTE, P. J.

Reversed and remanded with instructions to award permanent total disability.

GILLETTE, P. J.

Claimant petitions for review of a Workers' Compensation Board order which awarded him 40.5 degrees for 35 percent loss of his left ankle but denied his claim for permanent total disability. We find that claimant meets the statutory criteria for permanent total disability and therefore reverse.

Claimant's first industrial injury came in the early 1970's when some metal fell on him while he was working in Nevada, injuring his back. He underwent two laminectomies and disc removals. He continued to have back pain, with four or five major flareups a year, but was otherwise able to control it adequately and work at fairly vigorous activities. Some of his work was apparently beyond what his Nevada physicians advised. His control of back pain decreased in recent years. As a result of his back condition he can now sit or stand for only short periods without change and can drive a car for only 45 minutes without a break. Claimant is in his mid-50's, has a high school education, was trained as a mechanic in the Army and has been a mechanic all his working life.

Claimant was injured again in July, 1979, while working for Papé Brothers in Coos Bay. While he was trying

to pry a roller frame on a caterpillar tractor track, he slipped and fell backwards, landing on his ankle and breaking it. The break healed satisfactorily, but the joint was permanently damaged and became arthritic as a result of the injury. Claimant now uses a special ankle brace and is severelly limited in his ability to walk, particularly any distance.

Because of claimant's limitations, he was unable to return to his former position as a mechanic with Papé Instead, Papé created a special job for him, a combination of bench repairman, tool room superintendent and parts runner. Papé built a tool room/work station for claimant at a cost of almost $10,000, which the Workers' Compensation Department paid. The work station required a special chair, which allowed claimant to stand up or sit down as necessary. Papé hired him for the position under a Workers' Compensation Department wage subsidy plan. The Department paid a declining percentage of claimant's first year wages. His treating physician's opinion was that claimant was unable to do any work beyond that required for this specific job. Claimant

worked for about 11 months. Papé then laid him off for economic reasons. Several months later, while he was still laid off, Papé terminated him, because it had received garnishments against him in violation of its garnishment policy.[1]

Claimant received unemployment benefits for a year after his layoff, continuing until a week before the hearing in this case. During that time he sought work in the parts departments of a number of businesses. At most of the places where he inquired he was not allowed to fill out a formal application; at all places he was told that there was no work available. It is not clear from his testimony whether the businesses had no parts work available at all or whether they had no work claimant could do, given his physical limitations. It is highly unlikely that claimant could physically perform a typical parts job in light of his restrictions on bending at the waist, lifting, walking and standing for extended periods.

ORS 656.206(1)(a) provides:

> " 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

Claimant is permanently totally disabled under this definition. He was able to work, despite his recurring back pain, before his ankle injury largely as a result of his strong motivation. After the injury he was able to work only because his continuing strong motivation was combined with a job and a work station carefully (and especially) tailored to his specific physical needs and because there was state money available to pay for that work station and to underwrite his wages.

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[1] ORS 23.185(5) provides:

> "No employer shall discharge any person for the reason that the person has had earnings garnished."

The parties could not raise any issue in this proceeding about the propriety of the discharge.

Claimant's vocational counsellor stated that, had it not been for that special job, claimant would have been

virtually unemployable without extensive retraining. She believed that, even then, his age would have made it very difficult to find another employer willing to hire him. Claimant is ineligible for further retraining or subsidized employment because of what he received while with Papé His condition is the result of the progression of his Nevada-compensable back injury, the permanent ankle loss due to his Oregon-compensable ankle injury, the limitation of his previous training and experience to jobs which he is no longer physically able to perform and the lack of other jobs which he could physically perform. There is no "suitable occupation" available. He is permanently and totally disabled.

Reversed and remanded with instructions to award permanent total disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Donald R. Bailey, Claimant.

CECO CORPORATION et al,
Petitioners,

v.

BAILEY et al,
Respondents.

(82-06336, 83-00773, 83-00774 and 83-00969; CA A31149)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 16, 1984.

Jerald P. Keene, Portland, argued the cause for petitioners. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Jan Thomas Baisch, Portland, waived appearance for respondent Donald Bailey.

Patrick D. Gilroy, Portland, argued the cause for respondent Cotter & Company. With him on the brief were Schuyler T. Wallace, Jr., and Mitchell, Lang & Smith, Portland.

Bruce L. Byerly, Portland, argued the cause for respondents Mitchell Bros. Truck Lines and EBI Companies. With him on the brief was Moscato & Byerly, Portland.

LaVonne Reimer, Portland, argued the cause for respondents WNI, Inc., and Farmers Insurance Group. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

The issue in this workers' compensation case is which of four employers (Ceco Corporation, Cotter & Company, Mitchell Bros. Truck Lines, or WNI, Inc.) is responsible for claimant's herniated lumbar disc and resulting surgery. The referee decided that the work conditions at claimant's last employer, WNI, Inc., constituted a new injury which materially contributed to claimant's condition. The Board reversed, finding that claimant's condition resulted from an aggravation of a low back injury in July, 1978, while he worked for Ceco Corporation (Ceco), and that Ceco and its insurer are responsible.[1] On *de novo* review we affirm.

Claimant injured his back in July, 1978, while employed by Ceco as a carpenter. Dr. Baldwin diagnosed acute low back strain. In September, 1978, claimant was treated by Dr. Gritzka, an orthopedist, whose initial diagnosis was "subacute lumbosacral strain with left radiculopathy. Possible herniated disc." Dr. Gritzka later explained his diagnosis:

> "I felt that the patient possibly had a herniated lumbar disc. I felt such a herniation might be in its earlier incipient stages, but did not feel that the patient had developed a frankly herniated disc."

In February, 1979, claimant was examined by Dr. Langston, who diagnosed lumbar strain and degenerative disc disease at L4-5. In November, 1980, x-rays showed an estimated 50 percent narrowing at L4-5 with mild degenerative spurring and scoliosis. In November, 1980, Dr. Pasquesi examined claimant and diagnosed "chronic lumbar instability with probable degenerative disc disease with some sciatic radiation in the left leg." On November 28, 1980, a determination order awarded 20 percent permanent partial disability, which was increased to 27 percent by stipulation on May 15, 1981.

Claimant was retrained as a truck driver and worked for Cotter & Company from December, 1980, until September, 1981. His job included driving and loading and unloading freight. He reported chronic back pain but lost no time from work. He then worked for Mitchell Bros. from October, 1981,

to February, 1982. That job required him to lift, tie down and remove heavy tarps covering the freight. He continued to experience low back pain, but again he lost no time from work. On April 28, 1982, claimant went to work for WNI. Claimant's job did not include loading and unloading, except for one instance in which he helped his partner unload items weighing 5 to 35 pounds. There was no change in his back symptoms. On May 17, 1982, his truck was being loaded with doors. He did no lifting, but he was required to do "some bending and stooping" in order to inventory the load. The loading dock where he stood vibrated when forklifts passed over it. About mid-morning his leg began to tingle and his back pain increased. Claimant went to a hospital emergency room, and Dr. Joseph diagnosed back strain. On June 2, 1982, a CAT scan revealed either an "excessive bulging of the annulus or

[1] The referee and the Board determined that the evidence was insufficient to assign responsibility to Cotter & Company and Mitchell Bros. Truck Lines and we agree.

small central herniation at the L4-5 disc level." Claimant was then briefly hospitalized. On discharge, Dr. Gritzka noted that claimant had a "possibly minimally bulging disc in the lumbosacral area." Surgery was performed on October 27, 1982, and revealed a minor herniation. The amount of disc material removed was "not very impressive."

On appeal, Ceco argues that the Board misapplied *Boise Cascade Corp. v. Starbuck,* 296 Or 238, 675 P2d 1044 (1984). Ceco contends that *Starbuck* expressly mandates that *prima facie* liability for disability following successive work-related injuries be placed on "the last employer whose conditions of employment *might* have caused the disability." (Emphasis supplied.) Claimant argues that liability remains with the last employer, unless preponderating evidence shows that the disability was caused solely by previous work injuries and that subsequent employment conditions did not contribute, even slightly, to the disability.

In cases of successive injury "where a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing disability, but which did not contribute to the disability, the first employer is liable." *Boise Cascade Corp. v. Starbuck, supra,* 296 Or at 244. Whether or not the work conditions at the later employment contributed to disability is a question of fact. *Boise Cascade Corp. v. Starbuck, supra,* 296 Or at 244-45. The "last injurious exposure" rule operates to place liability on the last employer 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." *Boise Cascade Corp. v. Starbuck, supra,* 296 Or 245. If the trier of fact is convinced that the disability was caused by the earlier injury, then the liability for the injury remains with the first employer and the rule has no effect. *Boise Cascade Corp. v. Starbuck, supra.*

The referee found WNI responsible, because claimant's back condition significantly worsened after May 17, when claimant was working for WNI. The Board disagreed and found Ceco responsible for an aggravation of the 1978 injury. The Board concluded:

> "[C]laimant sustained a low back injury in 1978 which was diagnosed to be a developing disc rupture, constant unremitting pain from the time of claim closure in late 1980 until 1982, and no good history of any newer incident. There is no objective evidence that claimant's employment with Cotter, Mitchell Bros. or WNI actually contributed to claimant's condition."

We agree with the Board. Considering all the medical evidence and claimant's testimony that he had unremitting and chronic back pain following the 1978 injury, we are convinced that the most likely cause of claimant's disability is the 1978 interstitial tear in the annulus fibrosis, which gradually degenerated into a minor herniation.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Paul M. Ford, Claimant.

FORD,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(82-09898; CA A31286)

Judicial review of the Workers' Compensation Board.

Argued and submitted November 14, 1984.

Charles S. Tauman, Portland, argued the cause for petitioner. With him on the brief were Dennis O'Malley and Willner, Bennett, Hartman & Tauman, P.C., 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 Newman, Judges.

NEWMAN, J.

Reversed and remanded with instructions to accept the claim.

NEWMAN, J.

Claimant seeks review of an order of the Workers' Compensation Board that affirmed the referee's denial of compensability of his occupational disease claim for hearing loss due to prolonged exposure to noise. We reverse.

Beginning in 1954, claimant worked for 28 years for Forest Fiber Products Company at its hardboard (or "masonite") manufacturing plant. He worked for approximately the first 16 years in the treatment department and the remaining years as a maintenance employe. He filed his claim when he retired in 1982 at the age of 61. The treatment department trimmed hardboard with saws and coated, baked and rehumidified it. The saws, motors and fans made a constant loud noise. Brushes, which made a constant loud, high-pitched noise, then buffed the board. Claimant stood next to the buffing machine for the better part of every working day for 16 years. As a maintenance employe, beginning in 1970, claimant worked throughout the mill, including the trimming area, which was in an open floor containing saws, sanders and planers. Initially the machinery was unenclosed and made "screaming" noises. Claimant "set up" the equipment daily and adjusted it for thickness variations.

Commencing in the early 1970's, the employer provided earplugs and earmuffs. Claimant often did not use them,

because he needed to hear the machinery to determine if it was running properly. In the early 1970's employer also began to box in some of the major machinery with noise enclosures. It completed that program in approximately 1979. Employer sought to meet Occupational Safety and Health Administration standards of an eight-hour time-weighted average noise exposure of under 90 decibels. By 1982, all but one work station at the plant met those standards, which allow excess noise providing the average is maintained. The employer continued to require earplugs and noise mufflers in a number of plant areas.

Claimant first noticed his loss of hearing after the mid-1960's. He had had no hearing problems when he began working at the plant in 1954. His wife testified that she noticed 10 to 15 years ago that claimant had difficulty hearing her speak and that his hearing difficulty was particularly

evident if there was more than one source of sound. Claimant did not miss any work as a result of his hearing difficulty.

On January 6, 1976, claimant first consulted Dr. Hodgson concerning the hearing loss. On September 7, 1982, the doctor wrote to insurer:

> "I first saw Mr. Ford on January 6, 1976. He stated that his hearing had been decreasing for the past eight to ten years. He had no past history of ear infections but stated that he worked around a moderate amount of noise. He had been on no medication and had had no ringing in his ears. At that time, he was fifty-four and was wondering why his hearing was decreasing and wanted it evaluated. I did not go into the exposure to noise other than his work since there was not a question of litigation at that time.
>
> "The ear, nose and throat examination was completely normal. The audiometric examination showed a moderately higher frequency sensory neuro hearing loss in both ears of about equal degrees reaching eighty decibels at two thousand cycles and improving a little in the higher frequencies.
>
> "I told Mr. Ford that I thought he had a hearing loss in the inner ear, most likely due to noise exposure since he had worked around a moderate amount of noise. I, again, did not go into any questioning of his noise exposure at home or any other place, but it would be impossible to differentiate between noise exposure at work and that in his home or recreational areas if there is no sound level testing.
>
> "I tested Mr. Ford again on April 10, 1979, and his hearing had stayed about the same on that test. His symptoms had changed not at all during the period. He was tested again on October 21, 1980, and again, his hearing had not changed significantly.
>
> "I last tested him on October 27, 1981, and his hearing had decreased somewhat in the one thousand cycle range from thirty to thirty-five decibels. Also there was a slight increase at two thousand cycles, but I do not feel that this was particularly significant.
>
> "In answer to your questions, the most likely cause for Mr. Ford's hearing loss is due to noise exposure. It is impossible to differentiate between that obtained at work and that obtained elsewhere. His curve is very typical of a person in noise exposure. Without the background noise level readings using octave ban analyzers and decibel meters, it would be impossible to tell whether he is exposed to hazardous noise which is now considered to be ninety decibels for eight hours as a cause

of his hearing loss. There is *[sic]* no pre-disposing factors that I can determine that would add to this impression.

"As to his treatment, his hearing is decreasing to the point where I feel that in the not-too-distant future, he may need to consider a hearing aid. I did advise him that he should be wearing noise protection when he is exposed to hazardous noise, either at work or in any other situation. Normally we run into hazardous noise in the home in the use of power saws and other power equipment. Some people also do a fair amount of shooting which is also a source of noise exposure. Again, I did not go into detail with Mr. Ford on this point."

Claimant consulted Dr. Korn in November 1976. He wrote that claimant "has worked in [a] noisy shop for years." He diagnosed a "noise-induced hearing loss." After claimant filed the claim, the Portland Center for Hearing and Speech tested him. Its September 20, 1982, report to insurer stated:

"Mr. Ford presented a mild to moderately severe sensorineural loss in the mid and high frequencies. The loss had a sloping and slightly notched configuration. This pattern would be consistent with a history of long-term exposure and presbycusis.[1]

"Mr. Ford's primary source of noise exposure appears to have been at Forest Fiber Products; however, it seems he also had significant exposure in his previous employment and the military. Unfortunately, as there was no pre-employment hearing test it is not possible to determine how much, if any, of the loss was pre-existent to his employment at Forest Fiber Products.

"The percentage of hearing impairment, calculated with a correction factor for presbycusis, was 18.74% right, 20.4% left, and 18.94% binaural."

The referee held that claimant's filing was untimely. ORS 656.807(1):[2]

"By claimant's testimony, he sought medical services in 1976 because he felt his exposure to noise at work had caused a hearing loss. Dr. Hodgson confirmed claimant's suspicion about his hearing loss and, only knowing of claimant's exposure to noise from his work environment, told claimant it was most likely due to this noise. In the context in which it was given, this information was sufficient for claimant to know he was suffering from an occupational disease, even though the specific words may not have been used. Claimant had a duty to file his claim within 180 days, which he did not do. Had he done so, noise level tests could have been conducted to establish the degree of exposure. Eight years later, in 1982, it became impossible to acquire this information. Lack of this information was prejudicial to the employer's position. I find that claimant is barred from filing his claim at this late date."

[1] Presbycusis is a "loss of ability to perceive or discriminate sounds as a part of the aging process; the pattern and age of onset may vary." *Stedman's Medical Dictionary* (23rd ed 1976).

[2] ORS 656.807(1) provides:

"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."

The referee also ruled that claimant had not carried his burden of proof that the noise level at his work caused his hearing loss:

> "While Dr. Hodgson and the audiologist [Wendy Ainsworth, M.S., of the Portland Center for Hearing & Speech] relate claimant's hearing loss was most likely due to noise exposure, neither, without comparable noise level testing would attempt to differentiate between claimant's differing exposures. There is no medical opinion that causally relates claimant's hearing loss to his employment. Besides this apparent lack of required medical causation evidence, there is also no evidence that the noise level at claimant's place of employment exceeded the standard of 90 DBA level which is felt to be safe. Claimant has not carried his burden of proof."

The Board affirmed the referee without opinion.

Claimant assigns as error that the Board affirmed the referee's ruling that the claim was barred as untimely filed. Claimant argues that neither Dr. Korn nor Dr. Hodgson said directly that his hearing loss was the result of noise exposure at the plant. He testified, "They just wouldn't come right out and tell me what caused this." We agree with the referee that on January 6, 1976, Dr. Hodgson gave claimant sufficient information for him to know that he was suffering from an occupational disease. Claimant did not file within 180 days of that date. *See* ORS 656.807(1). On the other hand, we do not

agree that the claim was barred, because the employer was not prejudiced by the delay.

ORS 656.265(4)(a) provides that failure to give notice as required by that section bars a claim unless, among other things, "the insurer or self-insured employer has not been prejudiced by failure to receive the notice." In *Inkley v. Forest Fiber Products Co.*, 288 Or 337, 347, 605 P2d 1175 (1980), the court held that ORS 656.265(4) is applicable to occupational diseases claims. *See also Hayes-Godt v. Scott Wetzel Services,* 71 Or App 175, ___ P2d ___ (1984).[3] The burden of proving prejudice is on the employer. *Inkley v. Forest Fiber Products Co., supra,* 288 Or at 348. That some time has passed and that the employer claims it has been prejudiced is not sufficient. *Raifsnider v. Caveman Industries, Inc.*, 55 Or App 780, 784, 639 P2d 1298 (1982). The referee found that the employer was prejudiced because, if an earlier notice had been given, "noise level tests could have been conducted to establish the degree of exposure. Eight years later, in 1982, it became impossible to acquire this information." Employer's safety coordinator, however, testified that noise level tests were taken at the plant between 1970 and 1982, but that he did not know where those records were. The employer failed to locate the test results and introduce them at the hearing. Insurer did not carry its burden of proof that the employer was prejudiced by the passage of time.

[3] As in *Hayes-Godt v. Scott Wetzel Services, supra,* 71 Or App at 179 n 2, we do not accept the argument of insurer that the Supreme Court blindly relied on our earlier decision in *Gronquist v. SAIF,* 25 Or App 27, 547 P2d 1374, *rev den* (1976), and failed to consider the changes in the statute when it held in *Inkley v. Forest Fiber Products Co., supra,* that ORS 656.265(4) is applicable to occupational disease claims.

Petitioner also argues that the Board erred when it affirmed the referee's ruling that claimant did not carry his burden of proof that his hearing loss was causally related to his employment. Insurer responds that claimant has not established that his work exposure at the plant was the major contributing cause of his hearing loss, a point the referee did not discuss directly. Insurer asserts that there was no pre-employment hearing test to determine how much, if any, of claimant's hearing loss existed before 1954. Dr. Hodgson stated that he did not inquire into claimant's exposure to noise other than at his work and stated that "it would be impossible

to differentiate between noise exposure at work and that in his home or recreational areas if there is no sound level testing."

Certainty is not the required degree of proof for a claim under the Workers' Compensation Law. *See Hutcheson v. Weyerhaeuser,* 288 Or 51, 55, 602 P2d 268 (1979). The evidence shows that claimant suffered a hearing loss due to noise exposure, that he had no hearing problem when he started to work at the employer's plant in 1954 and that he did not begin to experience symptoms until the last half of the 1960's. During his many years of work at the plant, he was regularly exposed to high levels of noise. There is no evidence that he was exposed to abnormal noise off the job. The preponderance of evidence, therefore, shows a causal relationship between claimant's hearing loss and the workplace.

The evidence further establishes that the noise at the plant between 1954 and 1982 was the major contributing cause of claimant's hearing loss. Insurer questioned witnesses about the possible contibutory effects of claimant's exposure to noise at home or while hunting, or before 1954 in the military or other employment. There is, however, no evidence that claimant was exposed to excessive noise at home or while hunting or that he suffered any loss of hearing because of noise exposure in the military or in prior employment. The evidence also shows that claimant had no hearing impairment when he began to work at the employer's plant in 1954 and only noticed a hearing loss over a decade later. Although there is evidence that the pattern of claimant's hearing loss is consistent with presbycusis, claimant's pattern of hearing loss is also consistent with his long-term exposure to noise at the employer's plant. We find that claimant proved that his exposure to noise at his employment was the major contributing cause of his hearing loss.

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 Patrick Welsch, Claimant.

WELSCH,
Petitioner,

v.

FMC CORPORATION,
Respondent.

(81-08131; CA A30584)

Judicial review of the Workers' Compensation Board.

Argued and submitted September 24, 1984.

Victor A. Calzaretta, Portland, argued the cause for petitioner. With him on the brief were Robert K. Udziela, John S. Stone and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Allan M. Muir, Portland, argued the cause for respondent. With him on the brief were Ridgway K. Foley, Jr., P.C., Dennis S. Reese and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young. Judges.

PER CURIAM

Affirmed.

PER CURIAM

In this workers' compensation case, claimant seeks judicial review of an order of the Workers' Compensation Board that affirmed a referee's decision denying him unscheduled permanent partial disability for his shoulder condition. The referee apparently believed, incorrectly, that only medical evidence could support a finding of permanent disability. On *de novo* review of both the medical *and lay* evidence, we find that claimant has failed to sustain his burden of proving that his shoulder disability is permanent.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Dena G. McGehee, Claimant.

JELD-WEN, INC.,
Petitioner,

v.

McGEHEE et al,
Respondents.

(81-10062, 83-07112; CA A32671)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 5, 1984.

Brian L. Pocock, Eugene, argued the cause and filed the brief for petitioner.

Robert L. Chapman, Medford, argued the cause and filed the brief for respondent, Dena G. McGehee.

Gilah Tenenbaum, Beaverton, argued the cause for respondents Wausau Insurance Company and Lumoco. On the brief was David O. Horne, Beaverton.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

JOSEPH, C. J.

Affirmed.

JOSEPH, C. J.

Jeld-Wen, Inc., seeks review of an order of the Workers' Compensation Board which held that it, and not a subsequent employer, is responsible for claimant's compensable condition. Jeld-Wen argues that the Board erred in holding that it was barred from denying the aggravation claim that it had earlier accepted. We affirm.

Claimant suffered a compensable injury at Jeld-Wen on October 10, 1979. After she had returned to work, she was laid off and was unemployed for some time. In August, 1980, she began working at Lumoco, which was insured by Wausau. Her back condition worsened in April, 1981, without any specific incident having occurred at Lumoco. On August 28, 1981, Jeld-Wen accepted an aggravation claim and paid benefits for a year and a half. On March 25, 1983, Jeld-Wen denied the claim retroactively to April 17, 1981, on the basis that Lumoco was responsible for claimant's condition. After receiving Jeld-Wen's denial, claimant filed a claim against Lumoco, which denied it on July 29, 1983. Both employers concede compensability. The only issue is which is responsible for benefits.

The Board held that Jeld-Wen's acceptance of the aggravation claim and payment of benefits barred it from later denying the claim, citing *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983). Jeld-Wen argues that *Bauman* only applies when compensability is in issue and not when the only issue is responsibility, as in this case.

In *Bauman,* the Supreme Court gave three basic policy reasons, in addition to its readings of relevant statutory language, which provided the foundation for its holding:[1] retrospective denials add instability to the system; the parties would potentially encounter difficulties of proof resulting from the passage of time; and speedy final resolution of claims

is important to the system. Those considerations are as weighty in claims involving responsibility as in those involving compensability. Proof problems that could result from the passage of time and the impact on the system from delay are the same, regardless of whether the dispute is between employers or more directly involves a claimant. Moreover, stability is at least as likely to be impaired by denials in responsibility cases long after acceptances.

If an employer is allowed to accept a claim and pay benefits for a substantial period of time (like the year and a half in this case) and then deny the claim, a claimant would be placed in a threatened position. Even though she has an accepted claim as to one employer, she would be required to make protective claims against all other employers who might be responsible to protect against the eventuality that the employer who has accepted the claim will later deny and she will lose any chance for compensation. If she makes a claim against a second employer and it denies the claim, the claimant will not be able to rely on the fact that she has an allowed claim against another employer but would be required to appeal, even though she has nothing immediately to gain if the denial were overturned. Not to pursue alternate claims could well prove fatal to any compensation. The resulting costs of time and resources for claimants, attorneys, employers, insurers and the whole system is obvious.

It would be possible to create a rule that, whenever a claimant is subject to the described risk, an employer would be barred from a denial after acceptance but, if the claimant is not at risk, no bar would exist. However, given the time limits for claimants to make claims or appeal denials, that rule would affect few cases and would not contribute to the stability and certainty of the compensation system. We see nothing in the Supreme Court's opinion in *Bauman* or in the nature of responsibility issues as opposed to compensability issues that persuades us to hold that the *Bauman* rule is not equally applicable in a responsibility dispute between employers. We therefore agree with the Board that *Bauman* applies to this case and that Jeld-Wen, having accepted the aggravation claim and paid benefits, is now barred from denying responsibility.

Affirmed.

[1] The Supreme Court has recently clarified the *Bauman* rule to the effect that an employer may not deny a claim after it has been accepted unless the denial is issued within 60 days after notice of the claim. *Wheeler v. Boise Cascade,* 298 Or 452, ___ P2d ___ (1985). Jeld-Wen's reliance on *SAIF v. Matthews,* 66 Or App 175, 672 P2d 380 (1983), as being a modification of *Bauman,* is wholly without substance. That was not a retrospective ("backup") denial situation. It was a straightforward responsibility dispute. *See Parker v. North Pacific Insurance Co.,* 66 Or App 118, 672 P2d 1248 (1983), *rev den* 296 Or 536 (1984).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Howard Dean, Claimant.

DEAN,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(82-05128; CA A31562 (Control), A32495)

Judicial Review from Workers' Compensation Board.

On petitioner's petition for reconsideration filed December 11, 1984. Order of dismissal filed November 9, 1984.

James L. Edmunson, Evohl F. Malagon, and Malagon & Associates, Eugene, for petition.

Before Warden, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judge.

JOSEPH, C. J.

Reconsideration granted; dismissal of petition for judicial review affirmed.

JOSEPH, C. J.

Claimant petitions for reconsideration of an order which dismissed his petition for judicial review of an order of the Workers' Compensation Board. We allow reconsideration, grant reconsideration and affirm the dismissal.

The Board's order gives the following facts regarding claimant's condition:

> "Claimant suffered a compensable injury to his neck, left shoulder and left arm on November 15, 1979. On November 29, 1979 a cervical laminectomy and discectomy was performed. About the time of the surgery, a mass was detected near claimant's left collarbone. This mass has continued without a clear diagnosis, and apparently is the major cause of claimant's continuing problems."

Claimant has continued to suffer pain. In August, 1981, the treating physician found him to be medically stationary.

The referee found that the claim had been prematurely closed, and SAIF requested review by the Workers' Compensation Board, which, with one member dissenting, reversed the referee on the issue of premature closure and remanded the case for determination of extent of disability. Claimant then petitioned for judicial review in this court and filed a brief claiming that the Board had erred in finding him to be medically stationary. We granted SAIF's motion to dismiss the appeal on the ground that that issue is not separately appealable under *Jones v. SAIF,* 49 Or App 543, 619 P2d 1342 (1980).

Claimant argues that, if he must wait until the extent of disability is determined to have the issue of whether he is medically stationary resolved, his case will be unnecessarily prolonged, because his being medically stationary is a precondition to extent of disability being determined. As authority for separate consideration of the closure issue on appeal, claimant relies on *Price v. SAIF,* 296 Or 311, 675 P2d 479 (1984), where the claimant had suffered a compensable back injury and then developed a heart problem, which he alleged was caused by the back injury. The Board found the heart condition noncompensable, and the Supreme Court approved judicial review of that issue while the issue of extent of disability from the back injury was still pending below.

Although *Price* allowed an appeal of one element of a claim, that appeal was specifically from a denial of a separate and distinct injury that the claimant alleged was caused by the initial injury. There is no statutory basis for "partial denials" but, as the Supreme Court recognized in *Ohlig v. FMC Marine & Rail Equipment,* 291 Or 586, 633 P2d 1279 (1981), and repeated in *Price,* in workers' compensation practice partial denial claims are provided for by OAR 436-83-125 and may be litigated.[1]

We do not read *Price* to permit an appeal from every determination made before the entire claim has been resolved. The language in the opinion approving a separate appeal is limited to the partial denial situation:

> "An order which addresses two separate aspects of the same claim, extent of disability on the accepted claim and compensability for an additional allegedly related disease, infection or injury, may finally determine one issue but not the other." *Price v. SAIF, supra,* 297 Or at 316.

Price recognizes that the practice has been to treat a partial denial of an injury separate and distinct from the initial injury as if it were a separate claim and approves that practice. We conclude that *Price* did not otherwise change existing law regarding what is a final order for purposes of appeal under ORS 656.298(1). *See Winters et al v. Grimes et al,* 124 Or 214, 264 P 359 (1928); *Jones v. SAIF, supra; Mendenhall v. SAIF,* 16 Or App 136, 517 P2d 706, *rev den* (1974); *Hammond v. Albina Engine & Mach.,* 13 Or App 156, 509 P2d 56 (1973).

Reconsideration granted; dismissal of petition for judicial review affirmed.

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[1] OAR 436-83-125 provides:

"Every notice of partial denial shall set forth with particularity the injury or condition for which responsibility is denied and the factual and legal reasons therefor. The notice shall be in the form provided for in [OAR 436-]83-120. Hearing and appeal rights and procedures shall be as provided for claim denials in ORS 656.262(6) and (7), 656.319 and these Rules."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
John K. Eder, Claimant.
ARGONAUT INSURANCE COMPANIES,
Petitioner,
v.
EDER,
Respondent.
(83-12044; CA A31417)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 3, 1984.

Lavonne Reimer, Portland, argued the cause for petitioner. On the brief were Rick T. Haselton and Lindsay, Hart, Neil & Weigler, Portland.

Diana Craine, Portland, argued the cause for respondent. On the brief were Victor A. Calzaretta and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Before Gillette, Presiding Judge, and Warren and Young, Judges.

GILLETTE, P. J.

Affirmed.

GILLETTE, P. J.

Argonaut Insurance Companies (Argonaut) petitions for review of a Workers' Compensation Board order requiring it to accept claimant's asbestosis claim. Argonaut asserts that the claim is time-barred. We disagree and therefore affirm the Board.

Claimant's last injurious exposure to asbestos occurred on March 9, 1976. At the time, *former* ORS 656.807(1) provided a five-year limitation period for all occupational disease claims except those for silicosis or radiation injury. *See Stone v. SAIF,* 57 Or App 808, 646 P2d 668 (1982), *rev dismissed* 294 Or 442 (1983). In 1981, the legislature amended the statute to provide a 40-year limitation period for asbestosis claims. Or Laws 1981, ch 535, § 47, *codified as* ORS 656.807(4).[1] The effective date of the change was more than five years after claimant's last injurious exposure. Claimant's physician first told him that he had asbestosis on March 2, 1982. Claimant filed this claim on May 15, 1982, after his right to bring a claim under the former statute was time barred.

[1] ORS 656.807(4) provides:

"All occupational disease claims for asbestosis or asbestos-related diseases are void unless a claim is filed within 40 years after the last exposure in employment subject to the Workers' Compensation Law and within 180 days from the date the claimant either becomes disabled or is informed by a physician that the claimant is suffering from asbestosis or asbestos-related diseases, whichever is later."

Argonaut argues that claimant's right to compensation is controlled by the law in force at the time of his injury, which occurred no later than his last injurious exposure. We disagree. The statute on which Argonaut relies, ORS 656.202(2),[2] applies only to a claimant's substantive rights to compensation. It does not apply to the procedural requirements for filing a claim or to the period within which a claimant must file. In contrast to Argonaut's position, we have generally given retroactive effect to workers' compensation statutes which change the time within which claimants must

assert their rights. *See Barrett v. Union Oil Distributors,* 60 Or App 483, 486-87, 654 P2d 668 (1982), *rev den* 294 Or 569 (1983); *Holden v. Willamette Industries,* 28 Or App 613, 560 P2d 298 (1977).

The question is one of legislative intent. In this case we see no basis, inside or outside the legislative record, for holding that the legislature did not intend the workers' compensation rule of retroactivity demonstrated by *Barrett* and *Holden* to apply. If anything, the facts that asbestosis often takes decades to become manifest and that many current claims arise from work in the wartime ship building industry suggest an intent to make the change retroactive. Claimant's claim was timely. *See Fossum v. SAIF,* 52 Or App 769, 629 P2d 857 (1981), *aff'd* 293 Or 252, 646 P2d 1337 (1982).

Affirmed.

[2] ORS 656.202(2) provides:

"Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Michael Lorence, Claimant.

EBI COMPANIES et al,
Petitioners,

v.

LORENCE,
Respondent.

(81-11404; CA A30858)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 9, 1984.

Jerald P. Keene, Portland, argued the cause for petitioners. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Marianne Bottini, Portland, argued the cause for respondent. With her on the brief was Bottini & Bottini, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed.

WARREN, J.

Employer, Columbia Excavating, and its insurer, EBI Companies (employer), seek reversal of the Workers' Compensation Board's order which held that claimant had established good cause for his failure to request a hearing within 60 days of the denial of his claim. We hold that the facts of this case do not establish good cause and reverse.[1]

Claimant sustained a compensable injury on December 16, 1979. On July 2, 1981, a determination order was issued which awarded no time loss and no permanent partial disability. On September 28, 1981, employer issued a denial for continued treatment under ORS 656.245. Claimant sought legal assistance from an attorney on October 12, 1981. Both claimant and the attorney were aware of the 60-day limitation on appealing the denial. The attorney testified that, once he had accepted claimant's case, he considered himself the person responsible for meeting the 60-day limit. On the day he first met with claimant, the attorney dictated a hearing request and gave it, along with other dictation, to his secretary. The request for hearing apparently never went any further in his office system. On December 15, 1981, the attorney reviewed claimant's file pursuant to his diary system and discovered that no request for hearing had been filed. He then filed the request for hearing 18 days past the 60-day limit.

[1] Because we hold that claimant did not establish good cause, we do not need to address employer's other assignments of error.

The referee and the Board held that the failure timely to file the request for hearing was due to the negligence of the attorney's employe who was handling the dictation and, therefore, that it constituted good cause for claimant's untimeliness.

Two Oregon cases have defined the rules governing good cause for failure timely to file a request for hearing when it is caused by the negligence of claimant's attorney or the attorney's employes. In *Sekermestrovich v. SAIF,* 280 Or 723, 573 P2d 275 (1977), the court held that the failure of an attorney to file a request for hearing did not constitute good cause under ORS 656.319(1)(b), unless the attorney's reason for failing to file would be good cause if attributed to the claimant. In *Brown v. EBI Companies,* 289 Or 455, 616 P2d

457 (1980), the claimant telephoned her attorney and informed him that she had received a denial letter. She was instructed to mail the denial letter to him, which she did. For some unknown reason, the attorney did not find out that the denial letter had reached his office until after the time for requesting a hearing had passed. The issue in *Brown,* as defined by the court, was "whether negligence in the chain of communication as a matter of law is beyond excuse." 289 Or at 459. The court stated:

> "* * * [I]t is at least within the range of discretion to relieve a claimant from a default caused by the mistake or neglect of an employee *who is not charged with responsibility for recognizing and correctly handling the message that constitutes the legally crucial notice* from which the time to respond is measured. * * *" 289 Or at 460. (Emphasis supplied.)

The distinction between *Sekermestrovich* and *Brown* appears to be that the negligence of an employe which results in an attorney's failure can constitute good cause, while the actual negligence of the attorney himself cannot. Clearly, under either *Sekermestrovich* or *Brown,* if a claimant's attorney had received the denial and failed to do anything, no good cause would exist. We find no substantial distinction between that situation and the facts of this case. True, claimant's attorney did dictate a request for hearing, and the secretary may have been negligent in failing to return the dictation to her employer. However, the negligence of the secretary cannot excuse the primary negligence of the attorney, who had the denial in his possession, was aware of the exact date on which the request for hearing had to be filed and merely forgot about the file and the deadline, because he had dictated the request for hearing.

Under the facts of this case, it was the negligence of the attorney in failing to keep track of the preparation of the request for hearing and to make sure that it was filed on time that caused the late request. Further, nothing under these facts could be held to be excusable neglect if it were done by the claimant himself. Claimant has failed to establish good cause for his failure timely to file a request for hearing. The denial must therefore stand.

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE ACCIDENT INSURANCE FUND CORPORATION,
Appellant,
v.
GATTI et al,
Respondents.
(77972; CA A32444)

Appeal from District Court, Marion County.

Thomas C. Beck, Judge.

Argued and submitted October 24, 1984.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for appellant. With her on the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Margaret E. Rabin, Assistant Attorney General, Salem.

Charles D. Maier, Salem, argued the cause for respondents. With him on the brief was Gatti & Gatti, P.C., Salem.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

SAIF appeals from a judgment dismissing its civil action for money had and received. The issue is whether the complaint alleges ultimate facts sufficient to state a claim. ORCP 21A(8). Assuming that the well pleaded facts in SAIF's complaint are true, *Sager v. McClenden,* 296 Or 33, 35, 672 P2d 697 (1983), we conclude as a matter of law that SAIF's complaint fails to state a claim. Therefore, we affirm.

Respondents represented a workers' compensation claimant before a hearings referee, who found that the claimant was permanently partially disabled and awarded respondents $800 as attorney fees to be paid out of the claimant's compensation. SAIF appealed the referee's decision to the Workers' Compensation Board, but paid the attorney fees pending review. The Board reversed the referee's award of permanent partial disability. That determination was not appealed.

SAIF then filed this action in district court to recover the $800 paid to respondents. In dismissing SAIF's complaint with prejudice, the trial judge stated:

> "[T]he attorneys fees in this case were part of the compensation awarded to the injured workman. It is also clear that ORS 656.313 provides that any compensation award paid shall not be recoverable by the insurance carrier even if the award is later decreased or deleted by the Court of Appeals."

SAIF argues that under OAR 437-47-080[1] attorney fees are not payable until an award of permanent disability becomes final and that, because the award here was reversed by the Board, it never became final. SAIF also argues that the plain language of ORS 656.313 shows that defendants may not keep the fee.

ORS 656.313 provides, in pertinent part:

> "(1) Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant.
>
> "(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.
>
> "* * * * *
>
> "(4) Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services."

ORS 656.313(1) concerns payment "to a claimant." ORS 656.313(2) provides that "the claimant" shall not be obligated to repay any compensation received pending review or appeal.[2] SAIF argues that the provisions against repayment apply only to a claimant, and not to a claimant's attorney. SAIF points to the legislative purpose of ORS 656.313, *i.e.*, to provide support to injured workers. *See Wisherd v. Paul Koch Volkswagen,* 28 Or App 513, 517, 559 P2d 1305, *rev den* 278 Or 393 (1977).[3] SAIF argues that a claimant receives no support from money paid to an attorney and, therefore, the legislative purpose is not served.

We give effect to the plain language of the statute. ORS 174.010; *see Franklin v. SIAC,* 202 Or 237, 241, 274 P2d 279 (1954). The money paid respondents was part of compensation paid to a claimant. The fact that it was paid *directly* to respondents is of no consequence. ORS 656.313(2) provides that the claimant shall not be obligated to repay any compensation received. SAIF's argument that this result does not comport with legislative intent is not persuasive. Any change in the statute must come from the legislature.

Affirmed.

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[1] OAR 438-47-080 provides:

> "The Board may, with consent of claimant, order payment of the same directly to the attorney. The paying agency shall compute sufficient amounts of the final payments of compensation payable under the award to a lump sum for such attorney's fee payment. The lump sum shall not be payable until the award of permanent disability becomes final."

[2] We do not decide whether OAR 438-47-080 is consistent with the mandate of ORS 656.313(1) that the filing of a request for review or appeal shall not stay payment of compensation.

[3] We held in *Wisherd* that ORS 656.313 requires that the insurer or self-insured employer pay all compensation, including payment for medical services. The legislature amended ORS 656.313 in 1979 to exclude medical services. *See SAIF v. Maddox,* 295 Or 448, 454, 667 P2d 529 (1983).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Marilyn J. Christensen, Claimant.
CHRISTENSEN,
Petitioner,
v.
ARGONAUT INSURANCE COMPANY/
STANDARD INSURANCE COMPANY,
Respondents - Cross-Respondents,
INDUSTRIAL INDEMNITY COMPANY,
Respondent - Cross-Petitioner.
(81-03090, 81-09364; CA A29350)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 16, 1984.

Kathryn H. Clarke, Portland, argued the cause and filed the brief for petitioner.

LaVonne Reimer, Portland, argued the cause for respondents - cross-respondents. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Scott M. Kelley, Portland, argued the cause for respondent - cross-petitioner. With him on the brief was Cheney & Kelley, P.C., Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Reversed on petition for judicial review; referee's order as to extent of disability reinstated; affirmed on cross-petition.

VAN HOOMISSEN, J.

Claimant seeks judicial review of a Workers' Compensation Board order that reversed a referee's award of permanent total disability. The issue is whether the Board erred in holding that claimant failed to make a reasonable effort to follow medical advice that she lose weight and thereby failed to mitigate the extent of her disability. Industrial Indemnity cross-petitions from that portion of the Board's order which holds that it is responsible for paying claimant's compensation. We review *de novo.* ORS 656.298(6).

Claimant is 5'3". She weighs about 300 pounds. She suffered a compensable back injury in April, 1980, while working for Standard Insurance Company. Dr. Eigner, her physician, diagnosed a lumbar strain. Within a few weeks she was released to return to work with restrictions on lifting. She returned to her regular duties. Throughout that period she continued to experience back pain. At the time of the injury, Industrial Indemnity was Standard's workers' compensation carrier.

Claimant suffered a second work-related back injury in July, 1980. Dr. Eigner diagnosed a "restrain." She continued to work on a modified basis but was released within two weeks to return to regular duties with a 50-pound lifting limitation. Despite therapy, her back pain continued. On February 3, 1981, she stopped working. She has not worked since. Dr. Eigner confirmed that she should not return to her previous work. At the time of the second injury, Argonaut Insurance was Standard's workers' compensation carrier.

The referee concluded,

> "[b]ased upon a preponderance of the evidence[,] that claimant is permanently and totally disabled in accordance with ORS 656.206(1). She is permanently incapacitated from regularly performing work at a gainful and suitable occupation given her permanent impairment to her back and morbid obesity."

On review, the Board found that claimant had failed to meet her burden to prove that she had made a reasonable effort to follow medical advice that she lose weight and that the referee had erred in considering her morbid obesity in determining the extent of her disability. The Board considered the extent

of her disability due to her back injury only, which it concluded was minimal, and awarded her 20 percent permanent partial disability.

Claimant first contends that the Board improperly imposed on her the burden of proving that she had made a reasonable effort to follow medical advice that she lose weight. In *Nelson v. EBI Companies,* 296 Or 246, 674 P2d 596 (1984), the Supreme Court considered whether a claimant's failure to follow reasonable medical advice to lose weight could result in a reduced award. There, an obese claimant was found to have unreasonably failed to follow medical advice that she lose weight. Her permanent partial disability award was reduced by the Board from 25 percent to 5 percent. We affirmed. *Nelson v. EBI Companies,* 64 Or App 16, 666 P2d 1360 (1983). The Supreme Court affirmed. As to the burden of proof in such cases, the Supreme Court stated:

> "In workers' compensation cases, we believe the allocation of the burden of proving a claimant unreasonably failed to mitigate damages should follow the common law. We, therefore, hold the Board erred in concluding 'where a case involves the rating of disability and the issue is raised, the burden of proof is on the claimant to show that he or she did not unreasonably fail to follow the medical advice [of her physican].' The law allocates to the employer the burden of proof to persuade the trier of fact that the worker unreasonably failed to follow needed medical advice or otherwise to mitigate her damages." *Nelson v. EBI Companies, supra,* 296 Or at 252.

The question, therefore, is whether employer proved that claimant failed to make a reasonable effort to follow medical advice that she lose weight. Dr. Eigner testified:

> "Q. But overall as a general rule obesity is not a permanent problem?

"A. As far as I know there is zero percent success in treating morbid obesity with intestinal bypass, amphetamines, psychological counseling, drastic caloric restrictions. These people tend to recur.

"Q. Would you say it is basically a motivational problem of sorts, weight loss?

"* * * * *

"A. I think it is a very complex disease and we haven't discovered the cure or the cause.

"Q. Have you prescribed diets for her to follow, Marilyn Christensen to follow, to lose weight?

"A. Yes. She has been given a long succession of attempts to get her to lose weight beginning with a thousand calorie diet. She has tried some fad diets from magazines she has brought in and asked me to approve. She has tried, not amphetamines, but a less addictive form of appetite suppressant available now. She was given a machine which counts bites and chewing. All of these methods would improve her weight by ten to 20 pounds and, then, she would relapse. As a final resort, she was referred to a surgeon and she had at least three sessions discussing surgery with him and at the latest time has chosen not to have any kind of surgical intervention.

"Q. What sort of things would cause her to relapse, can you tell me that, with regard to her obesity?

"A. Mainly she would begin eating again.

"Q. So her obesity obviously is directly tied to her appetite; is that correct?

"A. Yes."

Dr. Eigner also testified that claimant had attempted all the recommended treatments, that she had made reasonable efforts to control her obesity and that she did not lack motivation to lose weight.

Claimant testified at the hearing that she was undergoing hypnosis and was considering a gastric stapling procedure, despite the fact that the insurer would not authorize payment for such treatment. After the hearing, the referee referred her to the Risk Factor Obesity Control Program for an independent evaluation. Dr. Palmer, director of that program, stated that claimant would have only a small chance of success in his program. He was not confident that her back pain would diminish with weight loss.

Respondents argue that the evidence shows that claimant's weight problem is within her control, that it is solely a function of her appetite and that the result here is controlled by *Nelson v. EBI Companies, supra.* In *Nelson,* the claimant's physican signed a statement that her condition was "completely within her control" and "entirely voluntary." *Nelson v. EBI Companies, supra,* 296 Or at 249. In holding that

the claimant in *Nelson* had failed to make reasonable efforts to lose weight, the Supreme Court reasoned:

"The Court of Appeals found in this case' * * * that claimant was able to lose weight for a while, but she eventually lost enthusiasm for her prescribed weight program. There is no indication in this record other than that she could have continued to lose weight, had she gone back to the regimen Dr.

Lautenbach prescribed. There was no medical impediment to success, no severe pain or other contraindications; all that was required was an exercise of will. Her failure to make further efforts was unreasonable.' " *Nelson v. EBI Companies, supra,* 296 Or at 252.

This case is distinguishable from *Nelson* primarily because of the medical testimony regarding individuals with morbid obesity. Dr. Eigner testified that it is typical for those individuals to lose weight but be unable to keep it off, that there has been virtually no success in treating the condition and that medical science has yet to determine its cause or find its cure. Claimant's changing motivation apparently is of physiological or psychological etiology. However, we discern no difference between the two for purposes of determining whether she has reasonably attempted to follow medical advice that she lose weight. Claimant has made repeated attempts to lose weight and has been cooperative with her physician. Employer has failed to carry its burden to prove that she unreasonably failed to follow medical advice. The Board erred in concluding otherwise.

The Board correctly found that Industrial Indemnity, the original carrier, is the responsible insurer, because the claim is for an aggravation. The weight of the evidence shows that claimant continued to have pain after her April, 1980, injury and that the event in July, 1980, was an aggravation, not a new injury.

Reversed on petition for judicial review; referee's order as to extent of disability reinstated; affirmed on cross-petition.

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126 February 6, 1985 No. 64

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Dennis Bloomfield, Claimant.

BLOOMFIELD,
Petitioner,

v.

NATIONAL UNION INSURANCE COMPANY,
Respondent.

(82-07387; CA A31218)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 3, 1984.

James L. Edmundson, Eugene, argued the cause for petitioner. On the brief was Peter O. Hansen, Portland.

G. Kenneth Shiroishi, Portland, argued the cause for respondent. With him on the brief was Dunn, Carney, Allen, Higgins & Tongue, Portland.

Before Gillette, Presiding Judge, and Warren and Young, Judges.

YOUNG, J.

Reversed; referee's order reinstated.

YOUNG, J.

The issue in this workers' compensation case is compensability. Claimant petitions for review of a Board order which reversed a referee's order and found that claimant's right knee injury was caused by off-work activities. We reverse and remand for the reinstatement of the referee's order.

Claimant played golf during the morning of June 28, 1982, and for the first time wore spiked golf shoes. Because the shoes tended to hold his right foot in place during a swing, his right knee began to cause him some pain. By the end of the game, he was walking with a limp. Claimant went to work that afternoon. His supervisor and various co-workers noticed that he was limping. He explained that he had hurt his knee that morning playing golf. Later during his shift, he tripped on a pallet and felt an immediate sharp pain in his right knee. The pain was different from what he had felt while playing golf. It soon subsided to what it had been before he tripped, and he continued working for several days.

The knee became quite painful, and he saw Dr. Dineen, an orthopedist, who performed an arthrotomy on the knee. Dineen reported that the injury was work-related; claimant apparently mentioned only the pallet injury, and not the golf incident, to him. Dr. Pasquesi, an orthopedist, examined claimant some months later. He agreed that claimant had suffered a twisting injury to the knee. Pasquesi could not say whether the golf game or the pallet incident produced the injury. Either, he believed, would have been sufficient.

The referee found claimant's testimony credible. Because the injury would be compensible if the pallet incident contributed to it, *Pattucci v. Boise Cascade Corp.*, 8 Or App 503, 507, 495 P2d 36 (1972), he found in claimant's favor. The Board reversed, noting that Dineen was not aware of the golf game and that Pasquesi did not positively link the alleged pallet incident to the knee condition. The Board did not discuss the referee's evaluation of claimant's credibility, but it found that there was insufficient evidence that any incident at work materially contributed to the knee condition.

We give great weight to the referee's determination of witness credibility. *Hannan v. Good Samaritan Hosp.*, 4 Or App 178, 471 P2d 831, 476 P2d 931 (1970), *rev den* (1971). We have no reason to disagree with the referee's evaluation in this case and therefore accept claimant's testimony as correct. According to claimant, he experienced a sharp pain when he tripped on the pallet. The pain that he had experienced as a result of golfing did not come on with the same sharpness. We infer that, when claimant tripped on the pallet, he suffered an injury which was different from what he had previously suffered and which independently contributed to his injury. By the time claimant saw a physician his injury was complete. It is doubtful that Dineen could have separated the contributions of the two incidents if he had been aware of both; Pasquesi stated that he could not. Although we also are unable to determine the exact contribution of the pallet incident to

claimant's injury, we need not do so. We are satisfied that the pallet incident contributed to the injury, and that fact is sufficient to make the injury compensable. *Pattucci v. Boise Cascade Corp., Supra.*

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of the beneficiaries of Jerry Sassmen, Deceased.

AMOS et al,
Petitioners,

v.

SAIF CORPORATION,
Respondent.

(82-06927; CA A29586)

Judicial review of the Workers' Compensation Board.

Argued and submitted May 25, 1984.

Robert J. Guarrasi, Eugene, argued the cause for petitioners. With him on the brief were Malagon & Associates and Christopher D. Moore, Eugene.

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.

Before Richardson, Presiding Judge, and Rossman and Newman, Judges.

NEWMAN, J.

Affirmed as to Christy Amos' claim; reversed and remanded as to Raymond Sassmen's claim with instructions to accept claim.

NEWMAN, J.

Claimants, mother and child, seek judicial review of an order of the Workers' Compensation Board that adopted and affirmed the referee's order that denied their claims for benefits based on the accidental death of the alleged father of the child.

Mother married David Cantwell in December 1976. They had a son, David, Jr., on June 20, 1978. In October 1978, mother and Cantwell separated. She testified that she did not have sexual relations with him after October 1978. She filed for divorce from Cantwell on April 18, 1979. The divorce decree was entered on May 16, 1980, and became effective on July 15, 1980.

In February 1979, mother and Sassmen began to live together and to have sexual relations. She testified that during

this period she did not have sexual relations with anyone else. Mother gave birth to a child, Raymond, on December 7, 1979. The paternity of Raymond has not been established by a court proceeding. *See* ORS 109.125.

Mother and Sassmen lived together until December 1980, or January 1981, when they separated. Thereafter, Sassmen continued to visit Raymond and to pay some of his expenses. Sassmen was killed in a compensable accident on January 12, 1982. Mother and Sassmen were not cohabitating at the time of the accident. Both were then unmarried and Sassmen was then cohabiting with another woman.

Raymond claimed death benefits under ORS 656.204(4):

> "(4) If the worker leaves neither wife nor husband, but a child under the age of 18 years other than one described in subsection (3) of this section, $150 per month shall be paid to each such child until the child becomes 18 years of age."

Mother also claimed death benefits, asserting that she qualified under ORS 656.226:

> "In case an unmarried man and an unmarried woman cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are

> entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

If mother qualifies under ORS 656.226, then ORS 656.204(2) applies:

> "If the worker is survived by a spouse, monthly benefits shall be paid in an amount equal to 4.35 times 50 percent of the average weekly wage to the surviving spouse until remarriage. The payment shall cease at the end of the month in which the remarriage occurs. The surviving spouse also shall be paid $150 per month for each child of the deceased until such child becomes 18 years of age."

Mother would then receive benefits for Raymond under ORS 656.204(2), and Raymond would not receive benefits under ORS 656.204(4). SAIF denied both claims.

The appeals present these issues:

1. If Raymond's paternity has not been established under ORS chapter 109, may the Board determine that Sassmen is Raymond's father for purposes of determining benefits for Raymond and mother?

2. May the Board consider mother's testimony that her husband, Cantwell, did not have access to her at the time the child was conceived?

3. Is mother otherwise qualified under ORS 656.226 and, therefore, eligible for death benefits under ORS 656.204(2)?

A "child" includes an illegitimate child. ORS 656.005(6).[1] Neither claimant, however, is eligible for benefits

[1] ORS 656.005(6) provides:

> "'Child' includes a posthumous child, a child legally adopted prior to the injury, a child toward whom the worker stands in loco parentis, *an illegitimate child* and a stepchild, if such stepchild was, at the time of the injury, a member of the worker's family and substantially dependent upon the worker for support." (Emphasis supplied.)

unless Sassmen is the natural father of Raymond. Both mother and Raymond assert that Sassmen was the father. SAIF argues that paternity can only be established under ORS Chapter 109, *see* ORS 109.070(6),[2] and that before paternity is

established the parties must have a court trial. Consequently, SAIF argues that the Board lacked jurisdiction to determine Raymond's paternity and, therefore, to decide if either Raymond or mother is entitled to benefits.

The referee stated:

> "SAIF contends that only the circuit court has jurisdiction to determine paternity. That may very well be in order to establish responsibility for support of the child or similar liability considerations, but such an issue is not presented here. The issue presented in this case deals only with a claim for compensation and a Referee has jurisdiction to decide any question concerning a claim. Consequently, I conclude I do have jurisdiction to decide all questions pertaining to this minor child's claim for the sole purpose of determining whether he is entitled to workers' compensation."

We agree with this portion of the referee's opinion. The referee and Board are not determining paternity under ORS 109.070(6), but only eligibility for worker's compensation benefits. ORS 656.704(1) provides:

> "Actions and orders of the director, and administrative and judicial review thereof, regarding matters concerning a claim under ORS 656.001 to 656.794 are subject to the procedural provisions of ORS 656.001 to 656.794 and such procedural rules as the board may prescribe."

A claimant may request a hearing "on any question concerning a claim." ORS 656.283. The hearings division

> "has the responsibility for providing an impartial forum for deciding all cases, disputes and controversies arising under

> ORS 654.001 to 654.295, all cases, disputes and controversies regarding matters concerning a claim under ORS 656.001 to 656.794, and for conducting such other hearings and proceedings as may be prescribed by law." ORS 656.708(3).

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[2] ORS 109.070 provides:

"The paternity of a person may be established as follows:

"(1) The child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child, shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void.

"(2) A child born in wedlock, there being no decree of separation from bed or board, shall be presumed to be the the child of the mother's husband, whether or not the marriage of the husband and wife may be void. This shall be a disputable presumption.

"(3) By the marriage of the parents of a child after birth of the child.

"(4) By filiation proceedings.

"(5) By joint declaration of paternity filed with the Vital Statistics Unit of the Health Division of the Department of Human Resources in the form approved by the state registrar and with the fee prescribed in ORS 432.145. The Vital Statistics Unit shall prepare a new birth certificate under the procedure established by ORS 432.420.

"(6) By paternity being established or declared by other provision of law."

Although Raymond's paternity has not been established under ORS Chapter 109, the Board could determine that Sassmen is Raymond's father to determine benefits for Raymond as a "child" under either ORS 656.204(4) or ORS 656.204(2) and mother's benefits under ORS 656.226 and ORS 656.204(2).

The referee, however, denied both claims, because he believed that he could not consider all the evidence and that what he could consider did not overcome the presumption that Raymond was the child of mother and Cantwell. Although mother was separated from Cantwell when Raymond was conceived, he was born while Cantwell and mother were still married and is presumed to be Cantwell's son. OEC 311(1)(v); *see* ORS 109.070(2). This presumption may be overcome only by clear and convincing evidence of impotency or non-access. *Burke v. Burke,* 216 Or 691, 697, 340 P2d 948 (1959); *In re Rowe's Estate,* 172 Or 293, 299, 141 P2d 832 (1943).

Without objection from SAIF, claimants introduced evidence that:

a. Raymond was given Sassmen's last name.

b. Although provision was made for their child, David, Jr., Raymond was not considered as a child of mother and Cantwell in their divorce decree.

c. Mother and Sassmen were cohabiting when Raymond was conceived.

d. Sassmen listed Raymond as his child on his income tax return in 1979, although not in 1980. He tried to have his name placed on the birth certificate as Raymond's father, but the hospital would not allow it. He paid hospital and other expenses for Raymond.

e. Mother testified that she and Cantwell were living in Texas before they separated. He brought her to Oregon, returned to Texas and later went to Germany with the military. Raymond was conceived four months later.

Except for evidence of mother's marriage to Cantwell, no evidence was introduced which indicated that Cantwell was or could have been the father of Raymond.

The referee, however, applied "Lord Mansfield's Rule" that "proof of non-access of the married party may not be testified to by the married parties, either husband or wife." *See Burke v. Burke, supra,* 216 Or at 697; *In Re Rowe's Estate, supra,* 172 Or at 304.[3] He considered as evidence only the

[3] In *Goodright v. Moss,* 2 Cowp. 291, 98 Eng. Rep. 1257 (1777), Lord Mansfield said "that the declarations of a father or a mother cannot be admitted to bastardize the issue born after marriage * * * is a rule founded in decency, morality and policy, that they shall not be permitted to say after marriage that they have had no connection and therefore that the offspring is spurious." Professor McCormick has stated:

"This invention of the great jurist, though justly criticised by Wigmore as inconsistent, obstructive and pharisaical, has been followed by later English decisions until recently abrogated by statute, and has been generally accepted in this country. A few courts have wisely rejected it by construing the general statutes abolishing the incompetency of parties and of spouses as abolishing this eccentric incompetency also, but most courts have not yielded to this argument." McCormick, *Evidence* (2nd ed 1972) 146. (Footnotes omitted.)

divorce decree and the income tax returns. He then ruled that claimants had not met their burden of overcoming the presumption of Cantwell's paternity. Whatever may be the present validity of "Lord Mansfield's Rule" in other types of cases, that evidentiary rule should not be applied in workers' compensation hearings to exclude or ignore relevant evidence. The referee is "not bound by common law or statutory rules of evidence or by technical or formal rules of procedure," but must conduct the hearing in "any manner that will achieve substantial justice." ORS 656.283(6). The referee should have considered mother's testimony that Cantwell did not have access to her at the time of Raymond's conception. He should also have considered the other evidence in the record that permitted the inference that Raymond was Sassmen's child.

On *de novo* review we consider the evidence the referee excluded. There was clear and convincing evidence to overcome the presumption that Raymond was the child of Cantwell and to establish that he was Sassmen's child for purposes of his own and mother's qualification for benefits.

Although evidence established that Raymond was born as a result of the cohabitation of mother and Sassmen and that they had cohabitated for more than 12 months before

Sassmen's accident, the referee denied mother's claim, because she was "unmarried" for only six months of the cohabitation period. Whether ORS 656.226 requires that the natural mother and father both be unmarried during the entire required period of cohabitation, or only at the time of the accidental injury, mother, nonetheless, does not qualify under this statute and, therefore, also does not qualify under ORS 656.204(2). ORS 656.226 requires that the period of cohabitation include the time of the accidental injury. The statute states that the "surviving cohabitant" is entitled to compensation "the same as if the man and woman had been legally married." Mother was not a "surviving cohabitant" of Sassmen at the time of the accidental injury, because she was not then cohabiting with him.[4]

Accordingly, the Board's order that denied mother benefits under ORS 656.226 and ORS 656.204(2) for herself and Raymond is affirmed, because mother does not qualify under ORS 656.226. Raymond, however, is a child of Sassmen and is entitled to benefits under ORS 656.204(4).

Affirmed as to Christy Amos' claim; reversed and remanded as to Raymond Sassmen's claim with instructions to accept the claim.

[4] If the statute did not require the period of cohabitation to extend to the time of the accidental injury, a deceased worker could leave surviving more than one "cohabitant," each of whom could qualify for the benefits of a "spouse." Furthermore, the statute does provide benefits to a child of a deceased subject worker, but not to his divorced spouse. *See* ORS 656.204(3). We do not believe that the legislature intended that a former cohabitant be given a status superior to that of a divorced spouse.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Arliss Ingram, Claimant.

AMFAC, INC.,
Petitioner,

v.

INGRAM,
Respondent.

(82-06472; CA A31160)

Judicial review of the Workers' Compensation Board.

Argued and submitted November 19, 1984.

Mildred J. Carmack, Portland, argued the cause for petitioner. With her on the brief were William Replogle and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Kenneth D. Peterson, Jr., Hermiston, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed and remanded.

NEWMAN, J.

Employer seeks review of an order of the Workers' Compensation Board that reversed the referee and held that petitioner's claim was compensable as an occupational disease. ORS 656.802. We reverse.

After not working for six years, claimant began to work at the employer's processing plant on February 1, 1982. She inspected potatoes on a conveyor and trimmed out defective portions. She handled about 16 potatoes per minute and made two or three knife trims to each potato. Claimant is right-handed and held the trim knife in her right hand. Within about two weeks she began to have numbness and tingling in her right hand. At the end of February she saw Dr. Johnson, a general practitioner, who suspected carpal tunnel syndrome. On May 17, 1982, Dr. Hendricks made nerve conduction studies and confirmed carpal tunnel syndrome. Dr. Nathan, a hand surgeon, examined claimant at employer's request on June 14, 1982, and diagnosed bilateral carpal tunnel syndrome, right greater than left.[1] In November 1982 claimant had surgery on his right arm.

[1] Carpal tunnel syndrome is the name for the symptoms of numbness and tingling in the hand from carpal tunnel disease. Dr. Nathan testified that

> "when we have symptoms or physical findings, we have a syndrome. When we have the same changes in the nerve on the electrophysiological testing without symptoms, we have carpal tunnel disease. Disease becomes syndrome with symptoms."

This is the first carpal tunnel case before us in which the distinction has been clearly drawn between carpal tunnel disease and carpal tunnel syndrome.

The parties do not dispute that, when claimant began work for employer in February 1982, she probably had had carpal tunnel disease for at least two years. She did not, however, have any symptoms before starting to work. Moreover, claimant's off-the-job activities before and during her employment were normal. Her work at the plant required repetitive hand, wrist and arm motions that far exceeded what she did off the job or before her employment. The referee found that claimant's work activity was the major contributing cause of her symptoms. The referee held, however, that the

carpal tunnel syndrome was not compensable, because claimant had failed to prove a worsening of her underlying condition, relying on *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979).

After the referee's order, this court decided *Wheeler v. Boise Cascade,* 66 Or App 620, 675 P2d 499 (1984), which held that proof of a worsened underlying condition is not necessary if the claimant had not previously sought medical attention for the underlying condition. Because claimant was asymptomatic and had not sought medical attention before she commenced work with employer, the Board ruled that she did not have to prove a worsening of her underlying condition:

> "Because *Weller* does not apply to this case, and because we find that claimant has proven by a preponderance that her work activities were the major contributing cause of her symptoms, we reverse the Referee. The employer's denial should be set aside."

In *Wheeler v. Boise Cascade Corp.,* 298 Or 452, ___ P2d ___ (1985), the Supreme Court reversed our decision. It stated:

> "The requirements for a claimant to prevail were set forth in *Weller* as follows:
>
> " '* * * we believe that in order to prevail claimant would have to prove by a preponderance of evidence that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pay (4) to the extent that it produces disability or requires medical services.' " 288 Or at 35.[2]

The Supreme Court stated that this court's opinion in *Wheeler* "created a distinction that was not there," and held "that the *Weller* analysis is the appropriate analysis whether the conditions are symptomatic or asymptomatic at the time of employment." ___ Or at ___.

This is an occupational disease claim. *James v. SAIF,* 290 Or 343, 348, 624 P2d 565 (1981). Claimant must prove by a preponderance of the evidence that her work activity caused a

worsening of her underlying carpal tunnel disease, even though she was asymptomatic and did not require medical services until after she commenced the employment. *Wheeler*

[2] Although the court did not say so in *Wheeler,* a claimant must also establish that the work was the major contributing cause of the worsening of the underlying disease. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983); *Dethlefs v. Hyster Co.,* 295 Or 298, 667 P2d 487 (1983).

v. Boise Cascade Corp., supra. Claimant, however, did not establish by a preponderance of the evidence that her work activity worsened her underlying disease.

Claimant argues, and the evidence establishes, that an increase in pressure on the median nerve is a worsening of the disease. She then argues that her symptoms, or carpal tunnel syndrome, reflect an increase in pressure on the median nerve. She argues that, because she first had symptoms after she commenced work, she must have suffered from an increase in pressure on the median nerve because of her work activities. Therefore she argues that her work caused a worsening, including an acceleration, of her underlying carpal tunnel disease.

There is, however, no medical evidence to support her claim that her work caused a worsening of her underlying disease. Dr. Nathan wrote that "it does not seem reasonable that the work activity is either the cause of the underlying disease or significantly responsible for the symptoms." He testified that, if the cumulative effect of her hand-wrist activities at work was greater than would have occurred off the job, which it was, that the work exposure brought about the need for medical treatment and the disabling condition sooner than might otherwise have occurred. Dr. Nathan, however, testified that the appearance of symptoms does not indicate that the disease process has worsened or changed.[3] He

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"Q. [Employer's attorney] As I understand from your testimony, the mere perception of symptoms or the appearance of symptoms which the patient reports does not indicate that that disease process has worsened or changed?

"A. That's correct.

"* * * * *

"Q. [Claimant's attorney] Mr. Replogle [employer's attorney] asked if you agreed that the appearance of symptoms, whether that means a worsening or changing of the tissue engorgement, is what you described as the disease. And you replied no. I'm assuming that you mean there is not a necessary relationship between the appearance of symptoms and the degree of engorgement of the tissues. Is that correct?

"A. It's partially correct.

"Q. And so, as we spoke of earlier, the appearance of symptoms, just as much as it may not represent a further engorgement of the tissues, may represent a further engorgement of the tissues, which would thereby cause some quantum of increased compression of the median nerve?

"A. We're both trying to seek the truth, which we're not capable of doing. We have symptoms, we have engorgement. We have changes in the nerve.

"Q. But it's engorgement that's the disease. All the other changes —

"A. The engorgement is not necessarily the disease. When it leads to slowing of the nerve, then there is a disease process. You may very well have engorgement. You could have transient engorgement, limited time engorgement. And I believe we're talking about, at the most, a few days, at most a few days, without nerve conduction study changes, electrical conduction charges. I believe in the short term that you can have symptoms such as that in waxing and waning of a disease process or beginning of the process, that there would be no demonstrable nerve conduction changes related to the amount of change in the symptoms."

testified that he was unable to say that the acceleration of the symptoms reflected a worsening of the disease process.[4] He also testified:

"A. I can state as a reasonable medical probability that if she was not at work, that she would have presented with the symptomatology compatible with a carpal tunnel syndrome and underlying disease whether she was or was not gainfully employed for the 15 days at this particular employer, at a time relative to the time that she did. I can't say it would have been the same day. But the markings were on the wall. They would occur. And I'm not saying five years from now, I'm talking about a proximity, I'm sure, in months.

"Q. [Claimant's attorney] Okay. Did the work that she did in the interval between February 1 and when she presented to the doctor on February 26, in your opinion, hasten her presentation of carpal tunnel syndrome?

"A. If we confirm that these activities, in fact, and the accumulative effect were greater than she would have done in the same period of time at home as a housewife, and the symptoms occurred while doing these activities, I can't disassociate the two. However, I cannot demonstrate — I cannot demonstrate that this represents a worsening of the disease process."

"Q. [Claimant's attorney] Now, earlier, my understanding was that the degree of nerve damage is related to the amount of compression and the duration of compression.

"A. Correct.

"Q. Does it follow, I guess is what I'm saying, that symptoms indicate more compression or longer duration compression than no symptoms, but with this potential slowing of the nerve anyway?

"A. We can see — let me start again. I cannot state in any — that if we have a patient on day 1 and day 5 and a patient on day 10, I have no reason, in some cases, to believe that if on day 5 she has symptoms that the degree or the extent of slowing will be worse on day 5 than it would be on day 1 or day 10, because the symptoms may be just a reflection of not a change in the nerve, but reflection in a change of the person herself to withstand or to tolerate some discomfort. For instance —

"* * * * *

"Q. Is it just as likely or is it more likely that the perception of significant symptoms, where none were reported before, would represent a worsening compression of the median nerve?

"A. I can't state that it does.

"Q. Well, but you can't state the other way either, that it doesn't. Is that right? I mean, in the same way that you testified earlier, that it could represent simply difference in perception, it could represent a change in the compression of the nerve.

"A. Yes, it could. But I can't demonstrate that.

"Q. No. And it could just as much as it could not?

"A. That is — not necessarily.

"* * * * *

"Q. So all you can say now without that sort of intense clinical data, is that it could but you don't know for certain?

"A. I don't know. For me to be comfortable, the only thing I can say is, I cannot demonstrate worsening."

Claimant's attorney asked him directly:

"Q. This is my last little try at this. A presentation of symptoms can be the result of increased pressure on the median nerve. I believe you've already testified to that.

"A. Yes.

"Q. Increased pressure on the median nerve caused by engorgement is what I understand - defined by you - is the definition of carpal tunnel, provided that it results in nerve conduction delays.

"A. Yes, but, again, you're not addressing the fact that there's long-term effects of pressure and short-term effects of pressure. I cannot — we're dealing with the short term, 15 days short term. I cannot demonstrate from the documents given to me, nor does it seem reasonable to assume, based on observing that film, videotape, and looking at the hours of life and so on, that this activity had a material effect on the disease process.

"Q. At the microcellular level, the engorgement comes about as a result of — can come about as a result of venostasis, as I understand it.

"A. Correct.

"Q. This can have a kind of a synergistic effect, where the nerve becomes ischemic and itself enlarges, sort of, which further presents to ischemia. And your testimony earlier was that nerve conduction sometimes can be - maybe I've gone too far there - that the nerve itself can be damaged within very short periods of time?

"A. Correct. But I'm not able to demonstrate — in fact, I think the evidence here demonstrates that the compression here, though, is a very long-term process. The medical evidence given to me does not allow me to assume that this work activity, however, caused an acceleration of the — what I believe would have been a gradual worsening of her condition."

Claimant's other medical evidence establishes a causal relationship between claimant's work and her carpal tunnel syndrome. It does not support claimant's position, however, that her work caused a worsening, including an acceleration, of her underlying carpal tunnel disease.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Kenneth L. Greene, Claimant; and In the Matter of the Complying Status of Mark Luedtke, dba 4-Point Timber Company, Employer.

LUEDTKE, dba 4-Point Timber Company,
Petitioner - Cross-Respondent,

v.

GREENE et al,
Respondents - Cross-Respondents,
VAN PORT MFG. et al,
Respondents - Cross-Petitioners.

(82-07607, 82-07911, 82-08067, 82-09328; CA A31426)

On respondent - cross-respondent State Accident Insurance Fund Corporation's motion to dismiss filed September 24, 1984.

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Robert M. Atkinson, Assistant Attorney General, Salem, for motion.

Allan M. Muir, Portland, appeared contra.

Mark Luedtke, petitioner - cross-respondent *pro se*, no appearance contra.

Robert K. Udziela, on behalf of respondent - cross-respondent Kenneth L. Greene, no appearance contra.

Before Warden, Presiding Judge, Joseph, Chief Judge, and Van Hoomissen, Judge.

PER CURIAM

Motion granted; petition for judicial review dismissed.

PER CURIAM

Respondent Greene, claimant, moved to dismiss this judicial review on the ground that the order is not reviewable. The motion was denied. SAIF now moves to dismiss on the same ground, and respondent Van Port Mfg. requests a determination of jurisdiction. We have reconsidered our denial of claimant's motion and have now concluded that we erred. Accordingly, the order denying claimant's motion is withdrawn and both motions to dismiss are allowed.

Claimant filed an aggravation claim against Kruesi Cutting (insured by SAIF) and a new injury claim against Luedtke. The referee held that claimant had sustained an aggravation, chargeable to Kruesi, and the Board reversed, holding that claimant had sustained a new injury, chargeable to Luedtke. The Board remanded the case to the referee to determine whether Luedtke is a noncomplying employer.

Luedtke seeks judicial review of the Board's holding Luedtke responsible for claimant's condition. It cites *Price v. SAIF*, 296 Or 311, 675 P2d 479 (1984), as authority that the

Board's order here is a final, reviewable order. *Price* allows review of issues relating to a partial denial of an injury occurring after an initial, related injury. *Price* does not authorize separating review of the issue of compensability from the issue of responsibility. *See Dean v. SAIF,* 72 Or 16, ___ P2d ___ (1985).

Motion granted; motion for judicial review dismissed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Richard S. Ingram, Claimant.

INGRAM,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(82-09558; CA A31947)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 3, 1984.

Diana Craine, Portland, argued the cause for petitioner. On the brief were Peter W. Preston, and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. On the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge, and Warren and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant petitions for review of a Board order that denied compensation for a heart condition. The question is whether the referee and the Board properly applied ORS 656.802(2), commonly referred to as the "fireman's presumption." The referee found that SAIF had rebutted the presumption by proving that claimant's condition was not work related, and the Board affirmed. On *de novo* review, we affirm.

When this claim was filed, ORS 656.802 provided:[1]

[1] ORS 656.802(2) was amended in 1983 to require "clear and convincing medical evidence" that the cause of the condition or impairment is unrelated to the fire fighter's employment. Or Laws 1983, ch 236, § 1. Claimant argued to the referee and Board that SAIF must overcome the fireman's presumption by clear and convincing evidence. The Board held that the 1983 amendment is not retroactive. That holding has not been challenged here.

"(1) As used in ORS 656.802 to 656.824, 'occupational disease' means:

"* * * * *

"(b) Death, disability or impairment of health of firemen of any political division who have completed five or more years of employment as firemen, caused by any disease of the lungs or respiratory tract, hypertension or cardiovascular-renal disease, and resulting from their employment as firemen.

"(2) Any condition or impairment of health arising under paragraph (b) of subsection (1) of this section shall be presumed to result from a fireman's employment. However, any such fireman must have taken a physical examination upon becoming a fireman, or subsequently thereto, which failed to reveal any evidence of such condition or impairment of health which preexisted his employment. Denial of claim for any condition or impairment of health arising under paragraph (b) of subsection (1) of this section must be on the basis of medical or other evidence that the cause of the condition or impairment is unrelated to the fireman's employment."

Claimant developed arteriosclerotic disease after he had worked for more than five years for the Oregon City Fire Department. The referee and Board found that claimant met the statutory requisites for application of the presumption under ORS 656.802(2). They also concluded, however, that

the medical evidence established that claimant's condition was unrelated to his work and that such evidence, when weighed against the presumption, was more persuasive.

Claimant argues that the medical evidence was insufficient to overcome the presumption. Dr. Grover, claimant's treating physician, after analyzing certain risk factors as they apply to claimant, concluded that the heart condition was not caused in material part by his employment as a fire fighter. He later clarified his opinion, stating that "[d]ogmatic conclusions regarding the causal relationship of various 'risk factors' to the development and progression of coronary heart disease and to the precipitation of clinical events * * * simply cannot be done with much assurance." Nevertheless, Dr. Grover adhered to his conclusion that claimant's work activities were not a material contributing cause of the development of his coronary artery disease.

Dr. Wasenmiller, a cardiologist, agreed with Dr. Grover that claimant's coronary artery disease was not caused by his employment. He acknowledged that medical science has been unable to identify a definite cause of heart disease, but he was reasonably certain that claimant's occupation did not cause his coronary artery disease. He stated: "I cannot say that his work conditions were not related to the acceleration, but I can say with high probability that his work conditions were not associated with the cause." Both doctors explained their opinions in terms of the risk factors which applied to claimant. Each believed that claimant's pipe smoking, hypercholesterolemia, hypertension and obesity were the primary factors in the cause and development of his coronary artery disease.

Claimant contends that the medical evidence estab-

lished only that claimant's heart disease was "idiopathic," that is, of unknown origin, and that such evidence does not establish that claimant's disease is "unrelated" to his employment. Claimant is correct in his assertion that a diagnosis that a condition is idiopathic is not evidence under ORS 656.802(2) that the condition is unrelated to the fireman's employment. *See Wright v. SAIF,* 289 Or 323, 332, 613 P2d 755 (1980).

In *Wright* the claimant experienced heart and chest pain that could not be linked to any physical disorder. The condition was idiopathic in the sense that there was no known

origin. In this case, claimant's condition is "idiopathic" only in the sense that no one cause for heart disease has been isolated. Instead, the opinions as to medical causation were made on the basis of "risk factors," which may include such individual factors as obesity, cholesterol consumption, smoking and stress.[2] We find that the medical opinions, although necessarily stated in terms of probability, are sufficiently persuasive to overcome the statutory presumption. *See Lines v. SAIF,* 54 Or App 81, 634 P2d 262 (1981).

Affirmed.

[2] Dr. Wasenmiller did not believe that stress is a "risk factor."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Daryl R. Gabriel, II, Claimant.

GABRIEL,
Petitioner,

v.

HYSTER COMPANY,
Respondent.

(82-00800; CA A30822)

Judicial review from the Workers' Compensation Board.

Argued and submitted September 7, 1984.

Dennis O'Malley, Portland, argued the cause for petitioner. With him on the brief were Willner, Bennett, Hartman & Tauman, P. C.

Bruce L. Byerly, Portland, argued the cause for respondent. With him on the brief were Moscato & Byerly, Portland.

Before Joseph, Chief Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed; referee's order reinstated.

WARDEN, J.

Claimant petitions for review of an order of the Workers' Compensation Board that reversed the opinion and order of the referee and denied his occupational disease claim for asthma. The issue is compensability. We reverse.

Claimant, at age 24, was employed by Hyster Company in September 1978. He worked initially as a painter. He had had asthma since childhood, with symptoms including rhinorrhea, nasal blockage, watery eyes and difficulty sleeping. Soon after he started working at Hyster, however, he experienced an acute asthma attack, during which he felt unable to breathe sufficiently. He contacted the employer's nurse, who advised him to rest; after resting he was able to resume working. He continued, intermittently, to experience similiar attacks and resorted to the use of non-prescription bronchial mist atomizers, which afforded some relief and allowed him to continue working.

On May 21, 1981, claimant experienced a severe attack while painting winches. He saw Dr. Baker on an emergency basis. Dr. Baker diagnosed asthma and prescribed several medications. That evening, claimant also sought treatment at the Providence Hospital emergency room, where a probable viral infection also was diagnosed. The doctor subsequently arranged for claimant to be tested for sensitivity to paints found in his work environment. An inhalation challenge test of the paints, which contained isocyanate-related chemicals, was performed at Providence Hospital on June 22, 1981, under the supervision of Dr. Lawyer. Claimant's exposure to the paints produced an asthma attack. Dr. Baker and Dr. Lawyer both advised claimant not to work around the paints. Claimant told employer of the physicians' advice, and employer transferred him to a job as a lift truck operator.

After his direct exposure to the paints terminated, claimant continued to have problems with shortness of breath and sleeping. The chart notes of Dr. Baker indicate that claimant went to the emergency room on September 29, 1981, and saw Dr. Baker the following day. The doctor indicated that he thought claimant was having an asthma exacerbation, etiology unknown. Claimant filed this claim for benefits on October 21, 1981. He continued to work at Hyster until October 31, 1981, when he was laid off as part of a general

workforce reduction. He experienced another severe asthma attack with an accompanying viral infection in January 1982.

Hyster delayed acceptance or denial of the claim until February 4, 1982, when it issued a "partial denial":

> "We are partially denying your claim. It is our position the paint to which you were exposed in October 21, 1981, caused, at most, a temporary aggravation of your pre-existing, underlying, chronic, obstructive, pulmonary disease. Your treating physician has advised that your condition returned to your pre-aggravation status as of at best October 28, 1981."

After a hearing, the referee found the claim compensable, on the basis that claimant's pre-existing asthma had worsened. The board reversed, apparently because it did not find the

medical evidence to establish a permanent worsening of claimant's pre-existing asthma. On *de novo* review, we conclude that claimant has proved by a preponderance of the evidence that his claim is compensable, but for a reason different than that stated by the referee.

Preliminarily, we note that the medical evidence establishes that claimant's medical condition involves two distinct diseases—chronic pre-existing asthma and isocyanate-induced asthma resulting from exposure to paints in the work environment. In a 1977 letter issued before claimant's employment with Hyster Company, Dr. Romanaggi described claimant as having perennial allergic rhinitis and recurrent episodes of acute asthmatic bronchitis, wheezing and dyspnea. Dr. Lawyer, on the basis of the paint inhalation tests, testified by deposition that claimant, while employed at Hyster, developed isocyanate-induced asthma from exposure to the paints. He characterized it as "[a] well-defined disease entity where asthma occurs in response to exposure to these isocyanate chemical hardeners that are used in some * * * paints," and noted that "having pre-existing asthma does not predispose [one] to develop isocyanate-induced asthma * * * [which is] as common in people without pre-existing asthma as in those that have preexisting asthma." Although the board ignored the fact that two diseases were involved, we find it necessary to consider them separately.

We first consider claimant's isocyanate-induced asthma, which we conclude is an occupational disease, as statutorily defined:

> "As used in ORS 656.802 to 656.824, 'occupational disease' means:
>
> "(a) Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." ORS 656.802(1)(a).

Claimant argues that he developed isocyanate-induced asthma, unrelated to his pre-existing asthma, and we find persuasive Dr. Lawyer's testimony that isocyanate-induced asthma is a discrete disease entity. It is undisputed that claimant was exposed to isocyanate-related chemicals in paints on the job; the medical evidence that exposure to those paints induced in claimant an asthmatic reaction is uncontroverted. Where, as here, on-the-job conditions are the major contributing cause, if not the sole cause, of an occupational disease, it is compensable. *See Dethlefs v. Hyster Co.*, 295 Or 298, 667 P2d 487 (1983). We conclude that claimant's isocyanate-induced asthma is a compensable occupational disease.

Claimant also contends that the development of isocyanate-induced asthma is itself a worsening of his chronic asthmatic disease, meeting the criteria for compensability of a pre-existing disease set out in *Weller v. Union Carbide*, 288 Or 27, 602 P2d 259 (1979). We are not persuaded. To establish compensability under the *Weller* standard, a claimant must prove "that (1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services." 288 Or at 35. *See Wheeler v.*

Boise Cascade, 298 Or 452, ___ P2d ___ (1984). On the basis of our *de novo* examination of the evidence, we conclude that claimant has failed to establish the second element of that test.

In his second and third assignments of error, claimant contends that Hyster's "partial denial" was an improper attempt to circumvent the claim closure procedures of ORS 656.268, *see Safstrom v. Riedel International, Inc.*, 65 Or App 728, 672 P2d 692 (1983), *rev den* 297 Or 124 (1984), and that Hyster's delay in accepting or denying the claim entitle him to penalties and attorney fees pursuant to ORS 656.262(10). On appeal, Hyster has conceded that the "partial denial" actually was a full denial of compensability and that claimant is

entitled to the statutory penalty and attorney fees if claimant prevails on the issue of compensability. We agree. Accordingly, we do not discuss the "partial denial" issue and reinstate the referee's award of a statutory penalty and attorney fees.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Anthony P. Brech, Claimant.

BRECH,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(83-04044; CA A31888)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 14, 1984.

Robert Wollheim, Portland, argued the cause for petitioner. On the brief were James S. Coon, and Welch, Bruun and Green, Portland.

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, and Warren and Rossman, Judges.

WARREN, J.

Reversed and remanded for award of permanent total disability.

WARREN, J.

Claimant petitions for review of an order of the Workers' Compensation Board denying him permanent total disability and awarding him 85 percent scheduled disability for the loss of use of his left leg. We review *de novo* and hold that claimant is permanently and totally disabled.

Claimant is 62 years old and has worked for 33 years, since his discharge from military service, as a carpenter. He suffered a compensable knee injury in 1978, for which he underwent several surgeries, including a knee replacement in 1981. He testified that he cannot stand for more than 15 minutes at a time, nor walk more than one block, without experiencing severe pain. The referee found claimant's testimony credible as to those limitations. In addition to his leg problem, claimant suffers from tinnitis, for which, if he were in a noisy situation, he would have to take medication that precludes his driving and operating machinery. Claimant is also hard of hearing and has difficulty communicating by telephone.

A vocational counselor testified that, because of his problems, "it [is] just about impossible for [claimant] to be employed." She stated that she did not know of any sedentary jobs in which he could use his carpentry skills and that he cannot work in an office or use a telephone because of his hearing loss and tinnitis.

The referee's opinion, which the Board affirmed, incorporated the conclusion that claimant cannot obtain regular, gainful employment, stating:

> "In view of claimant's age and his impairment there isn't any likelihood claimant would return to work, even if work were available. There is even less likelihood claimant would be able to obtain and hold regular, gainful sedentary employment which would be suitable, considering the restrictions imposed by his compensable injury. However, in view of the fact his physician is of the opinion claimant could perform sedentary work, and in view of the legislative requirement that a seeker of permanent total disability comply with the requirements of ORS 656.206(3) I find that even if claimant is permanently and totally disabled as a matter of fact, he does not meet the statutory requirement for an award of permanent total disability."

The referee apparently considered the physician's testimony to which he referred as contradicting the vocational counselor's testimony that claimant is not "reasonably employable." It is clear from an examination of the record that the physician based his opinion that claimant "could be employed in a sitting type of position" on a consideration only of claimant's leg injury, without considering also his hearing problems. The record supports a finding that, because of all his problems, claimant is unable to perform regular gainful work and, therefore, is permanently totally disabled.[1]

The second basis for the referee's denying permanent total disability is claimant's alleged failure to comply with the requirement of ORS 656.206(3) that a claimant prove "that

the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment." Claimant's failure to seek employment is not unreasonable when, in view of his disabilities, such efforts would be futile. *Hanna v. SAIF,* 65 Or App 649, 654, 672 P2d 67 (1983); *Looper v. SAIF,* 56 Or App 437, 441, 642 P2d 325 (1982). The evidence establishes that claimant cannot perform regular gainful employment; because he is permanently totally disabled from a physical standpoint, it is unnecessary for him to undertake the futile effort of seeking employment.

We conclude from our review of the evidence that, as a consequence of his compensable injury and preexisting disabilities, claimant is permanently incapable of performing regular gainful work. He is entitled to permanent total disability.

Reversed and remanded for an award of permanent total disability.

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[1] ORS 656.206(1)(a) provides:

"As used in this section:

"(a) 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Chester A. Clark, Claimant.

CLARK,
Petitioner,

v.

BOISE CASCADE CORPORATION,
Respondent.

(82-10864; CA A31356)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1984.

Gerald C. Doblie, Portland, argued the cause and filed the brief for petitioner.

Mildred J. Carmack, Portland, argued the cause for respondent. With her on the brief were Paul R. Bocci, Jr., and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed; referee's order reinstated.

ROSSMAN, J.

Claimant seeks review of an order of the Workers' Compensation Board, which reversed the referee and held that claimant was not permanently and totally disabled. We reverse.

Several basic rules and principles are involved in the resolution of this kind of case. First, and foremost, in order to meet his burden of proving that he is permanently and totally disabled, a claimant must establish that he is unable to perform any work at a gainful and suitable occupation. *Wilson v. Weyerhaeuser,* 30 Or App 403, 408-09, 567 P2d 567 (1977). Although this claimant's permanent impairment is quite substantial, he does not exhibit total incapacity, physically or medically. Because he is capable of performing some work, he can succeed in his permanent and total disability claim only by proving that he falls within the so-called "odd-lot" doctrine. The import of that doctrine is that a disabled person, capable of performing work of some kind, may still be permanently disabled due to a combination of his physical condition and certain nonmedical factors, such as his age, education, adaptability to nonphysical labor, mental capacity and emotional conditions. *See Livesay v. SAIF,* 55 Or App 390, 637 P2d 1370 (1981).

A claimant's motivation is also a key factor, and the burden is on him to establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(3). Finally, a permanent total disability award cannot be reduced on the basis of a speculative future change in employment status but only on the actual conditions existing at the time of the hearing. *Gettman v. SAIF,* 289 Or 609, 616 P2d 473 (1980); *Morris v. Denny's,* 50 Or App 533, 623 P2d 1118 (1981).

Claimant is a 44-year-old man, whose pre-injury work experience has been limited to manual labor jobs, including automobile body and fender work, ranch hand, roofing, cannery work, carpentry, truck driving, swimming pool construction, dry chain puller, press helper and patching and spreaderman. He has not worked since he sustained an industrial injury to his left hip in 1974, except for a three-month stint at cartographic drafting in late 1979 and early 1980. Since that time, he has had three surgeries on his hips,

including a bilateral hip replacement. The medical reports are uniform that he cannot return to any form of heavy labor and cannot do heavy lifting or prolonged walking. He is blind in his right eye, which causes difficulties in very close work. He is deaf, or nearly deaf, in his right ear. His mechanical aptitude, math, drawing ability and capacity for schooling are below average. He has significant emotional and personality difficulties, including "atypical adjustment disorder with mixed emotional features and schizoid, paranoid, and somatization tendencies."

Claimant did not attend school until he was 13 years old and received only six years of education. However, subse-

quent to his injury, he has received a GED and studied drafting for two years at Chemeketa Community College. That is what enabled him to do the previously mentioned work as an assistant cartographic drafter with the Oregon State Forestry Department for a 90-day federally funded appointment. That involved map tracing, work which is not generally available in the job market. Even when it was available, claimant performed at below average speed and skill. Thus, Vocational Rehabilitation determined that working as a draftsman was not a reasonable vocational goal for claimant.

Claimant was evaluated at the Callahan Center, where it was concluded that he was unable to work in the drafting field, had a significant disability and would require additional training to be employable. The center referred him to Anthony Iannarone, a private vocational rehabilitation counselor, who worked with him to develop an authorized training program. Iannarone concluded that there was no recognized job where claimant could sell his services in the labor market. He testified that they were setting up a vocational rehabilitation training as an appliance repairman at Sunrise Services, which would be a nine-month training course to begin after the hearing. However, he stated that, even when this was completed, claimant would probably not be able to compete in the general job market, because appliances and parts would have to be brought to him in small lots to be repaired and then taken back. These conditions are not available in the general job market.

The referee awarded claimant permanent total disability as of August 27, 1982. The Board reversed and awarded 60 percent unscheduled permanent disability and 75 percent scheduled disability for loss of use of his left leg.

Employer contends that claimant has failed to show that he is not able to engage in regular, gainful employment. It points to evidence in the record that claimant has the physical ability and basic skills to perform a variety of light bench work. Employer acknowledges that claimant may require a period of subsidized training in order to perform many of these jobs but argues that claimant has not shown that such preparation would be required in order to perform all the kinds of light bench work jobs which might be within claimant's capabilities.

Based on our *de novo* review of the record, we, like the referee, believe that the report and testimony of Iannarone and the conclusion of the Callahan Center vocational assessment team are particularly persuasive. It seems quite clear that claimant is not *presently* employable in the general labor market. Granted, he may become employable in the future with sufficient training preparation, but, under the earlier noted rule of *Gettman,* we must focus on claimant as his circumstances *now* exist, without regard to how his employability may change at some point in the future. The controlling facts in this case bear a remarkable resemblance to the facts in *Welch v. Banister Pipeline,* 70 Or App 699, 690 P2d

1080 (1984), in which we held that claimant was permanently and totally disabled. In both cases, the evidence provided that the claimant, though relatively young, could no longer perform the type of work which he had always done and was disabled from multiple causes from any other kind of work. We hold that this claimant has established by a preponderance of the evidence that he is permanently and totally disabled.[1]

Regardless of the applicability of *Gettman*, the employer argues that it still is entitled to win this case because of claimant's lack of motivation. It apparently relies on a single incident which happened when claimant was taken by his vocational rehabilitation counselor to a potential job training site. The counselor previously had seen claimant in his office and at his home, and on neither occasion had claimant used a cane. Yet he appeared at the potential job training site heavily relying on a cane in walking through the plant. The job counselor concluded from that that claimant had attempted to convince the employer that he was not capable of doing the work.

After reviewing all the evidence, we do not find this to be persuasive evidence of lack of motivation on claimant's part. Previous medical and vocational rehabilitation reports frequently mention that claimant used a cane. On the two occasions when the counselor had seen claimant previously, he had been sitting in an office and in his house. Surely, there would be no overwhelming need for claimant to use a cane on those occasions. In any event, the medical reports establish that claimant has substantial limitations in his walking ability. It was not unreasonable for him to use a cane when he was to be taken on a tour of a potential job site. Further, the job counselor himself stated that the job training at that particular site, as it was presented to claimant, would not have fit his limitations, and no attempt was ever made to see if the position could be modified. After this incident, claimant was cooperative in all attempts of vocational rehabilitation to find training for him. He even consented to a nine-month training program to prepare him for a particular job, for which the vocational rehabilitation counselor testified there is no market. We believe that claimant's extensive cooperation with Vocational Rehabilitation establishes motivation.

We conclude that claimant is entitled to an award of permanent total disability as of August 27, 1982, as originally awarded by the referee.

Reversed; referee's order reinstated.

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[1] As the referee pointed out in his opinion and order:

"* * * If through training [claimant] becomes employable in the future, his status can be reassessed pursuant to ORS 656.206(5). In fact, if his authorized training program * * * is approved by the Field Services Division, claimant's permanent disability status will be reassessed pursuant to ORS 656.268 once the rehabilitation/training program has been completed."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Darrel A. Chastain, Claimant.

CHASTAIN,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION et al,
Respondents.

(81-03963 & 81-03962; CA A30590)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 18, 1984.

Mark Andrew Lange, Salem, argued the cause for petitioner. On the brief was Rolf Olson, Salem.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Allan M. Muir, Portland, argued the cause for respondent Fremont Indemnity. With him on the brief were Roger A. Luedtke and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

PER CURIAM

Reversed and remanded for reinstatement of respondent SAIF Corporation's acceptance of the claim.

PER CURIAM

Claimant seeks review of a Workers' Compensation Board order denying him compensation for his low back condition as either an aggravation or a new injury. We reverse and remand for reinstatement of respondent SAIF Corporation's acceptance of the claim.

The dispositive issue is whether SAIF is estopped from denying acceptance of the claim under *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983).[1] We hold that it is. SAIF concedes that, under *Bauman,* it is estopped from denying the *compensability* of the claim. SAIF argues, however, that *Bauman* does not preclude its "back-up" denial of *responsibility.* That issue was decided against SAIF's position in *Jeld-Wen, Inc. v. McGehee,* 72 Or App 12, ___ P2d ___ (1985), where we interpreted *Bauman* as applying to "back-up" denials of responsibility. SAIF's back-up denial of responsibility was issued after the 60-day time limit prescribed in ORS 656.262(6). That denial is barred by *Bauman. Jeld-Wen, Inc. v. McGehee, supra.*

Reversed and remanded for reinstatement of respondent SAIF Corporation's acceptance of the claim.

[1] *Bauman* applies retroactively to back-up denials issued before *Bauman* was decided. *U. S. National Bank v. Wagoner*, 71 Or App 266, 692 P2d 149 (1984).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Charles B. Edwards, Claimant.

EDWARDS,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(82-06575; CA A31014)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1984.

H. Scott Plouse, Medford, 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 Joseph, Chief Judge, and Warden and Newman, Judges.

JOSEPH, C. J.

Reversed and remanded with instructions to allow claim.

JOSEPH, C. J.

Claimant seeks review of an order of the Workers' Compensation Board which affirmed the referee's denial of medical benefits under ORS 656.245. The only issue is whether claimant's neck condition is causally related to an earlier compensable accident. We review *de novo* and reverse.

Claimant suffered a compensable injury on August 27, 1980, when the hay truck he was driving for the C-2 Cattle Company rolled over. He was taken to a hospital, where he complained of pain in his right shoulder, ribs and right occiput and of nausea. The treating physician, Dr. Bomengen, reported that there was no tenderness of the dorsal or cervical spine and that claimant had full range of motion of his neck, although he had a bruise on the back of his head. He was treated for a right rib fracture and a punctured lung. He was hospitalized for approximately one and one-half days and released to return to regular work three weeks later on September 22, 1980.

Claimant continued to perform strenuous work following his return to work, including lifting bales of hay weighing 90 to 120 pounds. In the spring of 1981, he developed numbness and tingling in his hands, a problem that worsened until he saw Dr. Maukonen in April, 1982. The doctor took a history that inaccurately indicated that claimant had been hospitalized for one and one-half weeks for multiple rib fractures when, in fact, he had been hospitalized for one and one-half days for a single rib fracture and a punctured lung. The history also contained several other inaccuracies, including recording November, 1980, instead of September 22, 1980, as the time claimant returned to work after the wreck.

The record contains three medical opinions concerning the cause of claimant's condition. Dr. Maukonen, the only doctor who actually had examined him, diagnosed post-traumatic cervical spondylosis and ulnar dysesthesis, probably secondary to thoracic outlet syndrome. Dr. Riley, a neurological consultant for SAIF, reviewed the records and discussed the relationship of trauma to cervical spondylitis but concluded that claimant had degenerative disc disease. He noted, however, the numerous errors in the history and expressed his opinion that claimant's condition was not related to the 1980 injury, because symptoms would have been

expected within three to five days after that injury, whereas claimant did not complain of neck pain that soon after the accident.

Dr. Tennyson, a neurological consultant, was called as a witness by SAIF. He testified that, on the basis of the admitted exhibits and the x-rays taken by Dr. Maukonen in April, 1982, he agreed with the diagnosis of cervical spondylosis. Like Dr. Riley, he believed that the condition was not caused by the injury. He based his conclusion on the fact that claimant was apparently given a thorough examination at the time of the injury and that the standards of practice would have required x-rays to be taken of the neck area if there had been complaints about pain to that region. X-rays had been taken of the skull, elbows and ribs, but not of the neck. Dr. Tennyson agreed that a history of neck pain at the time of hospitalization and a history of continued neck pain would cause him to change his opinion about the relationship of the spondylosis to the injury.

All three medical experts discussed the relationship between spondylosis and trauma. Dr. Riley noted that cervical spondylitis can be associated with different trauma, either of hyperextension or severe twisting. Dr. Maukonen believed that claimant's condition was the result of the 1980 injury. Dr. Tennyson stated that cervical spondylosis is commonly related to trauma in persons of claimant's age, but that in his case it probably was the result of multiple traumas over a number of years.

The question in this case is whether claimant's condition was more likely than not caused by the 1980 accident. Claimant has the burden to prove his claim. *Martin v. SAIF*, 22 Or App 282, 538 P2d 943 (1975). The referee determined that Dr. Maukonen's opinion was "entitled to no weight" and decided, on the basis of the two other medical opinions, that

claimant had not proved a causal connection. The Board adopted the referee's reasoning.

On *de novo* review, we conclude that claimant has proved it more likely than not that his condition was caused by the 1980 accident. The medical evidence indicates that it was probably caused by trauma. In the accident, claimant was in a truck that rolled over. He experienced sufficient trauma

to fracture a rib, puncture a lung, jam his right shoulder and bruise the back of his head.

The two medical experts for SAIF rejected a causal connection between that accident and claimant's condition because of the lack of immediate neck pain associated with the accident. However, the doctor testifying for SAIF agreed that trauma is the most probable cause of spondylosis in a person of claimant's age. We find it difficult to understand the rejection of a causal connection between the accident and the condition, especially when there was no other evidence of trauma associated with the requisite neck pain to explain claimant's condition.[1]

Reversed and remanded with instructions to allow the claim.

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[1] Dr. Tennyson's opinion that claimant's spondylosis might be the result of a degenerative condition accelerated by multiple traumas arising from work activity of wrestling with cows and lifting bales of hay is too equivocal and speculative to be a satisfactory alternative explanation of the cause of the condition.

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524 March 6, 1985 No. 124

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert E. Alvarez, Claimant.

ALVAREZ,
Petitioner,

v.

GAB BUSINESS SERVICES, INC.,
Respondent.

(82-09965; CA A30776)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1984.

Robert L. Chapman, Medford, argued the cause and submitted the brief for petitioner.

H. Scott Plouse, Medford, argued the cause for respondent. With him on the brief were Cowling & Heysell, Medford.

Before Joseph, Chief Judge, and Warden and Newman, Judges.

WARDEN, J.

Order modified to require that aggravation claim be processed in accordance with ORS 656.262; affirmed as modified.

WARDEN, J.

Claimant petitions for review of an order of the Workers' Compensation Board. He contends that the Board erred in reversing the referee's determination that his claim had been prematurely closed and in failing to remand the case to the referee for a decision on the alternative theory that claimant had established an "aggravation." ORS 656.273.

The Board set out the facts:

> "Claimant compensably injured his right knee on July 22, 1980. He subsequently underwent two arthrotomies and a medial meniscectomy. Following claimant's second arthrotomy, Dr. Gilsdorf opined:
>
> '[H]is current condition has plateaued and will not materially improve with further time and treatment—may require further corrective surgery at a later date for continuing instability related to the articular changes in his right knee.'
>
> "On September 14, 1982 Southern Oregon Medical Consultants performed a closing examination and opined:
>
> 'The condition is considered stationary and claim closure at this time is recommended.'
>
> "On October 1, 1982 Gilsdorf indicated that he agreed with the Consultant's findings.
>
> "On October 27, 1982 a Determination Order issued, finding claimant medically stationary on September 14, 1982, the date of the Consultant's examination.
>
> "On December 13, 1982 Dr. Gilsdorf indicated that, because claimant's symptoms had become more severe, he was contemplating doing a joint replacement on claimant's knee. He indicated that claimant was considering the possibility and wished to discuss it with his attorney before he decided to undergo the surgery.
>
> "On January 24, 1983 Dr. Gilsdorf wrote:
>
> " 'It has been my recommendation that Mr. Alvarez undergo knee replacement surgery. He has now informed me, through his attorney, that he wishes to proceed with the definitive knee surgery, that is knee replacement surgery * * *.
>
> " 'In view of this man's symptomatic state, his condition cannot be and should not be considered stationary. Time loss should be reinstated and authorization to proceed, with this * * * knee replacement surgery, is requested.'

> "The insurer authorized the surgery, but apparently time loss was never paid. Surgery was scheduled for March 6, 1983 but was never performed because of elevated blood sugar.
>
> "The Referee said that the opinions of Southern Oregon Medical Consultants and Dr. Gilsdorf that claimant was stationary in September 1982 were 'tentative or precatory.' The Referee concluded that in '20-20 hindsight' claimant was not medically stationary."

In reversing the referee's finding of a premature claim closure, the Board stated:

> "[I]n September 1982 the unanimous medical opinion was that claimant's condition could not be expected to improve through treatment or the passage of time. It was only later

when claimant's symptoms increased that his treating physician felt it advisable for the claimant to undergo the rather drastic measure of having the entire knee joint replaced."

The Board correctly refused to exercise hindsight in determining whether the claim was prematurely closed. To support a conclusion that a claimant is "medically stationary," ORS 656.005(17) requires only that "no further material improvement would reasonably be expected from medical treatment, or the passage of time." The reasonableness of medical expectations at the time of claim closure must be judged by the evidence available at the time, not by the subsequent development of the case. *See Maarefi v. SAIF,* 69 Or App 527, 531, 686 P2d 1055 (1984).

The Board agreed with the referee's conclusion that Dr. Gilsdorf's January 24, 1983, letter was a valid aggravation claim. ORS 656.273(3). It concluded that "the insurer was under an obligation to respond to the request for time loss by either accepting or denying the aggravation claim. Because it did neither, the referee was correct in assessing a penalty."

The remaining issue is whether the Board should have remanded to the referee for a decision on whether claimant had established an aggravation. It should not have. Both the referee and the Board correctly found that claimant had made a valid claim for aggravation. The referee's order that the aggravation "claim shall be processed in accordance with ORS 656.263" was affirmed by the Board.

Because it is apparent that the referee made a scrivener's error in referring to ORS 656.263, we modify the

order to provide that claimant's claim for aggravation shall be processed in accordance with ORS 656.262 and affirm it as modified. ORS 656.273(6).

Order modified to provide that the aggravation claim be processed in accordance with ORS 656.262; affirmed as modified.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Virgie Killmer, Claimant.
ROSEBURG LUMBER COMPANY,
Petitioner,
v.
KILLMER,
Respondent.
(83-00075; CA A31378)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 14, 1984.

H. Scott Plouse, Medford, argued the cause for petitioner. With him on the brief was Cowling & Heysell, Medford.

Stephanie S. Collison, Eugene, argued the cause for respondent. On the brief were John Silk, and Bischoff & Strooband, P.C., Eugene.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Reversed and remanded for reinstatement of the denial.

RICHARDSON, P. J.

The issue in this workers' compensation case is whether claimant has established a compensable occupational disease claim for a cyst in her left groin. The referee and the Workers' Compensation Board, one member dissenting, held that the claim was compensable. The employer appeals, and we reverse.

Claimant has a history of chronic pain. One of the medical reports in the record states that she developed numbness in her left leg and foot in 1968 or 1969. In 1974, she had a lumbar fusion. She had a cyst removed from the area of her left groin in 1973 or 1974. In 1976, a cyst was removed from one of her ovaries. After the July, 1982, removal of the cyst involved in this case, she continued to experience pain over most of her body. She suffers from pain in her legs, arms and low back, has tension in her neck and shoulders and suffers from frequent headaches. In February, 1983, one examining physician expressed the opinion that the majority of her complaints are related to a major depressive disorder. The only ailment involved in this case is the cyst discovered and removed in 1982.

Claimant began working for employer in 1980. She first worked "pulling on the dry belt," later worked "off-bearing on the round table" and finally was moved to working as a "plugger," which involved plugging knotholes and patching veneer. As a plugger, she stood on her feet all day and

operated a foot pedal with her right foot. Her regular job in September, 1981, was as a plugger, but she occasionally relieved other workers on the dry belt and the dryers.

On approximately September 14, 1981, she began to experience "funny feelings" in her left leg. She described them as a "burning numbness and just like a band around your leg" and stated that it felt as if her pant legs were getting wet. She sought the advice of a doctor, but no specific problem was diagnosed at that time. She returned to work after a short time.

The sensation in her leg progressively worsened until she could hardly walk. In June, 1982, she was examined by Dr. Meharry. He discovered a cyst in her left groin, which he removed the following month. He was of the opinion that the

cyst was aggravated, but not caused by, claimant's work conditions. He wrote a letter to employer on September 2, 1982, stating, "This patient's work aggravated her leg in such a way she was unable to work beginning July 2, 1982."

On September 13, 1982, claimant filed a claim for workers' compensation, which was denied. She requested a hearing. The referee found that the cyst was asymptomatic before September 14, 1981, and concluded that, because the work conditions caused it to become symptomatic, requiring medical services and causing disability, the claim was compensable. The Board affirmed, one member dissenting on the ground that there was no evidence that work conditions were the major contributing cause of the worsening of the cyst condition. Employer appeals, arguing that the Board erred in finding that claimant sustained her burden of proving that the claim for removal of the cyst was compensable.

Claimant argues that her claim is compensable under our decision in *Wheeler v. Boise Cascade,* 66 Or App 620, 675 P2d 499 (1984), which held that when work conditions cause a previously asymptomatic condition to become symptomatic, requiring medical treatment or causing disability, the claim is compensable even though there is no worsening of the underlying condition. That decision was reversed after the parties in this case had submitted their briefs and presented oral arguments. *Wheeler v. Boise Cascade Corp.,* 298 Or 452, 693 P2d 632 (1985). The Supreme Court, following *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979), held that, in order to prevail, a claimant must show a worsening of the underlying condition, whether the condition is symptomatic or asymptomatic at the time of employment. Under *Weller,* claimant must prove by a preponderance of the evidence that (1) her work activity and conditions (2) caused a worsening of her underlying disease, (3) resulting in an increase in pain (4) to the extent that it produces disability or requires medical services. The work activities need not be the sole cause of the worsened condition, but they must be the major contributing cause. *Dethlefs v. Hyster Co.,* 295 Or 298, 667 P2d 487 (1983); *SAIF v. Gygi,* 55 Or App 570, 639 P2d 655, *rev den* 292 Or 825 (1982).

The only doctor to report on the relationship between claimant's work and the cyst was Dr. Meharry. As noted

previously, his letter to employer states that her work "aggravated her leg." He did not explain how her work "aggravated her leg." On an application for health insurance benefits filed by claimant, Dr. Meharry indicated that her work had not caused the cyst, but possibly had aggravated it. On March 29, 1983, he wrote to claimant's attorney:

> "This letter is written regarding my opinion as to whether Mrs. Killmer's work activities were a major contributing cause for her worsened condition. When I first saw her on June 17, 1982, regarding the pain in her left thigh we felt that she did have a problem and that she was unable to work with the condition as it was. Working probably aggravated it but did not cause the problem. As you are probably aware, she was taken to the operating room on the 9th of July, 1982. At this time Iliopsoas cyst was removed from the left groin which was probably a synovial or ganglionic cyst with mucoid fluid according to the pathology report. There was probably no question that any work or activities aggravated this type of problem. But, I wouldn't state that the work caused this type of problem; although, if she does any heavy type of work this will definitely aggravate and worsen her arthritic problems. This of course will make pain control more difficult to manage."

Claimant argues that that last letter satisfies the requirement to show that her work was the major contributing cause of her worsened condition. We disagree. We note first that it is entirely unclear from the medical evidence exactly what claimant's underlying condition is. We cannot discern whether the cyst is a disease or a symptom of a disease. Assuming that the references in the reports to a "condition" refer to some underlying disease, we do not interpret Dr. Meharry's letter as supporting the conclusion that claimant's work activity was a major contributing cause of a worsening of that disease. It reiterates his opinion that work conditions did not cause the cyst to appear, but did "aggravate" it. It states merely that work conditions were *a* cause of the worsened condition; it does not answer the question of whether work conditions were the major contributing cause. Thus, claimant has failed to sustain her burden of proof.

Reversed and remanded for reinstatement of the denial.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jose G. Perez, Claimant.

PEREZ,
Petitioner,

v.

EBI COMPANIES,
Respondent.

(81-08151; CA A31805)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 25, 1985.

Gary Furlong, Salem, argued the cause for petitioner. On the brief were Brian R. Whitehead and Michael B. Dye, Salem.

Cynthia S. C. Shanahan, Portland, argued the cause for respondent. With her on the brief were Paul R. Bocci and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed in part; reversed in part and remanded to Board for determination of total temporary disability payments for the period July 14 to August 27, 1981, and to determine amount of penalties and attorney fees.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board that reversed his award of permanent total disability and denied him additional compensation for temporary total disability. We affirm in part and reverse in part.

On July 19, 1976, claimant injured his back while lifting barrels at work. A fourth determination order, entered June 1, 1979, brought his unscheduled permanent partial disability award for that injury to 50 percent. On June 14, 1978, claimant was diagnosed as having ankylosing spondylitis, "a slow, inexorably progressive, painful disease affecting largely the spine, that slowly and steadily progresses with increasing pain and stiffness." When the insurer denied responsibility for any disability resulting from the spondylitis, a hearing was held. The referee concluded:

> "(1) Claimant's underlying disease, ankylosing spondylitis, was aggravated by the industrial injury but
>
> "(2) Somewhere along the line the aggravation may have ceased, leaving some internal 'permanent' injury as a result of the aggravation. When the aggravation ran its course, if it did, or how much damage was done by this is thus far unknown.

"The above is contrary to the denial to the extent that it denies responsibility for any effects of the injury on the underlying disease."

The insurer resubmitted the claim for closure and, by determination order dated August 27, 1981, claimant was denied additional compensation. The basis for that denial was medical evidence that the effects of claimant's industrial injury had ceased sometime before June 12, 1978, and that his present disability, beyond the unscheduled 50 percent, was caused by the ankylosing spondylitis. Claimant appealed the denial and was granted an award of total permanent disability by the referee, who found:

"[The industrial injury] precipitated a course of events in which the ankylosing spondylitis progressively worsened at a faster rate because of the occurrence of the back strain and the effect of that more rapid worsening remains today a material contributing factor to claimant's disability. That is, if claimant had not suffered the July, 1976 back strain, his ankylosing

spondylitis would not have worsened as fast or as much as it did. * * *"

The Board reversed the referee's award, because it did not agree that

"[t]he progression of claimant's ankylosing spondylitis condition, which accounts for the present disability from which he suffers, is attributable in material part to claimant's 1976 industrial injury."

We agree with the Board. The medical evidence is clear that the industrial injury had some effect on claimant's ankylosing spondylitis. The disagreement is over the extent of that effect. Claimant insists that all of the disabling effects are compensable, because the referee in the original hearing supposedly found that his industrial injury aggravated the spondylitis and left some "permanent" injury. The original order did not so find,[1] and the medical evidence is clear that the industrial injury only precipitated the onset of claimant's present symptoms. The record indicates that before the injury he apparently had no symptoms of that condition and, since the injury, he has and will continue to have the symptoms of the disease. However, the medical evidence shows that, although the occurrence of symptoms was accelerated by the compensable injury, claimant's present disability resulting from the disease is the same as it would have been even if the industrial injury had not occurred. It is that fact which defeats his present claim for permanent total disability. Although he is entitled to compensation for the period that he would not have been symptomatic but for the industrial injury, the Board correctly concluded on this record that his present disability resulted from the ankylosing spondylitis and is not attributable in material part to his 1976 industrial injury.

[1] Claimant relies on the referee's order denying a motion to reconsider his order. In that document, the referee "explained" that he had held in his original order that claimant had suffered some permanent injury as a result of the aggravation. The referee refused to modify the original order and ordered that it be ratified, affirmed and republished. The original order did not find a compensable permanent injury resulting from the ankylosing spondylitis.

The remaining question is whether claimant is entitled to temporary total disability payments from the time that the first referee reversed the insurer's denial (July 14, 1981) until the determination order denying compensation for

the ankylosing spondylitis was entered (August 27, 1981), and whether the insurer is subject to a penalty pursuant to ORS 656.262(10) for failing to make those payments. The Board concluded that, because claimant was medically stationary during that time, he was not entitled to temporary total disability. Although it is true that claimant had been determined to be medically stationary, that determination was only with respect to his compensable injury, which, until the first referee's order relating to the compensability of claimant's ankylosing spondylitis, did not relate to that condition. The referee's order reversing the insurer's denial for that condition required the insurer to accept the claim and to determine the extent to which it was compensable. The dispositional language of that order provided:

> "IT IS THEREFORE HEREBY ORDERED that claimant's claim is remanded to EBI Companies to provide claimant temporary total disability and permanent disability benefits that may have resulted from aggravation of the ankylosing spondylitis as caused by the industrial injury of July 16, 1976 and further process the claim, as necessary, until the claim is again ready for closure pursuant to ORS 656.268; to the extent that the above Order is contrary to the denial mailed August 7, 1980 by EBI Companies, the denial is reversed. Filing a request for review does not stay payment of compensation to claimant."

Because claimant had not been released by his doctor to return to work, temporary disability payments should have been paid until the evaluation division determined the extent of further compensation due. ORS 656.268. The failure to make those payments when ordered to do so is an unreasonable delay in payment of compensation, for which a penalty and attorney fees may be assessed under ORS 656.262(10). *See Hutchinson v. Louisiana-Pacific,* 67 Or App 577, 679 P2d 338, *rev den* 297 Or 340 (1984).

Affirmed in part; reversed in part and remanded to Board for determination of total temporary disability payments for the period July 14 to August 27, 1981, and to determine the amount of penalties and attorney fees.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Geraldine A. Haret, Claimant.

HARET,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(82-05250; CA A31047)

In Banc

Judicial Review from Workers' Compensation Board.

Argued and submitted October 24, 1984; resubmitted in banc February 6, 1985.

Charles Robinowitz, Portland, 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.

BUTTLER, J.

Reversed and remanded with instructions to accept aggravation claim as of December 4, 1981, and for determination of penalties and attorney fees.

Gillette, J., concurring in part; dissenting in part.

BUTTLER, J.

The issues in this workers' compensation case are whether claimant made an aggravation claim before June 11, 1982—the latest date when she and SAIF, after the hearing, agree that it had been made—and whether her condition had worsened by the time of the claim. We hold that claimant's physician's report of December 4, 1981, constituted an aggravation claim and that her condition had, in fact, worsened. We therefore reverse the Board's denial of compensation for the period before June 11, 1982, and its denial of penalties and attorney fees for SAIF's unreasonable delay in denying the claim. However, we affirm the conclusion of the referee and the Board that claimant is not entitled to interest at the statutory rate on unpaid compensation from the time that it became due under ORS 82.010(2)(a).

Claimant was injured in 1978 when her hair caught in rollers at work, causing a severe wrenching of her neck. She became medically stationary after 10 months of treatment but continued to experience pain. At that time, her symptoms were primarily in her neck, but she also had some problems in her right arm. Dr. Grimm, her attending neurosurgeon, stated

that her injuries included an acute stretch injury to her cervical nerves. He believed that her right arm problems were primarily the result of that stretch injury. The referee, in an opinion entered after a hearing in October, 1979, found that claimant had suffered a cervical sprain with arm symptoms but that she had no loss of function in her upper right arm. He awarded her 25 percent unscheduled permanent partial disability, based on loss of function of the cervical spine alone.

Claimant continued to have occasional flareups of her neck problem, but she did not need to see a physician from December, 1980, until December 4, 1981, when she went to Dr. Nash, a neurosurgeon.[1] His report to SAIF of that date emphasized the difficulties that claimant was having with her right arm and suggested that her C5-6 nerve root was involved. A myelogram in February, 1982, confirmed his suspicion.[2] Nash did not suggest surgery. He made a number

of reports to SAIF while he treated claimant and summarized his findings in a letter to her attorney on May 7, 1982. SAIF received a copy of the letter on May 26, 1982. Meanwhile, on May 10, 1982, SAIF had issued a denial of claimant's aggravation claim. The record reveals no "claim" other than Nash's reports.

Claimant apparently was not satisfied with Nash's conservative approach. On June 11, 1982, she went to Dr. Berkeley, another neurosurgeon. He performed another myelogram and reached a conclusion similar to Nash's, except that he recommended surgery. The parties now agree that Berkeley's June 11, 1982, report to SAIF was an aggravation claim and that claimant's condition had worsened. The period in dispute is from December 4, 1981, through June 10, 1982.

We must first determine whether any one of Nash's reports constituted an aggravation claim. If one of them did, we must then decide whether there was a worsening of claimant's condition before she first saw Nash.

ORS 656.273(3) provides:

> "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation."

That statute replaced *former* ORS 656.271(1) (*repealed by* Or Laws 1973, ch 620, § 4), which provided that an aggravation claim "must be supported by a written opinion from a physician that there are reasonable grounds for a claim." The purposes of the statutory change were to make the physician's report itself the claim and to delete any requirement that the report do more than request additional services. When the carrier receives such a report, it then becomes its responsibility to determine whether a worsening has occurred and to accept or deny the aggravation claim.[3]

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[1] Grimm had moved to another city. Nash was in the same office, but he had not previously seen claimant.

[2] A myelogram in August, 1978, soon after claimant's injury, showed a normal cervical area.

[3] Of course, if a carrier denies the aggravation claim, it will still be responsible for medical costs necessary to treat the claimant's compensable condition. ORS 656.245(1).

Even with the statutory change, not every medical report is an aggravation claim. We held in *Wetzel v. Goodwin Brothers,* 50 Or App 101, 622 P2d 750 (1981), that a medical chart note sent to the insurer at its request did not constitute

an aggravation claim. The note included a statement that the claimant's condition "is not changing." Almost anything more than that, however, can be an aggravation claim. The physician's report need not "adduce facts sufficient to show an aggravation; it need only show the need for further treatment of the injury." *Clark v. SAIF,* 50 Or App 139, 143, 622 P2d 759 (1981). Nash's report, dated December 4, 1981, meets the requirements. Claimant had not seen a physician for a year before going to Nash. Nash's report to SAIF indicated a "need for further medical services" and put SAIF on notice that it had to determine whether a worsening had occurred.[4]

Claimant's condition had in fact worsened before she first saw Nash. What was originally a strained but otherwise neurologically normal cervical area had progressed to significant nerve root degeneration. According to Berkeley, the condition that Nash observed in December was significantly different from that on which the referee based his order, precisely because of that progression. The nerve root involvement made the situation much more serious and created risks of further degeneration, including atrophy of the muscles of claimant's right arm. Claimant has proved a worsening as of December 4, 1981. SAIF's denial of her claim was both late and unreasonable.

The final issue is whether claimant is entitled to interest on the temporary total disability compensation she received after the hearing as the result of SAIF's agreement to accept her aggravation claim as of June 11, 1982, and on the additional amount of temporary total disability compensation she will receive as a result of our decision. We decided this question adversely to claimant in *Button v. SAIF,* 45 Or App 295, 608 P2d 206, *rev den* 289 Or 107 (1980), where we held that the claimant was not entitled to interest because "[t]here is no statutory authority for such an award in the Workers' Compensation Act. The only *penalties* available are those specified in [ORS 656.262(10)]." 45 Or App at 298. (Emphasis supplied.)

Although our quoted statement in *Button* may have oversimplified the issue by suggesting that interest is a penalty, our ultimate conclusion was correct. Interest is not a penalty; it is "compensation for the use or forbearance of another's money." *Portland Gen. Elec. Co. v. Dept. of Rev.,* 7 OTR 444 (1978). When applicable, an award of interest avoids the unjust enrichment of a debtor who retains the use of money that it should rightfully have paid to its creditor. The question is whether the general law stated in ORS

[4] SAIF must ultimately have realized that Nash's reports constituted an aggravation claim. There is no other explanation for its denial issued May 10, 1982, before it had received any written communication from claimant or her lawyer and when the only documents in its file were Nash's reports and related papers.

82.010(2)(a), which provides that interest at the statutory rate is payable on "[a]ll moneys after they become due" is applicable to compensation payable under the Workers' Compensation Law.

We conclude, as we did in *Button*, that it is not. Workers' Compensation is strictly a creature of statute, replacing a worker's common law remedies for job-related injuries. The act provides the exclusive remedy[5] for a worker injured on the job, ORS 656.018, and compensation is payable without regard to the fault of the employer or the worker. ORS 656.005(8)(a). Claims are processed exclusively through the statutory agency, the Workers' Compensation Department, the Hearings Division and the Board, with judicial review in this court, all within the confines of the provisions of the act. The act is a complete statement of the rights of workers to compensation for injuries covered thereby.

The act specifically provides for the consequences that follow from an insurer's or self-insured employer's unreasonable delay or unreasonable refusal to pay compensation. ORS 656.262(10) provides for a penalty "up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382." There is no provision for interest. When it is considered that other provisions of the act permit a worker to keep money paid to him or her, even though it is ultimately determined that the worker was not entitled to the compensation, ORS 656.313(1) and (2), it seems clear that the act strikes a balance of sorts.

To the extent that there are permissible adjustments for over-compensation under the act, ORS 656.268(4), for example, we have held that the statutory remedy is exclusive, even if it amounts to no remedy for the overpayment. In *SAIF v. Harris*, 66 Or App 165, 672 P2d 1384 (1983), we held that the insurer could not maintain a court action to recover an overpayment, even though an action for money had and received would have provided a remedy if the overpayment had not been made under the act. It seems clear that "normal remedies" to which a litigant might otherwise be entitled do not apply to litigants covered by the act.

Without cataloguing other examples of the exclusivity of the statutory rights and remedies, enough has been said to demonstrate that the Workers' Compensation Law is a complete statement of the parties' rights and obligations, and they are *sui generis*. The consequences for underpayment or nonpayment of compensation are just as limited as they are for overpayment. Either the act provides for them, or there are none. The act does not provide for interest on late payments; it provides for a penalty and attorney fees. Those are the exclusive consequences.[6]

[5] The injured worker may maintain an action for damages against a *noncomplying* employer for a job-related injury, ORS 656.020, and also for injuries caused by the negligence of a third person not in the same employ. ORS 656.154; *see also* ORS 656.578.

[6] Although not dispositive of the question, it is worth noting that the Supreme Court denied review in *Button*, and two legislative sessions since *Button* was decided have done nothing to change the conclusion we reached.

Reversed and remanded with instructions to accept the aggravation claim as of December 4, 1981, and for a determination of penalties and attorney fees.

GILLETTE, J, concurring in part, dissenting in part.

I agree with the majority's treatment of when claimant made an aggravation claim and therefore concur in that part of the majority opinion. I disagree with the majority's analysis of the key issue in this case is whether claimant is entitled to interest on the temporary total disability compensation she received after the hearing as the result of SAIF's agreement to accept her aggravation claim as of June 11, 1982, and on the additional amount of temporary total disability compensation she will receive as a result of our decision. I therefore dissent on that issue. We decided this question adversely to claimant in *Button v. SAIF,* 45 Or App 295, 608

P2d 206, *rev den* 289 Or 107 (1980), where we held that the claimant was not entitled to interest because "[t]here is no statutory authority for such an award in the Workers' Compensation Act. The only *penalties* available are those specified in ORS 656.262[(10)]." 45 Or App at 298. (Emphasis supplied.) We today reconsider our position and determine that *Button* oversimplified the issue.

As the majority acknowledges, our quoted statement in *Button* misconstrued the nature of interest and the statutory basis for awarding it. Interest is not a penalty. Rather, it is "compensation for the use or forbearance of another's money." *Portland Gen. Elec. Co. v. Dept. of Rev.,* 7 OTR 444, 445 (1978). An award of interest avoids the unjust enrichment of a debtor who retains the use of money that it should rightfully have paid to its creditor. We were mistaken, in *Button,* when we passed off requested interest as an unauthorized "penalty."

The question remains, however, as to whether *Button* was legally correct, although its rationale was not. There is no statutory provision within the Workers' Compensation law authorizing or requiring the payment of interest. The only interest provision arguably relevant is found outside the statutory scheme. ORS 82.010(2)(a) provides that interest at the statutory rate is payable on "[a]ll moneys after they become due * * *." Interim compensation pending acceptance or rejection of a claim, and temporary or permanent total disability payments after acceptance, are due and payable at specific times and in readily calculable amounts. *See* ORS 656.206(2), 656.210(1), 656.262(4), 656.273(6). It may be argued that the situation is thus the same as that in *Papadopoulos v. Bd. of Higher Educ.,* 48 Or App 739, 744-46, 617 P2d 931, *rev den* 290 Or 727, *cert den* 454 US 803 (1981), in which the plaintiff was awarded unpaid salary for a school year. We held that he was also entitled to statutory interest on each month's salary from the date during that school year on which it should have been paid. Workers' compensation payments are payable in the same regular fashion; it is easy to

argue by analogy that such payments are governed by the general provision for interest on moneys that are due and owing.

It may be argued with equal plausibility, however, that interest should not be awarded, because (a) the Workers' Compensation law is a complete statutory scheme, so that inclusion of penalties but not interest should be read as indicating legislative intent; and (b) the legislature in its two sessions since *Button* has not seen fit to change the rule we announced there.

On balance, I am persuaded by the former argument. Although the question is not an easy one, I perceive the penalty provisions of ORS 656.262(10) as additions to, not substitutes for, a litigant's normal remedies. I cannot believe that, given the remedial purposes of the Workers' Compensation law, the legislature would substitute penalties, whose award in a given case is problematical, for the just payment for use of a litigant's money that an award of interest is supposed to represent.

I respectfully dissent from the failure to award claimant interest.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Cleve A. Retchless, Claimant.

RETCHLESS,
Petitioner - Cross-Respondent,
v.
LAURELHURST THRIFTWAY et al,
Respondents - Cross-Respondents,
and
BUTLER'S VILLAGE MARKET et al,
Respondents - Cross-Petitioners.

(79-04418, 79-08745; CA A30738)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 17, 1984.

Mitchell Crew, Portland, argued the cause for petitioner - cross-respondent. With him on the brief was Mercer, MacLaren, King & Crew, Portland.

Allan M. Muir, Portland, argued the cause for respondents - cross-respondents. With him on the brief were Roger A. Luedtke, and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Scott M. Kelley, Portland, argued the cause for respondents - cross-petitioners. With him on the brief was Cheney & Kelley, P.C., Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Reversed and remanded for further proceedings.

VAN HOOMISEN, J.

Claimant and Industrial Indemnity Company seek judicial review of an order on reconsideration of the Workers' Compensation Board. ORS 656.298. They contend that the Board erred in vacating its previous order that had affirmed the referee's conclusion that claimant had sustained a new injury in 1978 while employed by Laurelhurst Thriftway, rather than an aggravation of an injury sustained in 1973 while employed by Butler's Village Market. We reverse and remand for further proceedings.

Claimant sustained a compensable back injury in 1973, while employed by Butler's. Industrial Indemnity, Butler's carrier at that time, accepted the claim. It was closed by determination order in 1974. Claimant sustained a second compensable back injury in 1978, while employed by Laurelhurst. United Grocers Insurance was Laurelhurst's carrier at that time. Industrial Indemnity accepted that claim as an aggravation of claimant's 1973 injury. It was closed by determination order in May, 1979. In August, 1979, claimant filed a claim against Laurelhurst, alleging that the 1978 incident was a new injury. United Grocers Insurance denied responsibility. In 1981, Industrial Indemnity retroactively denied claimant's aggravation claim. Claimant appealed both denials.

The referee found that claimant had sustained a new injury in 1978. The Board affirmed that finding. However, on reconsideration, ORS 656.295, the Board held that Industrial Indemnity's acceptance of the 1978 aggravation claim, and payment of benefits, barred it from later denying claimant's aggravation claim. The Board relied on *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983). We disagree with the Board's interpretation of *Bauman.*

We interpret *Bauman* to mean that Industrial Indemnity must pay compensation, at least until someone else is determined to be responsible. *See Jeld-Wen, Inc. v. McGehee,* 72 Or App 12, ___ P2d ___ (1985). Here, the referee and the Board found that claimant had sustained a new injury in 1978 while employed by Laurelhurst. We agree. United Grocers Insurance was Laurelhurst's carrier at that time; it is responsible for the new injury.

Reversed and remanded for further proceedings.[1]

[1] Because we remand, we do not consider the merits of claimant's second assignment that the Board erred in denying him an award of attorney fees against Laurelhurst and its carrier on Board review.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Helena Faye Childers, Claimant.

CHILDERS,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(78-01507; CA A30552)

Judicial review from the Workers' Compensation Board.

Argued and submitted July 18, 1984.

David C. Force, Eugene, 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 Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed and remanded with instructions to accept the aggravation claim.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board that affirmed the referee and denied her aggravation claim. Claimant, age 35, injured her back in a compensable accident in January 1973. She has experienced pain related to her back since the injury and had back surgery in March 1973 and September 1974. The initial determination order of May 22, 1974, awarded twenty percent unscheduled disability "resulting from injury to your back." A second determination order on November 18, 1975, awarded an additional fifteen percent unscheduled disability "resulting from injury to your low back." On February 23, 1978, claimant filed a claim for aggravation. SAIF denied it.[1]

The issue is whether claimant's condition resulting from the compensable injury worsened between November 18, 1975, and May 22, 1979, the date on which the five-year limitation period for filing an aggravation claim expired. ORS 656.273(4)(a). At the hearing in 1981, the referee appropriately considered evidence of claimant's worsened condition through May 22, 1979, even though some of that evidence was developed subsequent to SAIF's denial. *See* ORS 656.273(1), (4)(a); OAR 436-83-400(3), 436-83-510.

The parties agree that the determination orders of 1974 and 1975 recognized a psychological component of claimant's injury-related condition. The referee found that claim-

ant's psychological condition was related to her 1973 injury and awarded medical expenses pursuant to ORS 656.245.[2] He concluded, however, that claimant had failed to prove a compensable aggravation claim because, although he found the lay testimony convincing, medical evidence regarding the worsening of her psychological condition was equivocal.[3] The Board affirmed the referee, stating that "claimant has failed

to establish a worsening of her condition since the last award or arrangement of compensation * * *." We find that, although claimant's low back condition has not worsened since the last determination order, her related psychological condition, a conversion reaction, has.[4] We reverse.

The referee found:

> "*Claimant's chronic disabling mental state,* chronic back problems and chronic lower extremities problems or symptoms, and residual limitations have *'worsened' since November 18, 1975,* with passage of time (Testimonies of Claimant, Mr. Childers, claimant's husband, and Mr. Powers, the former employer of claimant at the Rod & Reel Restaurant).
>
> "Claimant's daily activities are now minimal. Claimant has given up, or limited, activities such as going to the beach, traveling, camping, socializing, yardwork, gardenwork, housework and riding a bicycle because of her chronic disabling mental state and because of her chronic low back condition, including the lower extremities.
>
> "Claimant has not held any substantial, gainful employment since her industrial injury of January 15, 1973.
>
> "All lay testimonies contained in the record are credible. The lay testimonies are entitled to full weight." (Emphasis supplied.)

We do not find that the medical evidence is equivocal but that it, along with the lay testimony, demonstrates a worsening of claimant's psychological condition. The evidence establishes that claimant converts her emotional reactions into physical manifestations[5] and that those physical manifestations of her psychological condition became more

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[1] Although the first request for a hearing was in 1978, four amended requests for hearing followed, as well as considerable correspondence between counsel and the referee. The matter finally came to hearing before the referee on June 25, 1981; the referee's opinion and order was issued on May 28, 1982; and the Board issued its order on review on November 30, 1983.

[2] SAIF does not contest the award under ORS 656.245, and it is not in issue here.

[3] The referee did not have the benefit of the subsequent Supreme Court opinion in *Garbutt v. SAIF,* 297 Or 148, 151, 681 P2d 1149 (1984), when he ruled against claimant on the ground that the medical evidence was equivocal.

[4] The record variously characterizes claimant's psychological condition as "functional overlay," "conversion reaction," "hysterical neurosis, conversion type" and "conversion hysteria." These terms describe the same underlying condition in this case. We will use "conversion reaction."

[5] Dr. Perkins, a clinical psychologist, described claimant as "utilizing repression, denial, and somatization as defenses against experiencing considerable emotional upset." Dr. Yospe, a clinical psychologist, stated that there were indications that claimant "tends to use somatic symptomology as a means of expressing underlying emotional problems." Dr. Fried, a physician, examined claimant in August 1978 and stated:

> "It is my impression the patient suffers from a certain degree of hysterical overlay to her physical problem and that she tends to deny psychological difficulties and find somatic explanations of her problems more compatible with her self image."

frequent, more severe and more diverse during the period in issue. The evidence also establishes that there was no physical cause for her increased disabilities and that during this period claimant had greater need of psychological treatment. We conclude that claimant's underlying psychological condition had worsened between November 18, 1975, and May 22, 1979.

Before November 18, 1975, the physical manifestations of claimant's psychological condition included her legs buckling occasionally, gastro-intestinal reactions, spasms, blackout spells and one incident of hysterical paralysis of undisclosed duration or location. Claimant's activities decreased, but she was still walking a few hours each day. During the same period, medical opinions noted an increasingly severe hysterical conversion reaction, moving from a "good" prognosis to a "guarded" one and an impression that claimant had reservations about pursuing rehabilitation.

Between November 18, 1975, and May 22, 1979, however, claimant was repeatedly hospitalized for back-related pain and suffered daily periods of severe pain lasting up to two hours, often with intense muscle spasms. She also had frequent and more severe falls caused by her legs buckling, suffered hysterical paralysis of the right leg for several days at a time, including one 19-day hospitalization for pain and the hysterical paralysis, and had headaches, lasting sometimes one to three days, and nausea. She was frequently bedridden. In November 1977, Dr. Grieser characterized claimant's problem as "hopeless," and in March 1978, Dr. Narus concluded that she was in "desperate need of psychiatric intervention in order to salvage her functional competence."[6] Although the evidence indicates that claimant continued to be ambivalent about rehabilitation, Dr. Dewey concluded in 1981 that her continued psychological problem was not a willful attempt to recover compensation without working. Her physical manifestations, the medical reports and her general inability to function all reflect a worsened psychological condition related

to her 1973 injury. Claimant's aggravation claim is compensable. ORS 656.273.

Reversed and remanded with instructions to accept the aggravation claim.

[6] A rare positive report in September 1978 noted a "marked improvement in psychogenic dysfunction."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Olive J. Elwood, Claimant.

ELWOOD,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(80-10264; CA A27555)

Remanded from the Oregon Supreme Court, *Elwood v. State Accident Insurance Fund Corporation,* 298 Or 429, 693 P2d 461 (1985).

Judicial review from Workers' Compensation Board.

Submitted on remand January 8, 1985.

Thomas A. Huntsberger, Springfield, appeared for petitioner. With him were Ackerman, DeWenter & Huntsberger.

Darrell E. Bewley, Assistant Attorney General, Salem, appeared for respondent. With him were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General.

Before Richardson, Presiding Judge, and Van Hoomissen and Newman, Judges.

NEWMAN, J.

Reversed and remanded with instructions to accept claim.

NEWMAN, J.

The Supreme Court reversed and remanded our decision, *Elwood v. SAIF,* 67 Or App 134, 676 P2d 922 (1984), for further proceedings, stating:

> "From the court's phrasing, we cannot be certain whether the court considered the circumstances of the employer's request for claimant's resignation as one aggravating element among others that caused her illness, or whether it believed that she became ill in substantial part because she lost her job. Because this court does not make such factual determinations for itself, we reverse the decision of the Court of Appeals and remand the case to that court for further proceedings." *Elwood v. SAIF,* 298 Or 429, 433, 693 P2d 461 (1985).

The court commented:

> "The line, we think, runs between illness resulting from the stress of actual or anticipated unemployment, which is not compensable, and illness resulting from the circumstances and manner of discharge, which can be regarded as events still intrinsic to the employment relationship before termination and can lead to compensation. * * * The principle, however, is that stressful events accompanying the discharge can make a

resulting illness compensable; illness resulting from the mere act of discharge and loss of the job is not." 298 Or at 433.

Our opinion had twice mentioned the "termination" as one of the stressful events and conditions of plaintiff's employment that caused her mental disorder.[1] The Supreme Court could not determine on which side of its line we intended our opinion to fall.

Our opinion recites the facts of claimant's employment relationship and the stressful events accompanying the discharge:

"Claimant, age 54, was a registered nurse for 24 years. She worked full time for McKenzie Manor Home from 1966 until

1976. For the last nine years of that employment, she was the assistant director of nurses. She worked 40 hours a week with occasional week end or over-time work and rarely took vacations. She was responsible for a ward on one shift, including supervision of nurses and aides, medications for 75 patients and other administrative duties. She had frequent contact with visitors and patients' families, had to meet demands from patients and other nurses and had the responsibility of director of nurses if that person was away or ill.

"The referee found claimant's testimony 'essentially credible.' Claimant testified that nurses made unnecessary phone calls to the doctor about patients under her general supervision, disobeyed her instructions, ignored her, lost respect for her and encouraged aides and orderlies to disrespect her, denigrated the quality of her nursing care to families of patients and told management about complaints of patients and their families about her work. She had numerous conflicts with other nurses during the last few years of her service. She also testified that drugs and alcoholic beverages used by the residents disappeared without explanation from her ward and that she was told by an aide two or three days after she was terminated that there were rumors at the Home that she had been drinking the patients' alcohol and taking drugs. Claimant believed that that was 'devastating' to her reputation.

"Claimant testified that, because she was the logical choice to become the new director of nursing, the director and the nurses were attempting to force her to quit. She also testified that the administrator admitted that claimant was 'being run off,' but the administrator denied that. Claimant said that the director of nurses told her that her impression that the nurses were 'giving her a bad time' was 'in her imagination.'

"Although claimant had received above average to outstanding annual performance evaluations, the insurer submitted evidence that her work performance began to decline in about 1974, that she had failed to keep adequate records and charts in conformance with state regulations and had been told of the deficiency, that she was disrespectful to the administrator and one of the physicians and that patients complained concerning the care they received from her.

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[1] Our opinion stated:

"The record shows that numerous events and conditions of the employment, including her termination, were real and capable of producing stress when viewed objectively." 67 Or App at 138.

"We also find that real, stressful events and conditions of plaintiff's employment, including the termination, when compared to the non-employment exposure, were the major contributing causes of her mental disorder." 67 Or App at 139.

"The record does not disclose whether the employer or other nurses, in fact, wished to force claimant out, whether claimant's imagination led her to this perception or whether there was good cause for her termination. It is clear that the employer requested and received claimant's resignation on

April 1, 1976. Although the employer denied that it was trying to force claimant out, it did not try to prove that the events on which claimant based her belief that people did not want her there were not real. The record shows that numerous events and conditions of the employment, including her termination, were real and capable of producing stress when viewed objectively. * * *

"* * * * *

"Claimant testified that, at the meeting at which her resignation was demanded, the director or nurses, the administrator and the owner told her that she was being terminated in part because of her illness. Although the administrator testified that claimant's termination was the result of her failure to keep proper records, the employer listed the basis of termination on its form as 'asked to resign as health didn't seem to be too good.' The director of nurses wrote that claimant 'was asked to resign because of inability in keeping up with workload which I feel was due to health reasons.' Claimant testified that one of the aides had told her that the director of nurses had told the aides that next morning that I was emotionally ill and would not be returning to work." 67 Or App at 137.

Our references to "termination" referred to the circumstances and manner of that termination. We hold that the "stressful events accompanying [claimant's] discharge" contributed materially to her illness; that is, that the circumstances and manner of employer's request for claimant's resignation were material, aggravating elements, among others, that caused her illness. We add these findings to our former opinion, which, as supplemented, we readopt.

Reversed and remanded with instructions to accept the claim.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Olive J. Elwood, Claimant.

ELWOOD,
Respondent on Review,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner on Review.

(80-10264; CA A27555; SC S30606)

In Banc

On review from Court of Appeals.*

Argued and submitted on July 11, 1984.

Thomas A. Huntsberger, Springfield, argued the cause and filed Response for Respondent on Review. With him on the briefs were Ackerman, DeWenter & Huntsberger, Springfield.

Darrell E. Bewley, Assistant Attorney General, Salem, filed Petition on Review for Petitioner on Review. With him on the briefs were Dave Frohnmayer, Attorney General and James E. Mountain, Jr., Solicitor General, Salem.

LINDE, J.

Reversed and remanded to the Court of Appeals.

* Appeal from Workers' Compensation Board Order. 67 Or App 134, 676 P2d 922 (1984).

LINDE, J.

The occupational disease law provides that a worker is entitled to compensation as for an "injury," ORS 656.804, if the worker contracts a disease that "arises out of and in the scope of the employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular employment therein." ORS 656.802. Mental illness can be an occupational disease, *James v. SAIF,* 290 Or 343, 624 P2d 565 (1981), if it arises from actual rather than imaginary job-related conditions. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983). The present case involves the question under what circumstances a claimant's discharge from employment can be one of the job-related conditions giving rise to a compensable occupational disease.

Claimant worked as a registered nurse for McKenzie Manor Home from 1966 to 1976, when she was discharged. In 1980 she filed a claim for compensation for occupational disease caused by emotional stress, which she attributed to a demanding work schedule, to employer pressure to quit her job, and to her eventual discharge. SAIF, the employer's insurer, denied the claim on grounds that the condition for which compensation was claimed did not arise from claim-

ant's employment. The referee and the Workers Compensation Board denied the claim. The Court of Appeals reversed and directed the board to order acceptance of the claim. *Elwood v. SAIF,* 67 Or App 134, 676 P2d 922 (1984). Having allowed review to consider the question of discharge as a causative factor in an occupational disease claim, we reverse and remand the decision to the Court of Appeals.

Because the Court of Appeals has the final word on disputed factual issues, we do not recite the medical evidence in detail. *Sahnow v. Fireman's Fund Ins. Co.,* 260 Or 564, 491 P2d 997 (1971). In holding claimant's "mental disorder" compensable, 67 Or App at 141, 676 P2d at 925, the Court of Appeals made a number of findings necessary to support its conclusion. The court summarized claimant's testimony that she believed other nursing personnel showed disrespect for her and encouraged others to disrespect her, denigrated her work, blamed her for the disappearance of patients' drugs and alcoholic beverages, and apparently sought to force her to quit her job. The employer denied that it wanted to force claimant

to resign, but eventually it did request and received her resignation.

The court found that "numerous events and conditions of the employment, including her termination, were real and capable of producing stress when viewed objectively," that she suffered from a "mental disorder" for which she was given medication, that her illness was a reason for her requested resignation, and that "real,' stressful events and conditions of plaintiff's employment, including the termination, when compared to the non-employment exposure, were the major contributing causes of her mental disorder." 67 Or App at 138-39, 676 P2d at 924-25. These findings satisfy the criteria for compensability of a psychological occupational disease as stated in *McGarrah v. SAIF, supra,* except for one problem. The problem is the court's inclusion of claimant's "termination" among the "stressful events and conditions of [her] employment" that made the resulting mental disorder compensable.

The insurer argues that the event of termination is not a risk of the employment but rather a removal from the risks of the employment, that claimant's depression did not arise from her job duties but from her release from those duties, and that therefore it did not "arise out of and in the scope of the employment" for purposes of the occupational disease law. Claimant responds that the Court of Appeals referred to her termination not as a cause in isolation but in the context of other stressful events that all were part of her "work experience" leading to her mental disorder.

It is not strictly accurate to say that termination (and its attendant stress) is not a risk of employment; indeed, logically termination can only be a risk of employment as death can be a risk only of life. The question of compensability cannot be answered in terms of causation. It is entirely plausible that a person might suffer a more devastating psychological reaction to losing a job than to being without a job. Nor can it be answered on the assumption that the stress

of termination begins at the moment when the employment ends, for that is not necessarily so, for instance, when an employee is told that her job will terminate six months in the future and in consequence worries herself into a mental illness.

If an employee is demoted and develops a mental illness as a result of the events of the demotion or the changed status or assignment, it would be difficult to argue that the illness was not "work connected" as that concept was used in *Rogers v. SAIF*, 289 Or 633, 616 P2d 485 (1983). Nevertheless, we agree with the insurer that the occupational disease law did not make illness from losing a job a compensable risk of the job. It would be anomalous to compensate for the mental distress consequent upon loss of employment more than for the traditionally more likely strains of such a loss on the unemployed person's physical health, yet the concept of occupational disease has not been extended to malnutrition and inadequate medical care resulting from loss of employment.

The line, we think, runs between illness resulting from the stress of actual or anticipated unemployment, which is not compensable, and illness resulting from the circumstances and manner of discharge, which can be regarded as events still intrinsic to the employment relationship before termination and can lead to compensation. Such events might produce a stress-caused illness irrespective of unemployment, even, for instance, if the employee knew that a better job was available elsewhere. Like many distinctions in the law, this line may not always be clear and sharp in the great factual variety of discrete instances. The reviewing tribunals must take care not to introduce fault concepts into the compensation law. The principle, however, is that stressful events accompanying the discharge can make a resulting illness compensable; illness resulting from the mere act of discharge and loss of the job is not.

The Court of Appeals opinion twice speaks of "including" the discharge among the stressful events and conditions of plaintiff's employment that led to her mental disorder. From the court's phrasing, we cannot be certain whether the court considered the circumstances of the employer's request for claimant's resignation as one aggravating element among others that caused her illness, or whether it believed that she became ill in substantial part because she lost her job. Because this court does not make such factual determinations for itself, we reverse the decision of the Court of Appeals and remand the case to that court for further proceedings.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Kevin D. Wheeler, Claimant.

WHEELER,
Petitioner - Respondent on Review,

v.

BOISE CASCADE CORPORATION,
Respondent - Petitioner on Review.

(81-06963; CA A26809; SC S30467)

In Banc

On review from the Court of Appeals.*

Argued and submitted May 2, 1984.

Michael T. Garone, Portland, argued the cause for petitioner - respondent on review. With him on the brief was Jolles, Sokol & Bernstein, P.C., Portland.

Alan M. Muir, Portland, argued the cause for respondent - petitioner on review. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

CAMPBELL, J.

The decision of the Court of Appeals is reversed.

* Judicial review from Workers' Compensation Board. 66 Or App 620, 675 P2d 499 (1984).

CAMPBELL, J.

This case arises as a result of an occupational disease claim filed on April 6, 1981. The hearings referee held that the claim was compensable citing *Hutcheson v. Weyerhaeuser,* 288 Or 51, 602 P2d 108 (1979). The Workers' Compensation Board on review reversed the referee stating that the claimant did not satisfy the requirements that: (1) the work conditions caused a worsening of the underlying disease, *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979); and (2) that work conditions were the major cause of the worsening, *SAIF v. Gygi,* 55 Or App 570, 639 P2d 655 (1982).

The Court of Appeals reversed the Board by distinguishing *Hutcheson* and *Weller.* The Court of Appeals held that the record did not support the *Weller* and *Stupfel v. Edward Hines Lumber Co.,* 288 Or 39, 602 P2d 264 (1979), requirement that there be a worsening of the underlying condition. However, it held that because the claimant had been asymptomatic and not receiving medical care for his disease until he started work that the claim was compensable under *Hutcheson.* We reverse.

The following facts are excerpted from the Court of Appeals opinion and the Board's record. In the fall of 1979 after graduating from high school, claimant got a job at

Anderson's Plywood as a glue spreader. While there, he suffered from a rash caused by "glue poisoning." The condition cleared up with medical treatment. He was laid off because of personnel cutbacks in February 1980 and remained unemployed until June 1980 when he went to work for Boise Cascade. He worked various jobs until October 1980 when he was permanently assigned as a green chain off bearer.

During the summer of 1980, claimant got a rash but it cleared up during the winter of 1980. By March 1981 the rash was again bothering claimant and he missed four or five days of work.

On April 6, 1981, claimant filled out a claim of Occupational Injury or Disease on which he claimed to be allergic to hemlock and glue. On April 14, 1981, the claim was "accepted" by Boise Cascade and claimant went to the doctor for diagnosis and treatment. Claimant was referred to a

dermatologist who diagnosed the problem as atopic dermatitis, an inherited predisposition to have sensitive skin. The dermatologist noted the following:

> "1) I feel fairly certain from the history that Mr. Wheeler has had a history of atopic dermatitis that began prior to his exposure at Boise Cascade.
>
> "2) I feel that his work activity has probably caused this problem to become symptomatic. Atopic individuals don't do well doing heavy exercise and activity which causes the patient to perspire. Many doctors feel that there is a defective sweat mechanism in these individuals.
>
> 3) His normal living activities probably did contribute to his problem in that he was using fairly harsh body soaps and also was showering frequently because of the heavy perspiring that he does in his occupation.
>
> "4) I feel that the skin rash is a symptom of a pre-existing underlying condition.
>
> "5) As far as working at Boise Cascade causing the underlying worsening of the pathological condition I think that's debatable. Probably not. The individual may become symptomatic any time that his skin becomes dry or he has excess perspiration or wears clothing that may be irritating to the skin. He will always have a skin which will be easily irritated and may flare up at any time. With the passing years these problems may become less symptomatic.
>
> "6) As far as the clinical findings which support that conclusion I would feel that there are few objective findings except that the scaling of the skin leads me to believe he does have an atopic diathesis. From what I know about atopic individuals these individuals do get worse when they exercise and perspire. This could easily happen to persons not working however, and working out in the gym."

On June 2, 1981, Boise Cascade, based on the information from medical reports, denied that the medical problem was compensable.

At oral argument claimant argued that as a matter of law Boise Cascade could not deny the claim once it had accepted the claim. He cited as authority *Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983). In *Bauman*, this court ruled that:

"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."

In *Bauman,* SAIF specifically accepted a claim as compensable and provided the claimant with an acceptance letter. SAIF then paid medical benefits for a period of three years before reversing its decision and denied compensability of the claim.

The controlling language in *Bauman* for this case is:

"If, as in this case, the insurer officially notifies the claimant that the claim has been accepted, *the insurer may not, after 60 days have elapsed,* deny the compensability of the claim unless there is a showing of fraud, misrepresentation or other illegal activity." 295 Or at 794. (Emphasis added.)

The record in this case shows that Boise Cascade denied compensability within the 60-day time period. Therefore *Bauman* does not prohibit the denial of this claim.

The second issue raised is whether, in awarding compensation, the *Weller* critera can be set aside because *Hutcheson* created its own test for claimants who were asymptomatic before beginning employment.

The Court of Appeals rationale for distinguishing *Weller* and *Hutcheson* is as follows:

"If there is a distinction between *Weller* and *Stupfel,* on the one hand, and *Hutcheson,* on the other, it is not articulated in the court's opinions. However, the opinions were written with all three cases in mind; we assume, therefore, that there is a distinction, and we believe that it lies in the fact that in *Weller* and *Stupfel,* the claimants apparently were receiving medical attention before the claimed exacerbations of the symptoms at work. Therefore, the court held that the exacerbations were not compensable, because there was no worsening of the claimants' underlying conditions for which they were being treated. In *Hutcheson,* however, the claimant was asymptomatic and not being treated at the time of the exacerbation of symptoms at work. The court expressly stated that the mill conditions caused temporary exacerbation of the claimant's preexisting condition 'so as to require medical services *that would not have otherwise been necessary* * * *.'" *Wheeler v. Boise Cascade,* 66 Or App 620, 623, 675 P2d 499 (1984).

We disagree. *Hutcheson* is only an application of the rule in *Weller.* The requirements for a claimant to prevail were set forth in *Weller*[1] as follows:

"* * * we believe that in order to prevail claimant would have to prove by a preponderance of evidence that (1) his work activity and conditions (2) caused a worsening of his underly-

[1] In *Weller v. Union Carbide,* 288 Or 27, 602 P2d 108 (1979), claimant injured his back in a nonindustrial accident. His work as a crane operator caused pain but did not cause or aggravate his underlying disease. The *Weller* decision turned on the fact that element (2) of the test was not met, *i.e.,* a worsening of the underlying disease.

ing disease (3) resulting in an increase in his pain (4) to the extent that it produces disability or requires medical services." 288 Or at 35.

The analysis in *Weller* was the analysis in *Stupfel*[2] and *Hutcheson*.[3] The points of *Hutcheson* were that (1) to be compensable, an occupational disease or injury does not have to *permanently* worsen the *condition,* (2) the level of proof necessary to substantiate a claim is by a preponderance of evidence and (3) the record in *Hutcheson* was strong enough to conclude that the preexisting *condition* was exacerbated, thus satisfying the *Weller* criteria.

The Court of Appeals in its analysis created a distinction that was not there. It did find that the underlying condition did not worsen and that the *Weller* criteria were not met. We are bound by the finding of fact that the underlying condition did not worsen. *Sahnow v. Fireman's Fund Inc. Co.,* 260 Or 564, 491 P2d 97 (1971). Therefore the plaintiff in this case cannot recover.

We hold that the *Weller* analysis is the appropriate analysis whether the conditions are symptomatic or

asymptomatic at the time of employment. The decision of the Court of Appeals is reversed and the decision of the Workers' Compensation Board is reinstated.

[2] In *Stupfel v. Edward Hines Lumber Co.,* 288 Or 39, 602 P2d 264 (1979), claimant suffered from chronic obstructive pulmonary disease and reactive airway disease. It was determined that the diseases were not caused by his work but that the work environment increased his symptomology. It was also determined that the work environment did not alter the progression of his underlying diseases. The four-part *Weller* . test was applied and because the underlying condition was not worsened by the work conditions, an increase in symptomology was not compensable.

[3] In *Hutcheson v. Weyerhaeuser,* 288 Or 51, 602 P2d 108 (1979), claimant suffered from a chronic obstructive pulmonary disease, sinusitus and bronchitis. The disease was originally caused by smoking but the evidence showed work conditions temporarily exacerbated the pre-existing "chronic obstructive pulmonary disease, sinusitus and bronchitis so as to require medical services that would not have otherwise been necessary." 288 Or at 56.

IN THE SUPREME COURT OF THE STATE OF OREGON

WILLIAMS,
Petitioner on Review,
v.
WATERWAY TERMINALS COMPANY,
Respondent on Review.
(A8108-05154; CA A27781; SC S31113)

In Banc

On review from the Court of Appeals.*

Argued and submitted December 13, 1984.

Douglas A. Swanson, of Royce, Swanson & Thomas, Portland, argued the cause and filed the petition and briefs for petitioner on review.

Paula B. Weiss, of Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland, argued the cause and filed the response and brief for respondent on review.

James L. Edmunson, Eugene, filed an amicus curiae brief on behalf of the Oregon Workers' Compensation Attorneys Association.

Henry H. Drummonds, of Kulongoski, Heid, Durham & Drummonds, Portland, filed an amicus curiae brief on behalf of the Oregon Education Association, Oregon AFL-CIO, Teamsters Local 670, American Federation of State, County and Municipal Employees Council 75, and United Food and Commercial Workers Local 1092.

JONES, J.

The Court of Appeals is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

* Appeal from Multnomah County Circuit Court, Richard Maizels, Judge Pro Tempore. 69 Or App 388, 686 P2d 441 (1984).

JONES, J.

This is a suit for relief under ORS 659.121 for an alleged violation of ORS 659.415. Plaintiff's complaint alleges that defendant, his former employer, committed an unlawful employment practice as defined by ORS 659.415, by failing to reinstate plaintiff after he sustained a compensable injury under the Workers' Compensation Act. At the relevant time, ORS 659.415 provided:

> "(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment or employment which is available and suitable upon demand for such reinstatement, provided that the worker is not disabled from performing the duties of such position. A certificate by a duly licensed physician that the physician approves the worker's return to the worker's regular employment shall be prima facie evidence that the worker is able to perform such duties.

"(2) Any violation of this section is an unlawful employment practice."

ORS 659.121(1) allows a civil action for violations of ORS 659.415(1) and at the relevant time provided:

> "Any person claiming to be aggrieved by an unlawful employment practice prohibited by ORS * * * 659.415 * * * may file a civil suit in circuit court for injunctive relief and the court may order such other equitable relief as may be appropriate, including but not limited to reinstatement or the hiring of employes with or without back pay. * * *"

The facts are not in dispute. Plaintiff (Williams) was employed by defendant Waterway Terminals Company (Waterway) in 1967. On September 17, 1976, Williams sustained a compensable injury and was temporarily totally disabled. Sometime prior to September 25, 1977, he indirectly learned he had been discharged from his employment.[1] He continued to receive workers' compensation benefits. During this time he was under a physician's care and unable to work.

On May 12, 1980, Williams demanded reinstatement to his former position or to another position which was

available and suitable. On May 14, 1980, he presented Waterway with a physician's certificate approving his return to work as of May 12. Waterway refused to reinstate him.

On May 27, 1980, Williams filed a complaint with the Bureau of Labor. On June 10, 1980, Waterway reinstated Williams, but the complaint was not dismissed. On May 27, 1981, the Bureau of Labor issued a Private Right of Action Notice, and in August, 1981, Williams filed this civil action seeking back wages from May 12 to June 10, 1980, reimbursement for medical expenses which would have been covered had he been reinstated on May 12, and attorney fees.

Waterway moved for summary judgment, asserting the trial court lacked jurisdiction either because (1) Williams had no private right of action,[2] or (2) Williams' claim was time-barred. The trial court granted the defendant's motion without stating the ground for its decision.

The Court of Appeals, Rossman, J., dissenting, affirmed the trial court and held that the applicable statute of limitations began to run on the date of Williams' discharge and, consequently, this suit, commenced almost three years after the date of discharge, was time-barred. *See, Williams v. Waterway Terminals Co.*, 69 Or App 388, 686 P2d 441 (1984). We reverse.

The time limitation for filing a complaint with the Bureau of Labor is one year "after the alleged unlawful employment practice." A civil action must also be filed within one year if no complaint to the Bureau of Labor is made. ORS

[1] Williams discovered he was discharged when his wife applied for dental insurance coverage and was refused because of the termination. Neither party has provided the precise date of discharge.

[2] The assertion that the trial court lacked jurisdiction because Williams had no private right of action was based on the effective date of ORS 659.121(1), October 4, 1977. Prior to that date, no private right of action existed. If Williams' discharge in September, 1977, was the relevant date for determining when his claim accrued, no private right of action would have been available.

659.040(1); 659.121(3). Where a complaint is first made to the Bureau of Labor, as in this case, ORS 659.095(1) provides an additional 90 days in which to commence a civil action following notice from the Bureau of Labor that the initial complaint has not been resolved.

The particular issue in this case is when a claim under ORS 659.415 accrues for limitations purposes. The Court of Appeals held that the key date was the date of

Williams' discharge, and that on that date the employment relationship was severed, which necessarily terminated any reinstatement right Williams might have had. According to the Court of Appeals, if Williams' discharge was the result of an unlawful employment practice under ORS 659.410,[3] which prohibits discrimination against workers who apply for workers' compensation benefits, Williams should have filed a complaint with the Bureau of Labor within one year after the discharge occurred.

We agree with the Court of Appeals' premise that discharge severs the employment relationship. However, we disagree with its conclusion that a worker's right to demand reinstatement does not survive an interim discharge occurring before the worker is technically entitled to make a demand for reinstatement under the terms of ORS 659.415.

ORS 659.415(1) is phrased in mandatory terms: The worker "shall be reinstated." This court has previously noted that ORS 659.415, together with ORS 659.410, is an integral part of the legislative scheme to prohibit employment discrimination on the basis of physical or mental handicap. *See, Vaughn v. Pacific Northwest Bell Telephone,* 289 Or 73, 611 P2d 218 (1980). As we stated in *Shaw v. Doyle Milling Co.,* 297 Or 251, 255, 683 P2d 82 (1984):

> "The main purpose of ORS 659.415 is to guarantee that an employer shall not discriminate against a disabled worker for exercising the worker's rights under the Workers' Compensation Law. This statute is but one of a set of statutes reflecting the legislature's concern to prohibit employment discrimination on the basis of handicap. * * *"

If the Court of Appeals' analysis in this case is accepted, an employer may readily circumvent the legislative policy embodied in ORS 659.415 and avoid the clear mandate of the statute. Judge Rossman, in his dissent, offers the following example:

> "* * * [I]f a worker sustains a compensable injury which will disable him for over one year, the employer could terminate the injured worker without any notice. If the worker does not discover that he was terminated within one year, then any cause of action under ORS 659.410 would be time barred under ORS 659.121(3). Once the worker is able to return to

[3] ORS 659.410 provides:

> "It is an unlawful employment practice for an employer to discriminate against a workman with respect to hire or tenure or any term or condition of employment because the workman has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.824, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

> work and demands reinstatement, pursuant to ORS 659.415, the employer would argue that no reinstatement right survived the discharge. Thus, the employer could manipulate and control the worker's statutory right. * * *" 69 Or App at 395 (footnotes omitted).

Judge Rossman's concern is not fanciful. He describes precisely the type of manipulation which permits an employer unilaterally to vitiate the mandate of ORS 659.415 and to thwart the broader legislative scheme, a practice we condemned in *Shaw v. Doyle Milling Co., supra,* 297 Or at 255.

The Court of Appeals majority, by indicating that an action under ORS 659.410 is a prerequisite to an action for reinstatement under ORS 659.415, misconstrues the relationship between the two statutes. Although ORS 659.415 is narrower in scope than ORS 659.410, each describes a separate and independent unlawful employment practice. ORS 659.415(2) specifically designates that any violation of ORS 659.415(1) is an "unlawful employment practice." In *Vaughn v. Pacific Northwest Bell Telephone, supra,* we noted that the Oregon legislature in ORS 659.121(1) did not assign priorities to the various types of employment discrimination. We determined that a worker claiming *any* type of unlawful employment practice listed in ORS 659.121(1) is entitled to bring suit for relief under that statute. 289 Or at 88.

In *Shaw,* we recognized the general rule that "in absence of a contract or statute to the contrary, an employer may discharge an employee at any time and for any cause." 297 Or at 254. However, we also noted that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employe who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone, supra,* that statute requires reinstatement unless the employer had just cause to discharge the employe.

Vaughn involved a question of the proper relationship between a discharged employe's collective bargaining agreement and the relief available under ORS 659.121(1). The plaintiff was refused reinstatement under ORS 659.415(1) after recovering from a compensable injury. As in this case, the employe was terminated prior to her demand for reinstatement. The defendant employer contended, *inter alia,* that because the plaintiff was discharged prior to her demand for reinstatement, she could not bring suit for relief pursuant to ORS 659.121(1) and 659.415 but was limited to the remedies under the collective bargaining agreement. This argument was based on a perceived distinction between nonreinstatement, which is forbidden by the statutes, and discharge, which is not expressly mentioned. We rejected the employer's argument because

> "* * * 'nonreinstatement' and 'discharge' mean the same thing to a worker, and the timing of such a discharge should not by itself determine the worker's forum for seeking a remedy. The scenario of worker discharges following a compensable injury and lost time can fall into two patterns: (1) the worker loses time due to a compensable injury, demands

> reinstatement, and is refused reinstatement, that is, is 'discharged' *after* the demand; or (2) a worker loses time due to a compensable injury, is notified *during* this time that he is discharged, and then demands reinstatement. It might seem that ORS 659.415 requires reinstatement of the worker even if the employer has just cause to 'discharge' by refusing to reinstate, but, as will appear later, nothing in ORS Chapter 659 prevents an employer from discharging a worker for just cause. If the worker is discharged for just cause, the employer can prove this in the grievance proceeding or as a matter of defense in a suit pursuant to ORS 659.121. The worker's right to bring suit for injunctive relief pursuant to ORS 659.121(1) must be based on reasoned policy rather than fortuitous timing." *Vaughn*, 289 Or at 79-80 (emphasis in original).

The second scenario is essentially the situation in this case. We suggested in *Vaughn*, and we hold in this case, that a worker's statutory reinstatement right under ORS 659.415(1) cannot be lost due to fortuitous timing. The right to demand reinstatement survives any interim discharge occurring before the worker is entitled, under the terms of the statute, to assert that statutory right. Otherwise the statutory

right embodied in ORS 659.415 could be so readily circumvented in many cases that this could not have been intended in the statutory scheme.

A claim under ORS 659.121(1) may arise from a violation of one of a number of separately defined unlawful employment practices. The date on which the claim accrues is determined by the alleged unlawful practice. ORS 659.040(1). For example, retaliatory discharge of an employe who applies for workers' compensation benefits is prohibited by ORS 659.410. A civil claim under ORS 659.121(1) alleging a retaliatory discharge would accrue upon discharge, the date of the alleged unlawful employment practice.

In this case, Williams alleged a violation of ORS 659.415(1). The statute prohibits nonreinstatement of a worker provided the worker is no longer disabled from performing his duties. No unlawful employment practice claim could accrue until Williams (1) was able to perform his duties, (2) demanded reinstatement, and (3) was refused. The claim did not accrue, nor did the time limitation begin to run, until May 12, 1980, when Williams was (1) able to return to work, (2) demanded reinstatement and (3) was refused by his employer.

Williams made a timely filing with the Bureau of Labor in May, 1980, after defendant refused to reinstate him. His subsequent filing with the Multnomah County Circuit Court in August, 1981, was also timely filed. The summary judgment in favor of defendant is reversed, and the case remanded to the trial court for further proceedings not inconsistent with this opinion.

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