VAN NATTA'S WORKERS' COMPENSATION REPORTER

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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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CONTENTS

CITE AS

37 Van Natta ___ (1985)

PAUL W. BRYAN (Deceased), Claimant
Doblie & McSwain, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-03334
October 1, 1985
Order Dismissing Request for Review and Remanding

The insurer requests review of Referee St. Martin's letter order denying its motion to dismiss the request for hearing pursuant to OAR 438-06-070. In his order, the Referee states: "The motion to dismiss is hereby denied and the case will be set down for hearing in due course." We have previously held that such an order is an interim order and not subject to review by the Board. Gerald L. Morris, 36 Van Natta 1684 (1984); Michael T. Simovic (Deceased), 36 Van Natta 1131 (1984); Harris E. Jackson, 35 Van Natta 1674 (1983). See also Price v. SAIF, 296 Or 311, 315 (1984).

However, the insurer has pointed out that in our recent case of James R. Drew, 37 Van Natta 570 (1985), we employed language that can be read to require that a party, in order to preserve a motion to dismiss, must request review of the motion's denial within 30 days. We have reviewed the language in Drew and we agree with the insurer that a literal reading of the case appears to require the absurd; that is, that to preserve an argument a party must appeal from a nonappealable order. To the extent that James R. Drew, supra, requires that result, it is overruled.

A Referee's decision to deny a motion to dismiss a request for hearing is not a final order and is not subject to Board review until a final order is issued. The insurer's request for Board review is dismissed as premature. This matter is remanded to the Hearings Division for further proceedings.

IT IS SO ORDERED.

OLIVE J. ELWOOD, Claimant
Ackerman, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 80-10264
October 10, 1985
Order on Remand

This matter is before the Board on remand from the Court of Appeals after decision by the Supreme Court. Elwood v. SAIF, 67 Or App 134 (1984), rev'd and remanded, 298 Or 429 (1985). We have been instructed to order claim acceptance. Therefore, the SAIF Corporation's denial of claimant's occupational disease claim for mental stress dated October 30, 1980 is set aside and the SAIF Corporation shall accept claimant's claim for processing and closure according to law. Attorney fees having been awarded to claimant's attorney by the Court of Appeals pursuant to ORS 656.386(1), no additional attorney fees are awarded.

IT IS SO ORDERED.

GEORGE A. STEAGALL, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-12942
October 10, 1985
Order Denying Attorney Fee

Claimant has petitioned for an award of attorney fees following our dismissal of the SAIF Corporation's request for Board review on SAIF's motion. Claimant cites SAIF v. Bond, 64 Or App 505 (1983), as authority for his petition. SAIF v. Bond, supra, was overruled by Agripac, Inc. v. Kitchel, 73 Or App 132, 135 (1985). We have concluded, based upon Agripac, Inc. v.

Kitchel, supra, that dismissal of a request for Board review prior to a decision on the merits of a case does not authorize an attorney fee for "prevailing" on an insurer or employer appeal under ORS 656.382(2). Rodney C. Strauss, 37 Van Natta 1212 (WCB Case Nos. 84-10699 and 84-13439, September 12, 1985). Claimant's petition for attorney fees is denied.

IT IS SO ORDERED.

SANDRA L. WALKER, Claimant
Jim Vick & Assoc., Claimant's Attorneys
Daniel DeNorch, Defense Attorney

WCB 84-09974
October 10, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee T. Lavere Johnson's order which upheld the insurer's de facto denial of claimant's medical services claim for dietary supplements.

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant has established that her claim for dietary supplements was reasonable and necessary treatment for her compensable back condition. Accordingly, we affirm the order of the Referee. See also Floyd L. Wiebe, 37 Van Natta 1295 (September 30, 1985).

ORDER

The Referee's order dated March 25, 1985 is affirmed.

MERLE L. BUCKLEY, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-10672
October 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of those portions of Referee Myers's order that: (1) found claimant to be permanently and totally disabled; and (2) found claimant's psoriasis condition to be the compensable result of claimant's compensable injury. Claimant cross-requests review of those portions of the order that: (1) failed to award an insurer-paid fee for claimant's successful defense at hearing of the compensability of claimant's psoriasis condition; and (2) found the effective date of claimant's award of permanent total disability to be the date of the hearing. Claimant also refers us to what appears to be a typographical error in the Referee's order; the order awards temporary total disability for the period from September 6, 1984 through February 8, 1984. The Order should read September 6, 1984 through February 8, 1985. The Referee's order shall be corrected to reflect the appropriate dates.

The issues on review are whether claimant has proved entitlement to an award of permanent total disability, the compensability of the psoriasis condition, an insurer-paid attorney fee for defending the compensability of that condition, and the effective date of the permanent total disability award.

We affirm the Referee's order with regard to the award of permanent total disability, the effective date of the award and the compensability of claimant's psoriasis condition. We agree

with claimant that he is entitled to an insurer-paid attorney fee for successfully defending the compensability of the psoriasis condition at hearing. ORS 656.386(1). A reasonable fee shall, therefore, be awarded. Because the benefit attained by claimant as a result of the defense will be limited to continuing medical services, however, the fee shall be minimal.

ORDER

The Referee's order dated April 15, 1985 is affirmed in part and modified in part. Those portions of the order that awarded claimant permanent total disability, found the effective date of the award to be the date of the hearing and held claimant's psoriasis condition to be compensable are affirmed. The remainder of the Referee's order is modified. Claimant's attorney is awarded a fee of $350, to be paid by the SAIF Corporation, for successfully defending the compensability of claimant's psoriasis condition at hearing. For successfully defending the compensability of that condition before the Board, claimant's attorney is awarded a fee of $150, to be paid by the SAIF Corporation. For successfully defending claimant's award of permanent total disability before the Board, claimant's attorney is awarded a fee of $650, to be paid by the SAIF Corporation. The Referee's order is further modified to correct the dates for payment of claimant's temporary total disability compensation. Claimant shall be entitled to temporary total disability compensation for the period from September 6, 1984 through February 8, 1985.

LYNDA J. DEAN, Claimant
Pozzi, et al., Claimant's Attorneys
Leonard Pearlman, Assistant Attorney General
James L. Emerson, Attorney, WCB

WCB CV-85003
October 11, 1985
Order Appointing Special Hearings Officer

This matter is before the Board on claimant's request for hearing concerning the Department of Justice's Findings of Fact, Conclusions and Order on Reconsideration dated August 19, 1985 which denied compensation to claimant under the Victims of Crime Compensation Act (ORS Chapter 147). Claimant has requested an evidentiary hearing.

Pursuant to OAR 438-82-035, we appoint James L. Emerson, Senior Staff Attorney to the Board, as special hearings officer to conduct a hearing herein. Further, it appearing that the presence of the Department of Justice is desirable for a full determination of the issues herein, the Department of Justice is hereby requested to participate as a party herein.

We direct that the request for hearing be processed and the hearing conducted in accordance with ORS 147.115, ORS 147.155, OAR 438-82-035 and OAR 438-82-040. The special hearings officer may consider only such documentary evidence as has been considered by the Department of Justice in rendering its orders herein. Only those persons whose statements were considered by the Department of Justice will be permitted to testify at the hearing.

Within 30 days after the hearing is closed, the special hearings officer shall prepare and forward to the Board recommended findings of fact and conclusions of law. A record of the oral proceedings shall also be made and forwarded to the Board within 30 days (for transcription, if necessary).

IT IS SO ORDERED.

JAMES E. HURTT, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-11103
October 11, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Seifert's order which increased claimant's unscheduled permanent disability award for a low back injury from 20% (64°), as awarded by an October 11, 1984 Determination Order and prior awards, to 60% (192°). Claimant cross-requests review, contending that he is entitled to an increased award of permanent disability, including permanent total disability. We find that claimant's award should be reduced. Consequently, we modify the Referee's order.

Claimant was 33 years of age at the time of hearing. In August 1978, while employed as a city maintenance worker, claimant sustained a low back injury when he attempted to lift a sump pump. Claimant's condition was diagnosed as acute lumbosacral strain with probable herniated disc. X-rays and a myelogram were normal.

Following conservative treatment, claimant was found medically stationary in January 1980 by Dr. Cronk, orthopedist. Claimant was released to work as a truck driver, subject to a heavy lifting and repetitive bending limitation. Dr. Cronk suggested a 25 pound lifting limitation, opining that claimant would probably be unable to work as a heavy laborer and would require a more sedentary job.

In February 1980 a Determination Order issued awarding claimant 5% permanent disability. An August 1980 stipulation increased claimant's permanent disability award to 15%.

Claimant apparently returned to the labor force in the summer of 1980, working as a caterpillar operator for a lumber company for about four months. From approximately October 1980 to August 1981 claimant drove a log truck. This employment ended when his employer went out of business.

In November 1982 claimant's back pain increased, prompting his return for medical treatment and the reopening of his claim. Following another period of conservative treatment and diagnostic consultations, an April 1983 CT scan revealed a large herniated central disc. In June 1983 Dr. Tsai, neurosurgeon, performed a bilateral L4-5 laminectomy.

In October 1983 Dr. Tsai reported that claimant's neurological examination was entirely within normal limits except for some limitation of range of motion. Dr. Tsai released claimant to work as a gravel dumptruck driver. However, this position apparently never materialized on a permanent basis.

In December 1983 Dr. Luce performed an independent medical examination. Dr. Luce had previously examined claimant in February 1983, as well as immediately after claimant's 1978 injury. Opining that claimant was currently disabled from his normal occupation or any occupation for which he had been trained, Dr. Luce suggested retraining and rehabilitation, including a pain center referral.

In January 1984 claimant was evaluated at the Callahan Center. Testing revealed claimant possessed good reading skills and generally average aptitude skills. Further evaluation was deferred, primarily because claimant had suffered an exacerbation of injury and also due to his dissatisfaction at not being referred to a pain center.

The Orthopaedic Consultants performed an independent medical examination in January 1984. The Consultants diagnosed chronic lumbosacral strain, status post-surgery, and undocumented functional overlay. Finding claimant's condition stationary, the Consultants suggested that he return to work requiring less demands than truck driving or operating heavy equipment. Bartending was also thought to be too physically demanding.

In August 1984 claimant was reexamined by Dr. Luce. Claimant had not seen Dr. Luce since March 1984. Claimant was not taking medications, but was experiencing low back pain, headaches, and intermittent episodes of left leg weakness. Noting a mild limitation of motion and minimal tenderness, Dr. Luce diagnosed chronic low back syndrome which was currently stable. Dr. Luce opined that claimant was "left with a permanent partial disability as a result of his injuries and he should be returned to a suitable occupation in the near future."

A Determination Order issued in October 1984. Claimant was awarded an additional permanent disability award of 5%, giving him a total award at that time of 20% unscheduled permanent disability.

In February 1985 Dr. Scheinberg, orthopedist, performed an independent medical examination. Dr. Scheinberg reported that claimant had been performing auto mechanic work at home and intended to open his own garage, provided he obtained sufficient capitalization. Dr. Scheinberg suggested a 50 pound lifting and carrying limitation. Claimant could bend, squat, and crawl only on an infrequent basis. In Dr. Scheinberg's opinion these limitations prevented claimant from operating heavy equipment or returning to his previous heavy work activities. Dr. Scheinberg further opined that claimant was capable of performing light to medium work activity.

In March 1985 claimant returned to Dr. Luce. Claimant's complaints included low back pain, which radiated into his left leg. This pain caused claimant to frequently change positions and had resulted in severe insomnia. Dr. Luce placed claimant under a 25 pound lifting restriction and recommended that he limit his bending, twisting and pulling activities to occasional episodes with low weights. Dr. Luce suggested that claimant could stand in one position without movement for no more than 15 minutes. In Dr. Luce's opinion claimant's goal of operating a mechanic shop was reasonable, provided it was at his own pace.

Claimant experiences constant low back pain. The pain is

generally at the beltline, but extends into his legs, primarily the left leg. His feet and toes become numb on an intermittent basis. Claimant suffers back spasms approximately two to three times a month that can incapacitate him for several days. These spasms, which are frequently accompanied by severe headaches, are generally the result of claimant's exceeding his physical limitations. He can sit comfortably for ten to thirty minutes, but can only stand for five minutes before his "back starts really hurting." Claimant could lift 15 to 20 pounds "without too much trouble as long as I don't do it all the time." He could carry 30 to 40 pounds unless bending or squatting was involved. As a result of his pain and limitations claimant no longer participates in many of the recreational activities he once enjoyed.

Claimant has an 11th grade education, but received his GED while serving in the U.S. Navy as a machinist mate. He has also completed one term at a community college in auto mechanics. The majority of his work experiences have involved heavy physical labor. These experiences include activities as a carpenter-framer, timber faller, sawmill laborer, and maintenance worker.

Since his surgery claimant has sought work as a truck driver, mechanic and oyster grader. He has briefly worked, performing minor auto repairs and repairing fences for an animal preserve. Claimant was willing to attempt truck driving, but felt he would need a "good comfortable seat" and be able to make frequent stops. He acknowledged that some phases of truck driving might exceed his physical limitations. Claimant felt he could be a full-line mechanic, provided he obtained certification and could use modern equipment such as hydraulic hoists and jack stands to accommodate his physical problems.

The evidence preponderates that as a result of his compensable injury claimant has sustained permanent impairment. This impairment has restricted claimant's ability to perform the work activities for which he is otherwise ably suited. In addition, claimant's impairment and physical limitations have reduced the transferability of his marketable skills. Thus, claimant has suffered a permanent loss of earning capacity due to his compensable injury. See ORS 656.215(5). However, we are not persuaded that claimant is entitled to an award of 60% permanent disability.

In rating the extent of claimant's permanent disability we consider claimant's physical impairment, which includes his testimony concerning disabling pain, and all of the relevant social and vocational factors set forth in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985). We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). After completing our de novo review of the medical and lay evidence, and considering the above-mentioned guidelines, we conclude that an award of 30% unscheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated March 27, 1985 is modified in part. In lieu of the Referee's award and in addition to the 20% (64°) unscheduled permanent disability awarded by the October 11, 1984 Determination Order and prior awards, claimant is awarded 10%

(32°), for a total award to date of 30% (96°). Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

FRANK L. LOMAS, Claimant
J.W. McCracken, Jr., Claimant's Attorney
G. Howard Cliff, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-08703 & 84-08702
October 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Industrial Indemnity requests review of that portion of Referee Seymour's order that set aside its denials of compensability of and responsibility for claimant's low back condition. The SAIF Corporation cross-requests review of that portion of the order that set aside its denial of responsibility as procedurally improper and void ab initio. The issues on review are compensability, responsibility, and procedure.

Claimant injured his back while working as a truck driver for SAIF's insured on November 8, 1983. While his claim was still open, claimant obtained a release from his treating doctor for a trial of truck driving to determine whether he could tolerate the effort. He obtained a truck driving job with Industrial Indemnity's insured. He did not reveal that he had a back injury claim in open status. He worked for two months with some continuing symptoms of pain and discomfort. On July 26, 1984 he suffered a new strain injury to his low back in the course of his employment with Industrial Indemnity's insured.

Claimant filed a new injury claim with Industrial Indemnity, which it denied as not related to claimant's employment with its insured. SAIF issued a partial denial for the reason that it should not be responsible for compensation after the subsequent injury. SAIF moved for entry of an order designating a paying agent under ORS 656.307, but Industrial Indemnity's denial of compensability prevented its issuance.

The Referee set aside SAIF's partial denial as a procedurally improper attempt to close its accepted claim according to Maddocks v. Hyster, 68 Or App 373 (1984); Roller v. Weyerhaeuser Co., 67 Or App 583 (1984); and Safstrom v. Riedel International Inc., 65 Or App 738 (1983). We considered a similar situation in Jimmy C. Lay, 37 Van Natta 583 (1985). We decided:

> "[T]hat it is the better policy to allow an employer/insurer to issue a preclosing denial of continued responsibility for an accepted condition where it appears that injuries or conditions attributable to a subsequent employment aggravate or exacerbate the condition such as to make a shift of employer/insurer responsibility appropriate." 37 Van Natta at 584.

The underlying policy goals are to insure that a claimant is properly compensated by someone for his work-related disabling condition and that the employer responsible for the disabling condition is responsible for the compensation. See Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). Therefore, we reverse that portion of the Referee's order which set aside SAIF's denial of responsibility.

We perceive that the facts of this case give rise to a procedural dilemma. The first injury insurer cannot obtain closure of the first injury claim because the evidence does not establish that claimant was medically stationary by the time of the second injury, nor was claimant released to return to his regular work. See Jackson v. SAIF, 7 Or App 109 (1971). On the other hand, claimant's disability after a certain date was due to a superseding intervening work-related event for which the first injury insurer was not responsible. Because there was a question whether claimant could return to his regular work, the vocational rehabilitation counselor remained in contact with claimant pending a determination whether rehabilitation services would be provided. When the first injury insurer learned of the subsequent disabling injury to the same body part, it issued its partial denial of continuing responsibility because of the intervening injury. It could not have issued or obtained a closure of the first injury claim. The subsequent employer's insurer denied compensability, thus preventing issuance of a .307 order.

In these circumstances, we believe that the policies of the Workers' Compensation Act, as expressed at ORS 656.012, are best carried out by requiring the first injury insurer to continue to process the claim until the first determination that a subsequent insurer is responsible for compensation. See Retchless v. Laurelhurst Thriftway, 72 Or App 728, rev. den., 299 Or 251 (1985). Once there is a determination that a subsequent insurer is responsible for compensation, the first injury insurer must close the first injury claim as soon as possible by Notice of Closure or Determination Order according to ORS 656.268. This procedure will provide a basis for maintaining support for claimant pending determination of ultimate responsibility and provide a reasonably contemporaneous assessment of claimant's permanent impairment due to the first injury with apportionment appropriately assigned among the responsible parties. If the dispute concerning responsibility continues, all parties' rights will be protected procedurally while claimant continues to receive the maintenance compensation he needs while recovering from his industrial injury or injuries. See Mary G. Mischke, 37 Van Natta 1155 (August 30, 1985).

On the issues of compensability and responsibility, the Board affirms the Referee's order. See John B. Bruce, 37 Van Natta 135 (1985).

ORDER

The Referee's order dated February 26, 1985 is reversed in part, modified in part, and affirmed in part. That portion of the order that set aside the denial of the SAIF Corporation and ordered it to continue making compensation payments to claimant is reversed. That portion of the order that allowed Industrial Indemnity not to make compensation payments to claimant is modified to require Industrial Indemnity to reimburse SAIF for claims costs to date since July 26, 1984 and to relieve SAIF of the requirement to make compensation payments to claimant as of July 26, 1984. The remainder of the order is affirmed. The claim is remanded to Industrial Indemnity for processing according to law. Claimant's attorney is awarded $100 for services relating to the issue of compensability on Board review, to be paid by Industrial Indemnity.

IRENE D. STAPLETON, Claimant
Welch, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-04377
October 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Leahy's order that set aside its denial of claimant's myocardial infarction claim. The sole issue on review is compensability.

Claimant was a 61-year-old sales clerk when, on the evening of January 25, 1983, an armed robber entered the department store in which she was employed and demanded money from her till. Claimant complied, the robber left the store, and claimant left work for the day. She was badly shaken, but physically unharmed.

Claimant spent a quiet evening at home with her family and was able to return to work for her next regular shift. Although she remained somewhat tense while at work, claimant was able to complete her duties. She worked three full shifts following the robbery, the last shift being on a Saturday.

After retiring Saturday night, claimant was awakened with what she thought was indigestion. She arose, took an antacid and returned to bed. When her symptoms worsened, however, claimant went to the emergency room of a Portland hospital. She was immediately diagnosed as having suffered a myocardial infarction. The infarct slightly damaged the heart's left ventricle, but subsequent arteriography revealed the presence of only a moderate occlusion in one of the lesser coronary arteries. Because of the favorable arteriogram results, claimant was released from the hospital only four days after the infarction, and no radical treatment was prescribed.

After her release from the hospital, claimant filed a Form 801 with her employer, asserting that she had suffered a myocardial infarction as a direct result of the armed robbery. The claim was denied.

While in the hospital, claimant was treated by Dr. Crislip, a cardiologist. It was Dr. Crislip's initial opinion that while there was a possible relationship between claimant's heart attack and the stressful incident at work, the relationship was uncertain due to the extended period between the incident and the onset of the infarction.

Dr. Crislip later changed his opinion, however, and testified at the hearing that claimant's stressful work incident was the probable cause of her heart attack. It was his opinion that the stressful event led to a release of adrenaline into claimant's bloodstream, causing the blood platelets to become sticky. This resulted in a blood clot that settled in the partially occluded area of claimant's peripheral coronary artery, causing a reduced oxygen flow to claimant's myocardium, resulting in the infarction. Dr. Crislip's opinion assumed that claimant remained in a highly agitated state for the several days between the armed robbery and the infarction.

The insurer produced the testimony of two cardiologists at hearing. Dr. Rhoades opined that the time between the robbery and the onset of symptoms was too great to suggest a causal relationship between the two events. Dr. Kloster agreed, noting

that when adrenaline is released into the bloodstream, it generally dissipates within 30 minutes to one hour. Along with the adrenaline dissipation goes the blood platelet stickiness. Dr. Kloster was of the opinion that if claimant were to have had an infarction as a result of the stressful work incident, it would have occurred within only a short time thereafter, rather than four days later.

Both Drs. Rhoades and Kloster were essentially of the opinion that claimant's myocardial infarction was coincidental with, rather than precipitated by, the robbery. They opined that claimant's partially occluded artery predisposed her to an infarction, and that it was not surprising that she had one when she did. Both cardiologists felt that the presence of the partially occluded artery meant that claimant could have an infarction at any time.

After considering the evidence, the Referee found the claim compensable. He accepted the opinion of Dr. Crislip as the most persuasive. The Referee was impressed by the fact that shortly before the heart attack claimant underwent her annual physical, which included an electrocardiogram, and was found to be in good health without evidence of cardiovascular disease. He also found Dr. Crislip's testimony regarding the mechanism of a delayed myocardial infarction to be uncontradicted by the defense experts.

In order to establish the compensability of her heart attack, claimant must prove that it was both legally and medically caused by the stressful event at work. Bush v. SAIF, 68 Or App 232 (1984); Coday v. Willamette Tug and Barge, 250 Or 39 (1968); Carter v. Crown Zellerbach Corp., 52 Or App 215, rev den, 291 Or 368 (1981). Legal causation is established by a showing that claimant was engaged in her usual job exertion at the time of the heart attack. Carter, supra, 52 Or App at 219. Medical causation involves proof that the exertion was a material contributing cause of the attack, and in most cases it must be established by medical experts. Foley v. SAIF, 29 Or App 151 (1977).

In the present case, we find the issues of legal and medical causation to be inexorably intertwined; if claimant is to succeed in proving one element of the claim, she must necessarily prove the other. Claimant's theory of compensability is that the armed robbery was an event that set in motion a series of biological events, culminating in an infarction. She does not argue that her "exertion" on the job was contemporaneous with her attack. In cases in which an attack immediately follows on the job exertion, legal causation is easily established. See e.g., Bush, supra, 68 Or App at 234. Rather, claimant suggests that her stressful event at work caused a physical change that gradually led to her attack. For us to accept this theory of "legal" causation, we must necessarily accept claimant's "medical" causation theory, as offered by Dr. Crislip, for the legal and medical causal explanations here are essentially identical.

After reviewing the record, we conclude that claimant has failed to prove either element of a compensable heart attack claim. Our conclusion is based on our review of the medical evidence. Unlike the Referee, we do not find Dr. Crislip's opinion persuasive.

Dr. Crislip's opinion is troubling for several reasons. First, we have noted that the opinion appears to be based in part

on Dr. Crislip's assumption that claimant remained in a state of anxiety and agitation from the time of the robbery through the time of the infarction. The record does not support that assumption. Claimant testified that her anxiety gradually dissipated following the robbery, and we find that this is best evidenced by her ability to return to work immediately after the incident and to continue working until a few hours before the onset of her infarction. We also note that Dr. Crislip could not have observed the level of claimant's anxiety before the infarction, for he saw her for the first time after it occurred.

Second, although Dr. Crislip opined that stress caused claimant's blood clot, he also repeatedly stated that the "stress" theory of heart attacks is very difficult to quantify and that cardiologists simply do not know the specific mechanisms involved in clotting. He also admitted that it would be difficult to isolate the time period during which claimant's clot began to develop; it could have developed before the robbery took place.

Third, claimant had been a cigarette smoker for many years. Dr. Crislip admitted that smoking is a significant risk factor in the development of myocardial infarction. The evidence also reveals that smoking, like the release of adrenaline, can cause blood platelets to become sticky, leading to the development of a clot. Claimant testified that it was probable she smoked cigarettes during the evening preceding her infarction.

Fourth, and perhaps most important, Dr. Crislip admitted that it is unusual for a patient to suffer an infarction several days after a stressful event. In the opinions of Drs. Rhoades and Kloster, it is not only unusual, it is unlikely. We find the opinions of these physicians to be persuasive, and conclude that claimant has failed to carry her burden of proof.

ORDER

The Referee's order dated January 21, 1985 is reversed and the insurer's denial is reinstated.

DAWN M. YOBP, Claimant
Patrick K. Mackin, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09300
October 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Brown's order which set aside its denial of the claim of aggravation of claimant's back injury. Claimant argues that we should modify that portion of the order which found SAIF's denial was reasonable and declined to award penalties and attorney fees. The issues on review are compensability and penalties and attorney fees.

Claimant injured her lower and upper dorsal spine and her neck when lifting ledgers from a safe at work on February 23, 1982. Her family doctor, Dr. Partridge, reported "muscle strain neck and dorsal spine." Subsequent examinations revealed that claimant had sustained a spontaneous pneumothorax. By March 10, 1982 claimant was "much improved" and returned to work. On June 7, 1982 the doctor reported to SAIF that claimant had been released to return to her regular work without permanent impairment on March 8, 1982 and that claimant had "recovered

completely and is able to perform her usual work." The claim was closed by Determination Order dated September 13, 1982 which awarded only temporary disability compensation through March 9, 1982.

From June 1982 through March 1983 claimant obtained services from Dr. Partridge, although the evidence is unclear what the nature of the services was and for what conditions. In November 1983 claimant gave birth to a child that was at risk for Sudden Infant Death syndrome. The next entry in Dr. Partridge's chartnotes was on May 15, 1984 when claimant complained of "backache [with] wrenching back 8 days ago." This event was associated with lifting her child. In July 1984 there was another episode of back pain associated with lifting her child. Dr. Partridge reported these incidents as "recurrence of old work related injury." On August 7, 1984 Dr. Partridge reported "muscle strain is in same area as previous strain February 1982 but I am unable to determine if the two injuries are related. Certainly complete recovery had occurred between injuries."

On August 10, 1984 Dr. Duff examined claimant. He diagnosed "musculoligamentous strain of the lumbar spine." He obtained a complete history from claimant and opined:

> "There is little if any evidence to link her present back problems with the original work injury in February 1982; in fact the original complaints of neck and dorsal pain were probably due entirely to the pneumothorax rather than any musculoskeletal injury. Her present symptoms of lower back pain clearly relate to her lifting her baby in May of this year, and I see no connection between this problem and her prior work activities. It is reasonable to conclude that the work injury of February 1982 is medically stationary without impairment, but a second injury has occurred in a different part of her back altogether and is not work related."

On August 27, 1984 Dr. Partridge reported that a "recheck of records indicates location of back pain not same as upper back pain experienced in Feb-March 1982." He expected claimant to be medically stationary by September 9, 1984.

On August 21, 1984 Dr. Grossenbacher examined claimant and diagnosed probable strains to her cervical, thoracic and lumbar spine. He ordered a trial of physical therapy. By September 6 claimant reported that she was 40% improved. Claimant received physical therapy through September 14, 1984. The therapist reported that claimant went to the hospital for back pain due to a slip and fall accident at home on September 11, 1984.

On September 16, 1984 Dr. Gripekoven examined claimant at a hospital. He reported a history of "bending over, lifting her ten-month-old infant, when she slipped, falling backward, sustaining a twisting type injury of her back." He diagnosed acute lumbar strain with a possible L3-4 disc herniation. Dr. Grossenbacher's discharge diagnosis was cervical and lumbar strain.

On October 1, 1984 Dr. Partridge stated that he agreed with Dr. Duff's report. On November 26, 1984 Dr. Duff agreed with the characterization of his opinion that claimant's condition was entirely the result of superseding intervening injury and that the original industrial injury was immaterial as a cause of claimant's current condition.

The Referee found no reason to question claimant's testimony based on her demeanor at hearing, and he found that the employer's testimony was similarly credible although there was a question of bias in favor of claimant. Claimant testified that she had low back pain since the 1982 injury. The employer testified that he had seen claimant rub her low back and use a heating pad since the 1982 injury.

The burden is on claimant to prove that there was a causal connection between her February 1982 industrial injury which resulted in a pneumothorax and her condition in 1984, diagnosed as a lumbar strain or possible herniated L3-4 disc. She must also establish by a preponderance of the evidence that the intervening incidents were not superseding as the cause of her condition. Cf. Grable v. Weyerhaeuser Company, 291 Or 387 (1981).

We find that claimant's condition which resulted from her industrial injury of February 1982 had fully recovered and that the subsequent incidents involving her infant were superseding causes of her low back condition. We are not persuaded, based on the contemporaneous records of her physicians, that claimant's injuries in 1982 contributed to the signs and symptoms of lumbar strain that claimant suffered in 1984. We are persuaded that Dr. Partridge was unsure whether there was a connection between the 1982 and 1984 symptoms which he finally resolved in the negative and that this opinion is entitled to the most weight. Dr. Partridge agreed with Dr. Duff's assessment that claimant's shoulder and back pain were symptoms of the pneumothorax rather than independent injuries which caused the pneumothorax. Dr. Partridge was claimant's attending physician from before the 1982 industrial injury through the most recent child-lifting incident.

By comparison, Dr. Grossenbacher's opinion relied on the general characterization of claimant's 1982 injury as having involved "the vertebral column including the neck and lower back." Although the contemporaneous reports from 1982 indicate claimant's lower back was painful, it is clear that they were referring to lower dorsal or thoracic spine as opposed to lumbar spine. Dr. Grossenbacher also did not have the benefit of Dr. Duff's examination and opinion and the final opinion of Dr. Partridge when he arrived at his opinion of causation.

We find that claimant did not carry her burden of proof that the industrial injury of February 1982 was a material contributing cause of her 1984 low back condition and reverse the Referee's order. Because we find that the denial was correct, we do not reach the issue of penalties and attorney fees for unreasonableness of the denial.

ORDER

The Referee's order dated April 22, 1985 is reversed. The denial of the SAIF Corporation is reinstated.

MARGARITA CHAVEZ, Claimant
Leeroy O. Ehlers, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 84-03579
October 15, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of Referee Shebley's order which: (1) affirmed a May 2, 1984 Determination Order that awarded claimant 5% (9.6°) scheduled permanent disability for loss of use of her right arm; (2) awarded claimant 35% (112°) unscheduled permanent disability for an upper and lower back injury, whereas the aforementioned Determination Order had awarded no unscheduled disability; and (3) set aside its partial denial of responsibility for claimant's out-of-state chiropractic treatment.

The Board affirms that portion of the Referee's order which pertains to claimant's award of scheduled permanent disability. However, we modify the unscheduled permanent disability award.

Claimant was 45 years of age at the time of the hearing. In May 1983, while working as a peeler and packer in a food processing plant, claimant was knocked over by a co-worker. Dr. Peterson, her treating chiropractor, diagnosed claimant's condition as cervical, thoracic, lumbar strain with cephalgia and myofascitis. Claimant was off work approximately two weeks, after which she returned to work subject to light duty restrictions. Approximately three weeks after her return claimant fainted at work and was hospitalized. She has not returned to work since.

In June 1983, upon her admittance into the hospital, claimant's complaints included right side and low back pain, as well as dizziness. She also complained of right arm weakness. A battery of tests reported normal findings, except an EEG which indicated "findings consistent with an irritative or an ischemic process over both hemispheres." Dr. Rasmussen reported that at the time of discharge, claimant's head and back pain had resolved slowly, but that her right upper extremity weakness persisted. Dr. Rasmussen diagnosed claimant's condition as "probable CVA" and encouraged a neurologic consultation.

In September 1983 Dr. Zivin, neurologist, performed an independent medical examination. Claimant's complaints included dizziness, loss of memory, aching and weakness of the right arm, a general fatigue, left finger cramping, and left arm numbness when sleeping on the right side. Dr. Zivin diagnosed cervical strain/contusion and post traumatic shoulder pain syndrome. The doctor concluded that there was no confirmation of the diagnosis of "probable stroke." In Dr. Zivin's opinion the original injury had produced a cervical strain and positional vertigo, which precipitated the fainting spell that had resulted in further soft tissue injury to the right shoulder. Dr. Zivin recommended further neurological testing, physical therapy, medication for claimant's dizziness, and "a great deal of reassurance" to counteract her fright and depression. Dr. Rasmussen concurred with Dr. Zivin's findings and recommendations.

In November 1983 Dr. Gehling, neurosurgeon, performed an independent medical examination. Claimant's condition was diagnosed as chronic pain syndrome and possible mild right carpal tunnel syndrome. Dr. Gehling could not predict if claimant would ever become functional inasmuch as the doctor believed a

significant amount of claimant's weakness during the examination was attributable to "poor cooperation and effort." Although claimant exhibited a generalized extremity weakness, Dr. Gehling could not find any "firm objective evidence" of permanent impairment. Dr. Gehling recommended physical therapy and further testing. The testing proved to be normal, except for "sharp waves on her EEG which is a nonspecific finding." Consequently, Dr. Gehling concluded that claimant's complaints were related to musculoskeletal aches and pains and not to any neurologic damage.

In January 1984 Dr. Peterson reported that claimant had not followed any therapeutic program he had designed for her. Furthermore, the doctor noted that claimant appeared usually when "her time loss slip has ran [sic] out." However, Dr. Peterson continued to believe that claimant would benefit from chiropractic care and authorized additional time loss.

In May 1984 a Determination Order issued. Claimant was awarded 5% scheduled permanent disability for loss of use of her right arm.

Dr. Lahiri administered an EEG in May 1984 and an EMG in September 1984. The EEG was within normal limits. The EMG indicated L5-S1 nerve root involvement of the left side.

In October 1984 Dr. Smith, orthopedist, performed an independent medical examination. Claimant complained of pain in her neck, low back, shoulders, left leg, the left side of her head, and her fingers and toes. Dr. Smith opined that the objective findings did not support claimant's complaints "as nearly as I can determine." Dr. Smith concluded that claimant might have a chronic muscle and ligament strain in her lumbar and cervical spine, but did not feel that further treatment would be of any great benefit.

Claimant testified at the hearing through the assistance of an interpreter. Prior to her injury her health was "fine." She has suffered no previous injuries or accidents. Since the injury she has experienced constant pains in her head, neck, shoulders, and back which radiates into her right arm. She also feels pain and numbness in both of her legs. Claimant takes no prescribed medication, but does ingest approximately twelve aspirin tablets per day. She has attempted to lift no more than five pounds, can sometimes stand for half of an hour, and can walk approximately one block. Most of the household duties are performed by her daughters. Claimant's testimony, which the Referee found to be essentially credible, was corroborated by her daughter's testimony.

Claimant has a sixth grade Mexican education. She can not read English and has very little understanding of the English language. Her past work experiences have generally involved "warehouse" and "potatoes."

We find that claimant is entitled to an award of unscheduled permanent disability. However, we consider a 35% award to be excessive.

Pursuant to OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985), we consider claimant's age, education, work experience, adaptability, mental capacity, emotional state, labor market findings, and physical impairment, including residual pain,

in rating the extent of claimant's disability. We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). We are also mindful that no physician's report is required to support an "extent of disability" claim. Garbutt v. SAIF, 297 Or 148 (1984). The worker's or other lay testimony may or may not carry the worker's burden of proof. Garbutt, supra., 297 Or at 151. After completing our de novo review, including claimant's "essentially credible" testimony, and considering the above guidelines, we conclude that an award of 10% unscheduled permanent disability would adequately compensate claimant.

We further find that the employer's denial of out-of-state chiropractic care should be upheld. Consequently, we reverse that portion of the Referee's order which set the denial aside.

In approximately February 1984 claimant, an Oregon resident, sought treatment from Dr. Chan, a Washington chiropractor. Until this time claimant had been receiving her chiropractic care from Dr. Peterson, an Oregon physician. There is no indication that claimant was referred to Dr. Chan by Dr. Peterson nor is there any notice that Dr. Chan had become claimant's attending physician. Claimant testified that she had begun seeing Dr. Martinez, an associate of Dr. Chan's, approximately ten months before the December 1984 hearing. The treatments had helped her "a little bit."

In February 1984 the employer denied responsibility for Dr. Chan's billings, contending that the treatments were out-of-state and were sought without prior authorization.

In setting aside the denial the Referee relied upon OAR 436-54-245(5) (Renumbered 436-60-050, May 1, 1985) which states as follows:

> "When the worker chooses an attending physician outside the state of Oregon, the insurer or self-insured employer may object to the worker's choice and select the attending physician."

The Referee found that the administrative rule required that if the employer objected to the worker's choice the employer must also select the attending physician. Since the employer did not select an alternate physician when it objected to Dr. Chan's billings, the Referee concluded that the employer's denial was invalid and that it was responsible for claimant's out-of-state chiropractic treatments.

Although the parties frame the issue in terms of the compensability for out-of-state chiropractic treatments, we would describe the issue differently. An injured worker has a lifetime right to medical services resulting from a compensable injury. ORS 656.245(1). The statute mandates provision of medical services, regardless of frequency, so long as the services are reasonable and necessary. See West v. SAIF, 74 Or App 317 (1985). Thus, the issue is whether the treatment claimant seeks is reasonable and necessary. See SAIF v. Belcher, 71 Or App 502, 505 (1984). Using this analysis, we find that claimant has not established that her Washington chiropractic treatments were reasonable and necessary. Consequently, the treatments are not compensable.

Claimant, an Oregon resident, had been receiving chiropractic treatments from Dr. Peterson, her attending physician, on an infrequent basis since her compensable injury. The record suggests that claimant sought medical treatment from Dr. Peterson in January 1984 and from Dr. Jones, another Oregon physician, in January and February 1984. These sessions apparently coincided with her initial visits to the Washington chiropractors. There is no suggestion that the Washington treatments were any different from the treatments claimant was receiving from her Oregon physicians. In addition, there is no indication that the employer refused to pay the Oregon physicians for their services. Thus, the employer's denial did not foreclose claimant from receiving medical treatment for her compensable injury.

Furthermore, there is no indication that claimant notified the employer that she wished to change her attending physician. Claimant may only have one attending physician at a time. See OAR 436-69-401(2) (renumbered 436-10-060(2), May 1, 1985). Although claimant testified that she had been treating with Dr. Martinez since approximately February 1984, the documentary evidence does not indicate that Dr. Peterson was ever replaced as claimant's attending physician of record. Moreover, we are not persuaded: (1) that Dr. Peterson referred claimant to Drs. Chan and Martinez; nor (2) that claimant's Washington treatments represented separate medical skills which were needed for proper treatment of claimant's compensable condition.

ORDER

The Referee's order dated December 31, 1984 is affirmed in part, modified in part, and reversed in part. In lieu of the Referee's award of 35% (112°) unscheduled permanent disability for an upper and lower back injury, claimant is awarded 10% (32°), which is her total award to date. Claimant's attorney fee shall be adjusted accordingly. That portion of the Referee's order which set aside the self-insured employer's partial denial is reversed. The employer's partial denial issued February 29, 1984 is reinstated and upheld. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $100 for services on Board review concerning the scheduled disability award, to be paid by the self-insured employer.

BRIAN L. HAYES, Claimant
Dwyer, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-11272
October 15, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated September 17, 1985.

The request is granted. On reconsideration, the Board adheres to and republishes its former order with the following comment. The issue on review was the extent of unscheduled permanent partial disability as a result of claimant's compensable injury. ORS 656.214(5). See Barrett v. D & H Drywall, 73 Or App 184 (1985).

The burden of proof was on claimant. Hutcheson v. Weyerhaeuser, 288 Or 51 (1979). Although the Board is persuaded that claimant has a minimal disability, the Board was not and is not persuaded that claimant's permanent disability is a result of his industrial injury. The Board made no finding related to

compensability of claimant's work-related injury. Claimant's attending physician, Dr. Becker, opined that claimant's functional ability was impaired by approximately 10%, but Dr. Becker did not relate the impairment to claimant's industrial injury. Dr. Becker explicitly agreed with the independent examiners' opinion that claimant was not impaired as a result of the industrial injury. Claimant's testimony was not sufficiently reliable that a determination of permanent disability could rest on that basis, as the Referee observed. Other possible causes of claimant's impairment, an unrelated developmental defect and an unrelated knee condition, were established in the record. The Board merely noted that claimant failed to prove that the industrial injury was responsible for claimant's impairment and disability.

IT IS SO ORDERED.

BRUCE A. SPRAGUE, Claimant
Haugh & Foote, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10945
October 15, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests and claimant cross-requests review of Referee Leahy's order that awarded 60% (90°) scheduled permanent disability for loss of use of the right forearm (wrist), which was in lieu of the 20% (30°) scheduled permanent disability awarded by a September 28, 1984 Determination Order. On review, SAIF contends that the award is excessive, while claimant contends the award should be increased. We conclude that the award should be reduced. Therefore, we modify the Referee's order.

Claimant was 35 years of age at the time of hearing. While working as an automobile mechanic, claimant suffered a compensable injury when an engine fell on his right wrist. The initial diagnosis was contusion of the forearm and hand, but x-rays subsequently confirmed the presence of a bone chip in the wrist, at or near the ulnar styloid. Eventually, claimant underwent surgery for excision of the pisiform bone.

Dr. Thayer, claimant's treating surgeon, opined that claimant will be limited in his ability to grasp and to perform repetitive fine motor movements. Claimant's right hand grip strength was 30 pounds less than the left, his dominant hand. Measurements have indicated that claimant's right forearm and hand are approximately 1/4" to 1/2" smaller, respectively, than his left forearm and hand. Range of motion findings revealed that the degrees of supination and extension in his right hand were approximately 2°-3° less than the findings for his left hand. Claimant's right hand flexion was approximately 12° less than his left. Dr. Thayer recommended that claimant refrain from lifting items exceeding 40 pounds with his right arm and hand, as well as avoid repetitive lifts involving his right extremity in excess of 16-30 repetitions. In Dr. Thayer's opinion, any activities which exceeded these physical limitations would cause fatigue and pain in claimant's wrist.

Claimant has preexisting ulnar nerve damage of the right hand resulting from a war injury and subsequent elbow surgery. In addition, the tip of his right thumb has been surgically reattached, following an axe incident in approximately 1981. However, these preexisting problems apparently did not affect his ability to perform his mechanic duties. Nerve conduction tests

performed following the compensable injury demonstrated markedly prolonged sensory latency from the wrist to the fifth finger. Dr. Platt, neurologist, opined that it was possible that part of claimant's injury involved the proximal forearm or even elbow, thereby irritating the ulnar nerve.

Since his injury claimant has been unable to perform the duties of an automobile mechanic. He no longer has the strength, durability, flexibility or dexterity to satisfy the requirements of the position. In addition, after attempting to use the tools of his profession, he experiences excruciating pain which can continue for days at a time. When these painful episodes occur, claimant takes pain medication and refrains from using his right wrist for two or three days. Cold weather evokes numbness and tingling in the wrist. Claimant finds it difficult to operate vehicles without power steering and no longer performs several of the farming chores he once performed. He opined that he could lift 50 pounds with his right hand and carry a 10-pound bag of potatoes for approximately 10 minutes. However, these activities would immediately provoke severe wrist pain.

When permanent partial disability to a scheduled body part results from an injury, the criteria for the rating of disability is the permanent loss of use or function of the injured member due to the industrial injury. ORS 656.214(2). OAR 436-65-520 and 530 (renumbered OAR 436-30-190 and 220, May 1, 1985) set forth guidelines to assist in the determination of the extent of permanent disability caused by a forearm (wrist) injury. However, these rules are not binding on the Referee or Board. SAIF v. Baer, 61 Or App 335 (1983). While rating the extent of claimant's permanent disability, we are ever mindful that the extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980).

Following our de novo review of the medical and lay evidence, which includes claimant's testimony concerning his disabling pain and physical limitations, and after considering the above-mentioned guidelines, we conclude that claimant would be adequately compensated by an award of 40% scheduled permanent disability.

ORDER

The Referee's order dated April 10, 1985 is modified. In lieu of the Referee's award and in addition to the 20% (30°) scheduled permanent disability awarded by the September 28, 1984 Determination Order, claimant is awarded 20% (30°), for a total award to date of 40% (60°) scheduled permanent disability for loss of use or function of the right forearm (wrist). Claimant's attorney's fee shall be adjusted accordingly.

CARLETTE L. WILSON, Claimant
Warren A. Covington, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-10975
October 15, 1985
Order Denying Request to Dismiss

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

The Board normally does not reject a brief that has been submitted a few days past the filing deadline, and in this instance we will accept claimant's brief, even though it was filed 18 days late. Respondent has 20 days from the date of this order to file its respondent's brief. The request for dismissal is denied.

IT IS SO ORDERED.

MILDRED M. DeROUSSE, Claimant
Flaxel, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-01184
October 17, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated August 29, 1985. The order was abated and a response requested from the SAIF Corporation. We have received SAIF's response. Reconsideration is granted.

Claimant was diagnosed as having carpal tunnel disease related to her work in July 1982. After surgical correction of the condition, she was released to return to her regular work in October 1983. A Determination Order dated December 28, 1983 closed the claim with no award of permanent disability. Claimant obtained counsel and requested a hearing on the issues of premature closure and permanent partial disability. An application for a hearing date was filed. On April 27, 1984 the Board sent a notice of hearing advising the parties that their case was set for June 21, 1984 as an alternate case.

On May 23, 1984 claimant's attorney advised the Referee that he was withdrawing from representation of claimant because he had lost contact with his client. He had last attempted contact on April 17, 1984 and had received no response. On June 12, 1984 the Presiding Referee postponed the hearing apparently on his own motion. On June 13, 1984 the Presiding Referee issued an Order to Show Cause which stated:

> "Since claimant's counsel of record has withdrawn, since we do not know of any other attorney representing claimant, and since we do not know if claimant intends to pursue this matter, we will postpone the hearing set for June 21, 1984.
>
> "It is claimant's duty to maintain contact with her attorney so that the hearing she requested can be held.
>
> "While it appears claimant has abandoned this matter, she will be given an opportunity to offer some excuse for failing to assist in moving this matter toward hearing.
>
> "Claimant is hereby ordered to show cause, if any, filed with the Hearings Division, Workers' Compensation Board, 480 Church Street SE, Salem, Oregon 97310, within thirty (30) days of this Order why the above-entitled case should not be dismissed as abandoned."

The record shows that the order was sent to claimant at her last known address, the employer, the SAIF Corporation, and claimant's former attorney. On August 21, 1984 the Presiding Referee, having received no response from claimant, issued the first Order of Dismissal. The record shows that the order was sent to claimant at her last known address, the SAIF Corporation, and the employer.

On September 6, 1984 the Board received the following letter dated September 5, 1984 from claimant's second attorney:

> "Our office was contacted on September 4, 1984, by [claimant]. She presented me with a copy of your Order of Dismissal dated August 21, 1984. I am writing concerning that Order of Dismissal. Please consider this letter [claimant's] MOTION FOR RECONSIDERATION [sic].
>
> "Evidently [claimant] moved to Coos Bay on December 16, 1983. At that time she was represented by [first attorney] whose offices are in Eugene and Salem. It was after that time that communications broke down between [first attorney]'s office and [claimant]. [Claimant] indicates she was unable to afford to travel to Eugene to see [first attorney] concerning her claim. [First attorney] withdrew his representation of [claimant] in March of 1984. As far as she knows, no action was taken on her claim after that time. She respectfully requests that you reconsider your Order of Dismissal and reinstate her pending hearing."

On September 11, 1984 the Presiding Referee vacated the dismissal order dated August 21, 1984 with the following Order:

> "I will vacate the Order of Dismissal dated August 21, 1984, and reopen this matter to receive defendant's position on the request for reinstatement of this case. Defendant has 10 days within which to file its response.
>
> "After defendant has filed its response, or after the 10 days for filing the response has passed, an order will be entered deciding the merits of claimant's motion for reinstatement of this case."

The Board received a response from the SAIF Corporation on September 17, 1984 which opposed reconsideration of the dismissal order. On October 5, 1984 Acting Presiding Referee Danner issued an Order of Dismissal which concluded:

> "Claimant failed to take any action on this file following notification from her previous attorney, dated May 23, 1984, that he no longer represented claimant, and had

> failed to secure any cooperation from her. Claimant then ignored the Order to Show Cause, even though she was actually given 59 days within which to respond, rather than simply 30 days. Claimant now asks that the Order be set aside, but has not established sufficient grounds for this to be done.
>
> "Accordingly, IT IS ORDERED that this matter is hereby dismissed."

On November 5, 1984 the Board received a letter from yet a third attorney who requested review of the Order of Dismissal and which provided claimant's current address. In the brief on review, claimant's current attorney relied on OAR 438-06-085 and cited no cases. He argued that claimant should have 90 days from the original Order to Show Cause and "within that 90 days she obtained new counsel and was pursuing her case by attempting to vacate the dismissal order and reinstate her request for hearing so a hearing date could be assigned." The SAIF Corporation relied on the same rule and cited Sandra J. Meddock, 36 Van Natta 1699 (1984).

The Board's Order on Review concluded that the dismissal was within the discretion of the Presiding Referee and noted that none of the dismissal orders was " with prejudice." At the time of the second Order of Dismissal and of claimant's request for Board review of that order, claimant was still well within the one year period in which she could request a hearing to contest the Determination Order dated December 28, 1983. See ORS 656.268(6).

In the request for reconsideration, claimant requests that the Board consider the second attorney's letter of September 5, 1984 "as a reinstatement of claimant's original hearing request" because claimant was still within the one year period in which to request a hearing on the Determination Order. Claimant argues that "the Order of Dismissal was vacated, leaving claimant's renewed and reinstated request for hearing pending before the Board."

ORS 656.283(2) provides: "A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Board." OAR 438-06-005 provides:

> "Proceedings before the Hearings Division are initiated by filing with the Board a request for hearing meeting the requirements of ORS 656.283. To expedite processing, the injured worker's name, Social Security number, the date of injury or exposure, the employer's name, the insurer's name and claim number should be included. For inclusion of such information, Board forms are available upon request. A copy of the request for hearing should be mailed to the insurer."

We are also mindful of the admonition of the administrative rules that the Workers' Compensation Act and the rules are to be given a liberal interpretation in favor of the injured worker in order to carry out the remedial and beneficent purposes of the Act. OAR 483-05-035.

In Sandra J. Meddock, 36 Van Natta 1699 (1984), the Board upheld a dismissal. The claimant had requested a hearing but failed to file an application for a hearing date. After more than ninety days passed, the Presiding Referee issued an Order to Show Cause which requested a response within 30 days why the case should not be dismissed as abandoned. When no response was forthcoming, the Presiding Referee dismissed the hearing request. The claimant then sought to have the hearing request reinstated. The claimant was at all relevant times represented by an attorney. The Board upheld the dismissal because there was no good cause shown for the delay of more than ninety days after filing the request for hearing without filing an application for a hearing date.

In Raymond L. Baldwin, 36 Van Natta 1626 (1984), the Board upheld a dismissal. The claimant was represented by an attorney who filed an applicaton for a hearing date within ninety days of the request for a hearing. The claimant's attorney withdrew and the hearing was postponed at the claimant's request and the claim was placed in inactive status. The unrepresented claimant then requested a hearing on another claim. The claimant was notified that his hearing would be set in the normal course of business. The claimant retained a second attorney and the claimant's two claims were consolidated for a single hearing. The employer requested a postponement which was granted. Then the claimant's second attorney withdrew. The Hearings Division sent the claimant a letter which requested his response within thirty days whether he planned to pursue his claims and if he planned to obtain counsel. The claimant did not respond, so the Presiding Referee issued a thirty day Order to Show Cause. The claimant did not respond, so the Presiding Referee dismissed the claims. The Board upheld the dismissal because the claimant disregarded plainly worded requests which also informed the claimant of the consequences of failure to respond.

In William V. Bredvold, 35 Van Natta 1393 (1983), the Board set aside a dismissal under former rule 436-83-310, the predecessor to rule 438-06-085 which has been referred to above. The claimant was represented, requested a hearing, and filed an application for a hearing date. The claimant's attorney withdrew because he had lost contact with his client and requested that the claim be put in inactive status. One week later, the Board issued a notice of a hearing date set for the following month. The claimant's former attorney inquired why the hearing date had been set in the face of his withdrawal and request. One month before the first date set for hearing, a Referee dismissed the hearing request in spite of the fact that the SAIF Corporation had apparently not even requested such action. The Board referred to long-standing practice and stated: "we believe that the process of setting a hearing date should be suspended upon receipt of notification that circumstances have changed, and that a party is no longer prepared to proceed to hearing." The Board then quoted from the rule and concluded:

> "We find it difficult to understand how claimant could have delayed a hearing when this agency had not even had an opportunity to schedule a hearing at the time claimant indicated he was withdrawing his applicaion for a hearing date. Moreover, the actual

hearing date had not even arrived before the Referee dismissed the matter. How could claimant be said to have caused delay in such circumstances?

"Alternatively, even though no hearing had been set at the time of claimant's January 3, 1983 letter, that letter could be viewed as a request for postponement. Whether so viewed or considered under the anti-delay provisions of OAR 436-83-310, the question is the same: Whether claimant showed 'good cause' for the delay or for a postponement. In the context of this case, which involved an August 1982 hearing request and a question arising in January 1983 about possible delay of the hearing, we believe that claimant's attorney's January 3, 1983 letter indicating that he had at least temporarily lost contact with his client established good cause, at least for an initial postponement of his hearing. We do not mean to imply that a loss-of-contact excuse would justify an extensive delay. We only conclude that an attorney's loss of contact with his or her client, which occurred less than five months after the hearing request was filed, with no indication of prior lack of alacrity in proceeding to hearing, was then good cause to delay the proceedings for some reasonable length of time."

In Fulgham v. SAIF, 63 Or App 731 (1983), the Court of Appeals reversed a Board order which upheld a dismissal issued by the Presiding Referee. The Court considered OAR 436-83-310 and held that the claimant had responded in timely fashion according to Board practice to the Order to Show Cause. It further held that "there is no evidence that claimant was responsible for the delays in obtaining a hearing in this case. Rather, all of the delays appear to have been attributable to mistakes on the part of the Board or to requests for postponement by SAIF." 63 Or App at 737.

The Court of Appeals considered the question of what is sufficient to request a hearing in Burkholder v. SAIF, 11 Or App 334 (1972). It held that the following letter from the claimant's new attorney was a sufficient request in a situation when there had been no formal request for a hearing: "Would you kindly advise me of prospective date for hearing the above captioned matter." The Court then reversed the Board order upholding dismissal and remanded for a hearing.

For comparison, we note that if the hearing had not been postponed in this case, and the hearing date had become firm by reason of the primary case settling or being otherwise removed from the docket, and claimant had simply failed to appear at that hearing, then dismissal of the hearing request would have been appropriate. See e.g., Michael R. Douglas, 37 Van Natta 65 (1985).

Having considered that there are valid reasons to uphold the dismissals or to grant claimant a hearing, we are persuaded that

claimant should have a hearing. We are not persuaded that the August 21, 1984 dismissal of her original hearing request was improper based on claimant's failure to respond to the clearly written request for information and the clear warning of the consequences of inaction. We also find that the excuse offered to explain the failure to respond to the Order to Show Cause was insufficient to set aside the dismissal. However, we are persuaded that the letter from claimant's second attorney was a statutorily sufficient request for a hearing which was filed within the applicable statute of limitations. Cf. Burkholder v. SAIF, supra. Because the dismissals were based on procedural grounds only and not on the merits of the claim and because claimant filed a request for a hearing within the statute of limitations, we remand the claim to the Hearings Division for a hearing. Claimant must file an application for a hearing date in timely fashion. Our previous Order on Review dated August 19, 1985 is hereby withdrawn.

IT IS SO ORDERED.

FRANCISCO M. HERNANDES, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-10186
October 17, 1985
Order on Reconsideration

Claimant requests reconsideration of our Order on Review dated September 30, 1985. The SAIF Corporation requested review of the Referee's order that set aside its denial of claimant's industrial injury claim for injury to his wrist. Our Order on Review was a memorandum order in which we affirmed the Referee's order. See John B. Bruce, 37 Van Natta 135 (1985) (discussion of Board's use of memorandum orders). Claimant contends that our award of $600 as a reasonable attorney fee for services on Board review was inadequate.

We recently discussed this issue in Kenneth E. Choquette, 37 Van Natta 927 (1985), where we said:

> "We will ordinarily discuss in our orders only those facts relevant to a decision whether to award an extraordinary attorney fee. Our failure to discuss or analyze an attorney fee award or allowance in most cases should not be taken to mean that all of the factors discussed [in the order] are not carefully considered in each and every case where the issue is relevant."

The factors we consider are those set forth by the Court of Appeals in Muncy v. SAIF, 19 Or App 783, 787-88 (1974), Barbara A. Wheeler, 37 Van Natta 122, 123 (1985), and our own regulations, in this case OAR 438-47-010(2) and 438-47-055. The principal factors are the efforts expended by the claimant's attorney and the result obtained for the claimant. Additional factors are the complexity of the factual and legal issues presented, the fact that attorneys in this forum are not required to operate within the constraints of technical or formal rules of evidence or procedure, the relative informality of the briefing and review process and the extent to which the attorney has already been compensated for services rendered at and before hearing, including the relative certainty of payment by the industrial insurer for those services. The relative certainty of payment of attorney fee awards also applies in awards made by the Board after review of a Referee's decision.

Claimant has appended to his request for reconsideration a copy of a letter order of the Circuit Court in another case involving resolution of a disagreement as to attorney fees pursuant to ORS 656.388(2). We have considered the observations of the Circuit Judge; however, we note that the issue in that case was attorney fees at the hearing level, not on Board review. We also note that the court apparently did not consider factors such as the nature of the forum in fashioning its order. Finally, as we have previously stated, the case-by-case evaluation of attorney fees mandated by our regulations, see WCB Admin. Order 1-1979, January 9, 1979, renders decisions in other cases, even our own, of little, if any, precedential value beyond recitation of the factors to be considered. See Kenneth E. Choquette, supra.

In this case, claimant's attorney was awarded an insurer-paid attorney fee for services at the hearing level for prevailing in a denied claim. ORS 656.386(1). The fee awarded at the hearing level was $1,000, and claimant has not objected to the adequacy of that award. The statutory authority for our award of attorney fees on Board review is ORS 656.382(2), which provides for an employer or insurer paid attorney fee where a claimant prevails on the employer or insurer's appeal. Given the nature of the practice in this forum and the facts of this particular case, including all of the factors enumerated above, we conclude that $600 is a reasonable award for claimant's attorney's services on Board review in this case. Claimant's request for reconsideration is allowed. On reconsideration, we adhere to and republish our former Order on Review effective this date.

IT IS SO ORDERED.

KENNETH R. KASHUBA, Claimant
Doblie & McSwain, Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-06918
October 17, 1985
Order on Reconsideration

The employer and its insurer have requested reconsideration of our interim order denying the employer and insurer's motion to dismiss claimant's request for review. Reconsideration is allowed. On reconsideration, we allow the employer and insurer's motion.

The Referee's order was mailed January 25, 1985. Claimant initiated the review process by delivering his request for review to the Portland office of our Hearings Division on February 22, 1985. The request was received by our closing and appeals section on February 25, 1985 and was acknowledged by a computer generated letter mailed February 27, 1985. The request for review contained an unsworn certificate that on February 22, 1985 a copy of the request for review was mailed to the attorneys for the employer's insurer. There is a presumption that mail duly posted is received in the regular course of the mail. OEC 311(q).

In our first order denying the insurer's request to dismiss, we noted that there was no evidence that the insurer's attorneys did not receive a copy of the request for review. We have since received the affidavit of the insurer's attorney that a copy of claimant's request for review was not received by the insurer's attorneys. While we are not bound to follow the formal rules of evidence, we look to the Evidence Code as persuasive regarding how we should treat the conflicting arguments in this case. Assuming

we are persuaded that the presumption of due delivery set forth in OEC 311(q) is operative in favor of claimant, the insurer has the burden of proving that it is more likely than not that the request for review was not received, in spite of the presumption. See OEC 308.

In assessing the available evidence, we take into account the sworn testimony of the insurer's attorneys that the document was not received and the fact that the original request for review was not mailed to the Board, but was delivered by messenger. Weighing this against the certificate of mailing and the presumption of due delivery, on the whole, we are persuaded that a copy of claimant's request for review was not mailed to the insurer or its attorneys and that no other notice of the request was provided within the statutorily allotted time. ORS 656.289(3); 656.295(2). Accordingly, we are without jurisdiction to entertain claimant's request for review and the request is dismissed. Argonaut Insurance v. King, 63 Or App 847 (1983); Junior L. Weatherford, 36 Van Natta 1705 (1984).

IT IS SO ORDERED.

STEVEN R. JOHNSON, Claimant
Jim Vick & Associates, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-10410
October 18, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Seymour's order which increased claimant's award of scheduled permanent disability for loss of use of the right arm (elbow) from 10% (19.2°), as awarded by a September 18, 1984 Determination Order, to 35% (67.2°). On review, the insurer contends that the award should be reduced. We agree and modify the Referee's order.

Claimant was 30 years of age at the time of hearing. In September 1983, while loading a piece of steel onto a truck, claimant's right elbow "popped and locked up." The diagnosis was right elbow sprain, with a possible chondral fracture. The fracture was subsequently confirmed and surgery was performed in October 1983 by Dr. Lawton, orthopedist. Three metal pins and "Kirschner" wires were inserted into the elbow.

Claimant's convalescence progressed smoothly until late November 1983, when X-rays revealed that two of the pins in the elbow had broken. Dr. Lawton was able to remove one pin in its entirety and portions of the two broken pins. However, fragments of the broken pins remain in the bone. Claimant was released to light work in January 1984 and to regular work in April 1984.

In July 1984 Dr. Murphy, orthopedist, performed an independent medical examination. Claimant reported that he had some mild limitation of extension and occasionally experienced soreness in the elbow toward the end of the day. However, he had returned to work and was not taking medications on a regular basis. Claimant's right elbow flexion was 10 degrees less than his left. His right elbow lacked 15 degrees to 20 degrees of full extension. No crepitation was detected. There was no sensory deficit in the ulnar, median or radial nerves, but there was minimal numbness about the incision, which Dr. Murphy reported was

to be expected. Grip strength findings were identical for both hands. X-rays revealed two retained pin fragments within the substance of the bone. Based on claimant's limitation of motion, Dr. Murphy rated claimant's residual impairment in the minimum category.

In October 1984 claimant was reexamined by Dr. Lawton. Claimant exhibited full range of motion in the right elbow with no real localized tenderness nor crepitation. However, claimant reported that he experienced soreness and restricted motion following excessive activity or heavy work. Dr. Lawton opined that claimant's continuing symptoms provided a "rather significant limitation in his ability to do his regular heavy work such as construction." Dr. Lawton further concluded that claimant remained "released for full work but will have some limitations, namely pain with strenuous activity."

In February 1985 Dr. Murphy reexamined claimant. Claimant's complaints included sharp pains radiating down his right arm with a popping sensation when lifting with his arm flexed. The soreness and pain evoked by these lifting activities was causing claimant increased apprehension concerning his continuing suitability for heavy labor activities. Claimant did not complain of any increasing numbness. Range of motion findings were approximately the same as Dr. Murphy's earlier findings in July 1984. Sensory testing indicated no deficit. Claimant's right hand grip strength was slighty less than his left. X-rays demonstrated some "beaking in the region of coronoid process" which was more prominent than on claimant's previous examination. In Dr. Murphy's opinion this radiographic abnormality could be contributing to claimant's "give-way" episodes, as well as his difficulty in flexion. Dr. Murphy classified claimant's symptoms as representative of a functional impairment rather than as an objective finding.

Claimant presently takes no prescribed medication nor does he engage in physical therapy or any exercise program. Although released to light work in January 1984, he was unable to find suitable employment until April 1984, when he received a regular work release and started his own logging and road construction company. Eventually, he was forced to cease operations due to his inability to perform several vital work activities. Specifically, claimant experienced difficulties setting chokers and operating a chain saw, activities which he had previously been able to capably perform. He has also attempted to return to construction and framing work, but finds his dominant right hand becoming increasingly weak, sore, and numb. These limitations significantly reduce his ability to continuously use a framing hammer. Claimant opined that his right hand grip strength was 25-30 percent less than it had formerly been and that his right arm was "not half as good as it used to be." His physical limitations have also forced him to curtail, if not eliminate, several of his hobbies and recreational activities. The Referee found claimant's testimony to be credible.

When permanent partial disability results from an injury, the criteria for the rating of disability is the permanent loss of use or function of the injured member due to the industrial injury. ORS 656.214(2). OAR 436-65-525 and 530 (renumbered OAR 436-30-210 and 220, May 1, 1985) set forth guidelines to assist in the

determination of the extent of permanent disability caused by an arm (elbow) injury. However, these rules are not binding on the Referee or Board. SAIF v. Baer, 61 Or App 335 (1983). The extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980).

Following our de novo review of the medical and lay evidence, including claimant's credible testimony concerning his disabling pain, numbness, and physical limitations, we are persuaded that claimant is entitled to an award of scheduled permanent disability greater than the Determination Order's award. However, we find the Referee's award to be excessive. After completing our review of the record and considering the above-mentioned guidelines, we conclude that an award of 25% scheduled permanent disability would more appropriately compensate claimant.

ORDER

The Referee's order dated April 9, 1985 is modified. In lieu of the Referee's award and in addition to the 10% (19.2°) scheduled permanent disability awarded by the September 18, 1984 Determination Order, claimant is awarded 15% (28.8°), for a total award to date of 25% (48°) scheduled permanent disability for loss of use or function of the right arm (elbow). Claimant's attorney's fee shall be adjusted accordingly.

ROY E. RANDLEMAN, Claimant
Hayner, et al., Claimant's Attorneys
Cowling, et al., Defense Attorneys

WCB 84-02356
October 18, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order which increased his award of unscheduled permanent disability for a low back injury from 20% (64°), as awarded by a February 2, 1984 Determination Order, to 30% (96°). On review, claimant contends that he is permanently and totally disabled.

Following our de novo review of the medical and lay evidence, which includes evidence concerning claimant's preexisting asthmatic condition, we are not persuaded that claimant is permanently incapacitated from regularly performing work at a gainful and suitable occupation. See ORS 656.206(1)(a). Furthermore, claimant has failed to establish that a combination of medical and non-medical conditions have effectively foreclosed him from gainful employment. See Livesay v. SAIF, 55 Or App 390 (1981). Accordingly, we affirm the Referee's order that concluded that claimant was not entitled to an award of permanent total disability.

ORDER

The Referee's order dated January 14, 1985 is affirmed.

ADELIE M. WEBB, Claimant
Stephen Behrends, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-00463
October 18, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of those portions of Referee Foster's order which: (1) set aside that portion of its December 3, 1982 denial denying further medical treatment for claimant's low back condition; (2) set aside its April 26, 1984 Notice of Closure of claimant's July 9, 1979 injury claim; and (3) awarded claimant's attorney $1,500. Claimant cross-requests review of those portions of the Referee's order which: (1) declined to award a penalty and attorney fee for the alleged unreasonableness of SAIF's medical services denial; and (2) declined to award temporary total disability.

I

Claimant, a log truck driver, compensably injured his low back on July 9, 1979 when throwing a wrapper over his load. The condition was initially diagnosed as a pulled muscle or strain. The claim was accepted as nondisabling. Claimant lost one day of work. The condition appeared to resolve, but in the spring of 1980, symptoms insidiously returned. An April 7, 1980 X-ray report noted degenerative disc disease at L2 through L4 and osteoarthritic degenerative disease involving the entire lumbar spine. Dr. Streitz, an orthopedic surgeon, examined claimant on April 11, 1980 and reported:

> "I do not feel that his present back problems relate directly to his incident of July 9, 1979, and cannot call this a true aggravation. There [are] some moderate long standing degenerative changes in the lumbosacral spine and I feel that this is the most likely problem and anticipate that he may have some more low back symptoms over time beyond those of the general population without his X-ray findings. Since there is no direct relationship of his present symptoms with that incident in the past, I do not feel that his case should be reopened * * *."

A reopening was requested and, in May 1980, denied.

Claimant came under the care of his present treating physician, Dr. Allcott, an internist, in June 1981, nearly two years after the injury. Although Dr. Allcott acknowledged unrelated underlying osteoarthritis, he related claimant's symptoms to a recurrent low back syndrome secondary to the industrial muscle strain. SAIF issued a second aggravation denial on August 27, 1981. Claimant requested a hearing and a disputed claim settlement was entered on October 22, 1981. It provided that the August denial would be rescinded and reissued as a partial denial. It stated:

> "Said partial denial relates to the underlying osteoarthritic condition

> described by Dr. Allcott in his report of September 2, 1981. Those conditions described by Dr. Allcott as 'a low back syndrome' and strained muscles, are hereby specifically accepted and the medical bills relating thereto shall be paid pursuant to the compensable industrial injury of July 9, 1979."

Claimant's low back continued to be periodically symptomatic, and he continued to receive treatment for his complaints. Following yet another claim for aggravation, SAIF issued its December 3, 1982 denial. By it SAIF denied aggravation and the compensability of medical treatment for claimant's low back, contending that claimant's then current condition was related to osteoarthritis, not the industrial low back strain.

Dr. Raaf thoroughly examined claimant and reviewed the medical file for SAIF. He stated on March 15, 1983 that claimant reported not only pain in the low back since the 1979 injury, but also occasional bilateral leg pain over the past six months. Dr. Raaf stated:

> "I think his present symptoms are due to his preexisting degenerative disc disease and arthritis of his spine, the symptoms of which were brought out by his fall on July 9, 1979."

Dr. Rosenbaum, an internist, also examined claimant for SAIF. He attributes claimant's symptoms to unrelated muscle strains and arthritis. He contends that the 1979 muscle strain would have healed fairly quickly without affecting the arthritis.

Dr. Brown, SAIF's neurological consultant, also reviewed the file. Dr. Brown stated:

> "In my view, the claimant's original low back strain does not contribute to his current condition. What effects the injury of July 9, 1979 had upon him have long since subsided and it is utterly foolish to blame that injury for any of his current problems. It is equally likely that though the particular injury of July 7, 1979 did nothing much in the way of increasing the amount of arthritis or change that he has in his back and if there are any changes, those would have gone on injury or no injury."

Dr. Allcott, however, has consistently maintained that claimant's symptoms remain compensably related to the industrial injury. He bases his opinion on the following factors: (1) the degenerative condition preexisted the July 1979 injury, but was asymptomatic; (2) each symptomatic exacerbation has been brought on by a traumatic incident; (3) with the exception of the recent leg pain, the symptoms during each exacerbation resemble those of the initial incident; (4) between fluctuations claimant is essentially asymptomatic, contrary to what he would expect were the condition due to arthritis; and (5) it is not uncommon for X-rays to show considerable degenerative disease, yet for the

patient not to experience symptoms consistent with the apparent level of degeneration. Dr. Allcott weighs heavily the temporal relationship between the injury and the onset of claimant's low back symptoms. He acknowledges that degeneration may be partially responsible for claimant's symptoms and agrees with Dr. Rosenbaum that a single muscle strain would long since have resolved. He believes, however, that the work injury remains a material contributor to claimant's condition.

This case originally came on for hearing before Referee Howell on April 16, 1984. The Referee informed the parties at the outset of the hearing that although the issue had been framed as aggravation, he did not consider aggravation to be the true issue. Notwithstanding the fact that that more than a year had passed since the injury, he concluded that since the nondisabling claim had not been closed, claimant did not need to establish a worsening to prove entitlement to disability benefits. Contra Garland Combs, 37 Van Natta 756 (1985); ORS 656.262(12). After weighing the various considerations, the Referee postponed the hearing as to the remaining issues.

On April 26, 1984 SAIF issued a Notice of Closure awarding no disability on the 1979 claim.

The hearing was reconvened before Referee Foster on December 13, 1984. Referee Foster subsequently issued the order now before us on review.

II

We first consider SAIF's denial of medical services. For medical services to be compensable claimant must show by a preponderance of the evidence that the condition for which treatment is rendered is materially related to the industrial injury. ORS 656.245. We find that claimant has not carried this burden. Although there appears to be a temporal relationship between the onset of claimant's symptoms and the industrial injury, we are unpersuaded claimant's current condition is due to a low back syndrome or strained muscles materially related to the industrial injury. Based primarily on Dr. Streitz's and Dr. Raaf's reports, we find that it is at least as likely that claimant's current need for treatment is solely due to his degenerative arthritic condition which has been stipulated to be noncompensable. Accordingly, we reinstate SAIF's denial of medical services.

Relative to claimant's allegation that the denial was unreasonable, we find that Dr. Streitz's report together with the disputed claim settlement afforded SAIF a reasonable basis for exercising its statutory right to put claimant to his proof. Even were that not the case, however, there being no sums due upon which to base a penalty, no penalty could be awarded. See e.g. Darrel W. Carr, 36 Van Natta 16 (1984).

III

We next consider claimant's request for temporary disability compensation. Claimant's claim is classified as nondisabling. Disability cannot be awarded on a nondisabling claim. More than one year after the date of injury a claim can be reclassified as

disabling only by proving an aggravation under ORS 656.273. ORS 656.262(12); Garland Combs, 37 Van Natta 756 (1985). To prove an aggravation claimant must show that a condition related to the original injury has worsened. ORS 656.273(1). In connection with his challenge of SAIF's medical services denial, claimant received a full and fair opportunity to prove that his condition remained materially related to the compensable injury. That also being a necessary element for proving an aggravation and claimant not having prevailed on that point, we uphold SAIF's December 3, 1982 denial of aggravation. Since claimant's claim remains classified as nondisabling, no disability compensation can be awarded.

IV

SAIF contends that the Referee erred in setting aside the April 26, 1984 Notice of Closure. In Barbara A. Gilbert, 36 Van Natta 1485 (1984), we held that the exclusive procedure for contesting an employer/insurer's Notice of Closure is to request a Determination Order from the Evaluation Division pursuant to ORS 656.268(3). The Referee lacked jurisdiction to consider claimant's request to set aside the Notice of Closure. Accordingly, that portion of the Referee's order is reversed.

ORDER

The Referee's order dated February 22, 1985 is affirmed in part and reversed in part. Those portions of the Referee's order which set aside the SAIF Corporation's denial of further medical services, set aside SAIF's Notice of Closure and awarded claimant's attorney a fee are reversed. The December 3, 1982 aggravation and medical services denial and the April 26, 1984 Notice of Closure are reinstated and affirmed. The Referee's order is affirmed in all other respects.

JAMES D. WHITNEY, Claimant
Philip L. Nelson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-03566, 84-05467, 85-07277 & 85-07278
October 18, 1985
Order on Dismissal (Remanding)

Claimant has requested Board review of Referee Mulder's order dated August 19, 1985. The request for Board review was received by the Board on September 17, 1985 and was timely. See OAR 438-05-040(4)(a). Also on September 17, 1985, Referee Mulder withdrew his order for reconsideration by entering an Order of Abatement. Although the Referee's Order of Abatement was not dated, we have ascertained through the affidavit of the employe of the Hearings Division responsible for the processing of the Order of Abatement that the order was in fact signed and mailed on September 17, 1985.

Where simultaneous acts affect the vesting of jurisdiction over cases in this forum, in the interest of administrative economy and substantial justice we will give effect to the act that results in the controversy being resolved at the lowest possible level. In this case, where the Referee abated his order simultaneously with claimant requesting Board review, we will give effect to the Order of Abatement. We, therefore, dismiss the request for Board review as premature. This matter is remanded to the Referee for further consideration.

IT IS SO ORDERED.

DON L. SMITH, Claimant
Samuel A. Hall, Jr., Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-08577
October 21, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated September 24, 1985. Claimant has also submitted an affidavit and another report from his treating doctor. We treat this as a motion to remand, even though claimant has not requested remand.

The Referee's opinion accurately summarized the medical and lay evidence. Claimant's treating doctor, Dr. Campagna, twice reported that he believed that claimant's condition which required surgery in April 1985 was not related to claimant's industrial injury in 1973. The first report was dated July 20, 1984 and the second was dated January 28, 1985. Both reports were unequivocal. They "constitute prima facie evidence as to the matter contained therein. . . ." ORS 656.310.

The first report was a short letter from Dr. Campagna to the self-insured employer. It was submitted in timely fashion and admitted without objection. At the hearing claimant requested a continuance or postponement to obtain a clarification which had been requested from Dr. Campagna. The Referee granted a continuance to receive a summary of Dr. Campagna's chartnotes which included an examination note from January 28, 1985. The chartnotes were received and admitted into the record which was then closed on February 15, 1985. The Referee's order issued on March 28, 1985. Claimant requested Board Review on April 23, 1985. The Board reviewed the record as developed before the Referee. ORS 656.295(5).

According to claimant's affidavit, claimant talked to his treating doctor in July 1985 and questioned his doctor's opinion of causation at that time. The Board issued its Order on Review on September 24, 1985. Claimant sought an explanation of the Board's order from his attorney on October 7, 1985. On October 10, claimant obtained a short note from Dr. Campagna which claimant believes is a complete reversal and correction of the opinions on causation expressed in the prior report letters. Claimant also reports his summary of Dr. Campagna's oral remarks. Claimant's affidavit is dated October 11, 1985.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). To merit remand it must be shown that material evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). We find that the evidence proffered by claimant was obtainable with due diligence before the hearing. Therefore, we deny the motion to remand to the Referee to further develop the evidence.

Claimant's request for reconsideration of the Board's Order on Review is denied.

IT IS SO ORDERED.

KURT COGSWELL, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09290
October 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Baker's order which enforced a December 31, 1984 Determination Order insofar as claimant was awarded temporary partial disability and assessed penalties and accompanying attorney fees for failing to comply with the Determination Order. On review, SAIF contends that claimant is not entitled to temporary partial disability, or alternatively, that SAIF's refusal to comply with the Determination Order was not unreasonable.

We affirm the Referee's order with the following comment. Subsequent to the Referee's order, the Board issued its opinion in C. D. English, 37 Van Natta 572 (1985). Finding that an employer/insurer was required to comply with a Determination Order until the temporary disability award was subsequently modified, the Board in English enforced the Determination Order and assessed penalties and attorney fees. As in English, SAIF has refused to fully comply with a Determination Order. Accordingly, it follows that the Determination Order will be enforced, with an assessment for penalties and accompanying attorney fees. In addition, we agree with the Referee's conclusion that claimant was entitled to temporary partial disability as awarded by the Determination Order.

ORDER

The Referee's order dated February 28, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the SAIF Corporation.

PETER J. ELIA, Claimant
Francesconi & Cash, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-10149, 82-10150 & 83-09116
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Shebley's order, as amended on reconsideration, that: (1) found claimant entitled to temporary total disability compensation for the period of January 18, 1983 through March 19, 1983; and (2) set aside the insurer's denial of responsibility for treatment of claimant's psychological condition. The Referee also made alternative findings in the event that the psychological component of the claim is held noncompensable. Because we find that it is compensable, however, we need not address the propriety of those findings.

We affirm the Referee's order with the following comment regarding the compensability of claimant's psychological component. At hearing and now on Board review, the insurer argues that the proper standard to be applied in this case is set forth in McGarrah v. SAIF, 296 Or 145 (1984), a case involving an occupational disease claim based on a theory of mental stress. Under McGarrah, for a claimant to establish the compensability of his or her psychological component, he or she must prove that working conditions were the major contributing cause of the mental disease process.

Claimant argued at hearing, and renews his argument before the Board, that his psychological condition is a compensable consequence of his accepted industrial injuries, and as such need only be caused in material part by those injuries and their sequelae. See e.g. Patitucci v. Boise Cascade Corp., 8 Or App 503 (1982). The Referee agreed with claimant, as do we.

At first blush, the insurer's argument is enticing, for the facts of this case are somewhat similar to those cases in which the McGarrah standard was properly applied. In the present case, claimant sustained two compensable injuries from which he was slow to recover. During the recovery period, confusion arose regarding whether he was released to return to his regular job by his treating physician. At times it appeared that the doctor was saying that claimant was released. At other times it appeared the doctor was of the opposite opinion. From these conflicting reports, the employer decided that claimant was released. Claimant, however, decided he was not. Claimant, therefore, did not report for work during times when the employer thought he should be there. Amid the confusion, claimant's relationship with his employer deteriorated. He ultimately became convinced that he was being mistreated by the employer and his perceptions contributed to his psychological stress, as did the pain and other problems associated with his injuries.

On review, the insurer argues: "[Claimant's] psychological problem is a result of an insidious process due to an inability to deal with many stressful factors, including his perceived 'harassment.'" The insurer also argues that claimant's problem gradually built up over a period of time and that his stressors were of the kind to which he was not ordinarily exposed except during employment. The insurer argues, therefore, that claimant's claim is one for occupational disease and that the McGarrah analysis applies.

The insurer fails to recognize a fundamental distinction between this case and the McGarrah line of cases. In this case, claimant's psychological reaction was preceded by two distinct accidental injuries, and claimant claims that his stress arose as a consequence of those events and peripheral happenings that would not have occurred but for the injuries. By contrast, in the McGarrah line of cases, claimants' claims were not preceded by distinct injurious events; the claims arose solely from stress alleged to be related to claimants' jobs themselves.

In Jeld-Wen, Inc., v. Page, 73 Or App 136 (1985), the court discussed the issue presented here. The claimant in Page suffered two compensable injuries in 1979. Three years later he was hospitalized for paranoid psychosis. His hospitalization stemmed from his belief that the employer or insurer had hired individuals to conduct surveillance of the claimant.

The parties disagreed as to the standard of compensability to be applied. The employer argued that McGarrah controlled. The court disagreed:

> "Neither [McGarrah nor Elwood v. SAIF, 67 Or App 134 (1984), rem'd for further proceedings 298 Or 429 (1985), decision on remand 72 Or App 771 (1985)] is applicable to the facts in the case at bar. Both are occupational disease cases that deal with

> the problem of establishing whether a claimant's psychological condition stems from actually existing mental stresses which were related to his employment and were the major contributing factor in causing the disability. . . .
>
> "A claimant asserting the compensability of a psychiatric condition following an industrial injury must prove by a preponderance of the evidence that the work-related injury was a material contributing cause of the condition, or, if the claimant's mental condition predated the injury, that the injury worsened that preexisting condition. [Citations omitted.]" (Emphasis added.)

In the present case, claimant asserts the compensability of a psychiatric condition following two industrial injuries. Thus, the "material contributing cause" standard applies. There is also evidence that claimant's psychological condition preexisted his injuries. Therefore, he must prove that his injuries worsened his psychological component. Partridge v. SAIF, 57 Or App 163, rev den 293 Or 394 (1982). After reviewing the record, we agree with the Referee that claimant has satisfied his burden of proof. The evidence is that claimant's psychological condition was essentially stable prior to his injuries, and that the injuries set in motion a series of events that led to a worsening of claimant's underlying disease. Under these circumstances, claimant's claim is compensable.

ORDER

The Referee's order dated December 21, 1984 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the insurer.

NORRIS R. HUGHES, Claimant
Jim Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09126
October 22, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee T. Lavere Johnson's order which upheld the SAIF Corporation's partial denial of his request for payment for a "Lark three-wheeled vehicle." On review, claimant contends that the vehicle is compensable.

The Board affirms the order of the Referee with the following comment.

Claimant has the burden of proving that the condition for which he is to receive medical services was caused by his compensable injury and that the treatment is reasonable and necessary. Poole v. SAIF, 69 Or App 503, 505-06 (1984); SAIF v. Forrest, 68 Or App 312 (1984). Claimant argues that SAIF, in effect, conceded the latter portion of his burden of proof by focusing its denial and hearing posture on the causal relationship. We disagree.

The record does not contain an affirmative representation

from SAIF conceding that the prescribed treatment was reasonable and necessary. We conclude that in order to dispense with the "reasonable and necessary" phase of the compensability analysis SAIF must have affirmatively conceded the issue rather than to be adjudged to have implicitly admitted the matter as claimant presently contends. Since claimant bears the burden of proving the compensability of the proposed treatment, we agree with the Referee's finding that claimant has failed to meet that burden.

Furthermore, we deny claimant's request for remand for additional evidence concerning the reasonableness and necessity of the prescribed treatment. Following our review of the record, we are not persuaded that this case has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). In addition, it has not been shown that this evidence was unobtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

ORDER

The Referee's order dated April 4, 1985 is affirmed.

RICHARD G. KENNEDY, Claimant
Heiling & Morrison, Claimant's Attorneys
James P. O'Neal, Attorney
Samuel A. Hall, Jr., Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-10845
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Quillinan's order that upheld a Determination Order awarding 27° for 20% scheduled permanent partial disability for loss of use or function of the left foot. Claimant also asks the Board to supplement the hearing record with four exhibits allegedly not received in time to offer at hearing. The issues on review are extent of scheduled disability and supplementation of the record.

The Board lacks authority to supplement the record or consider evidence not offered at hearing. ORS 656.295(5); Groshong v. Montgomery Ward, 73 Or App 403 (1985); Stephen P. Gese, 37 Van Natta 718 (1985). We can, however, remand the case to the Hearings Division for the taking of additional evidence if we find that the case has been improperly, incompletely or otherwise insufficiently developed. ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1984); Delphina P. Lopez, 37 Van Natta 164 (1985). We consider claimant's motion to supplement the record to be a request for remand. After reviewing the record, we find remand to be inappropriate.

Claimant offers four exhibits that he claims could not be presented at hearing. One is a letter from a physician generated prior to the hearing. The letter, which suggests a postponement of the hearing, was copied to claimant's former attorney. The attorney did not request postponement, however, nor did he submit the letter to the Hearings Division as an exhibit upon which claimant would rely. Claimant's motion for remand fails to adequately explain why the exhibit could not have been produced at hearing.

The remaining exhibits were authored after the hearing took place. Claimant does not explain why these exhibits were not solicited prior to the hearing or why he chose to go to hearing

before the exhibits were authored or received. As we noted in Robert A Barnett, 31 Van Natta 172, 174 (1981), we leave it to the parties to decide when to litigate. "[T]he parties should decide when they want disputed issues resolved based on available evidence and not rely on motions to remand based on subsequently obtained evidence as a fallback possibility." Barnett, 31 Van Natta at 174. (Emphasis in original.)

We appreciate the practical difficulties faced by claimant's current attorney, for it was claimant's former attorney who made the decision to go to hearing. However, considering the chronology of events, we are not persuaded that the evidence now sought to be admitted was not obtainable with due diligence prior to the hearing. Therefore, remand is inappropriate and claimant's motion is denied.

On the merits of the claim we affirm the order of the Referee.

ORDER

The Referee's order dated March 26, 1985 is affirmed.

RICHARD L. MANLEY, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-11309
October 22, 1985
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated August 29, 1985. We abated the Order on Review. The request for reconsideration is granted.

The issues on review were compensability of claimant's hospitalization and surgery for aggravation of his low back condition and attorney fees. The Board affirmed the Referee's order with the observation that two exhibits which were not relied on by the Referee were additionally persuasive on the issue of compensability.

The insurer requested reconsideration because it:

> " . . . believes that the Board has disregarded the clear preponderance of the medical evidence in holding that claimant's L5-S1 surgery is related to his compensable back injury. More significantly, [insurer] believes that the Board has improperly 'played doctor' by re-writing the copious medical reports issued by claimant's treating physician which referred to surgery at 'L4-5' so as to reflect that such surgeries were actually performed at L5-S1."

The insurer relies on Exhibits 4, 5, 6, 11, 12, 13, 14, 21, 22, 28, 29, 30, 32, and 33 as evidence that contradicts the Board's findings. The insurer states, "If surgeries were performed at the same level, Dr. Borman would have been most likely to so indicate," and the insurer states as a fact that the first two surgeries were performed at a different level identified as L4-5 from the third surgery at a level identified as L5-S1. The Board agrees with the insurer that this question is "an

extraordinarily difficult and technical medical aspect of a difficult medical claim," but we disagree that "there is no direct medical support for the Board's conclusions."

The Board affirmed the Referee's order, which relied on the treating surgeon's opinion and claimant's credible testimony, and added the comment that the Board was further convinced by the evidence contained in Exhibits 13 and 26. In its brief on review, the insurer relied in part on those two exhibits. The insurer characterized Exhibit 13 as solely showing that all disc levels except L4-5 were normal and it characterized Exhibit 26 as solely a statement of diagnosis of herniated disc at L5-S1.

Exhibit 13 is an X-ray report authored by John R. Anderson, D.O., on April 5, 1982. It states in its entirety:

> "LUMBAR SPINE:
>
> "Compare to June 17, 1981. There is no appreciable scoliosis. A Transitional [sic] vertebra is noted at the lumbo-sacral jun[c]tion which has the appearance of a lumbar vertebra. If this vertebra is considered L-5, Then [sic] there is a laminectomy defect at L-4 on the left. There has been interval 30% narrowing at the L4-5 interspace. The remainder of the disc spaces are normal and no other abnormalities are seen.
>
> "IMPRESSION: 1. Transitional vertebra at the lumbo-sacral junction, which will be called L-5 for reference.
> 2. Laminectomy defect at L-4 on the left.
> 3. 30% narrowing at the L4-5 interspace.
>
> "LUMBAR MYELOGRAM:
>
> "Amipaque contrast was instilled into the lumbar thecal sac by Dr. Borman. The sac was visualized from T-12 to S-1. A small extradural defect was noted at the L4-5 level on the right. The defect caused a minor rootlet cut off on the right and decreased density in this area was noted fluoroscopically. The lateral film reveals a distinct small extradural defect at this level, confirming the presence of a herniated disc. The other levels were unremarkable.
>
> "IMPRESSION: Findings consistent with a small herniated nucleus palposis [sic] at L4-5."

Exhibit 26 was an X-ray report dated June 28, 1983 also written by Dr. John Anderson. It states in its entirety:

> "LUMBAR MYELOGRAM: Compare April 5, 1982

"Six distinct vertebrae are identified, the inferior vertebra is felt to represent lumbarization of S1. With this nomenclature in mind, then there is a laminectomy defect on the left involving L5. Amipaque contrast was instilled into the lumbar thecal sac by Dr. Borman. Multiple impages [sic] were obtained. The thecal sac and rootlets were entirely symmetrical between T12 and L5. A mild extradural defect was noted on the left at L5-S1 which was also noted on the previous myelogram and it remains unchanged. The change is probably post-surgical in nature. On the right side at L5-S1 there is a slight swelling of bulbous appearance of the root which is exiting. A very similar appearance was again seen on the previous myelogram. The rootlets at S1-2 were normal in appearance.

"The lateral films show a wide epidural space anterior to the thecal sac as well as a minimal central indentation at L5-S1. These findings are consistent with a central herniation which has been noted on C-T.

"Additionally, with careful comparison of the previous study, there is a small or shallow extradural defect also noted at L4-5 with widening of the epidural space. Neither of these findings were present on the earlier study and suggest that a small central herniation could also be present at L4-5.

"IMPRESSION: (1) FINDINGS CONSISTENT WITH THE C-T EVIDENCE OF A CENTRAL HERNIATED NUCLEUS PULPOSUS AT L5-S1.

(2) POSSIBLE SMALL CENTRAL HERNIATED NUCLEUS PULPOSUS AT L4-5. RECOMMEND C-T CORRELATION AS THE PREVIOUS STUDY WAS PERFORMED AT L5-S1 and S1-S2.

(3) LAMINECTOMY DEFECT ON THE LEFT AT L5.

(4) POST-SURGICAL CHANGES AT L5-S1 ON THE LEFT.

(5) SLIGHT ENLARGEMENT OF THE NERVE ROOT ON THE RIGHT AT L5-S1 WHICH IS UNCHANGED SINCE 1982. THE EXACT SIGNIFICANCE OF THIS FINDING IS NOT KNOWN BUT MAY BE SECONDARY TO IRRITATION."

In addition to the two reports which the Board expressly relied on in the original Order on Review are Exhibits 27 and 28. Exhibit 27 is an X-ray report dated June 30, 1983 written by Larry R. Wampler, D.O. The report states in its entirety:

"CT L4-5: Computer tomography of the L4-5 level was obtained at 5 mm. intervals from the pedicles to the disc space where 3 mm.

slices were performed. On the previous computer tomography of the spine what was thought to represent the L4-5 disc level after perusing plain film radiography revealed this to actually represent the L5-S1 with apparant lumbarization of the S1 vertebra, thus the herniated nucleus pulposus identified on that scan actually was the L5-S1 level, not L4-5. This scan was obtained at the true L4-5 level and failed to reveal any evidence to indicate herniated nucleus pulposus or any other acquired or congenital abnormality.

DIAGNOSIS: 1. NORMAL 4-5 DISC LEVEL.
2. PREVIOUS REPORT WAS IN ERROR. THE REPORTED HERNIATED NUCLEUS PULPOSUS RESIDES AT L5-S1 LEVEL AND NOT L4-5 AS THE PATIENT HAS APPARENT LUMBARIZATION OF THE S1 VERTEBRA."

Exhibit 28 is the operation report dated July 7, 1983 written by Dr. Richard Borman, D.O. The report states in its "FINDINGS" section:

"There was clinical, orthopedic and neurological evidence of a right lumbosacral radiculopathy due to a herniated lumbo-sacral intervertebral disc which was confirmed by lumbar CT scan and lumbar myelogram. Upon surgical exposure there was noted evidence of a large closed posterior protrusion of the L5-S1 disc subjacent to the right S1 nerve root. There were considerable adhesions noted resulting from the prior surgery. The nerve root was free of compression at the conclusion of surgery."

In his discharge report, Dr. Borman stated, "Present symptoms appear to be an aggravation of the previous problem."

In contrast to these reports, the insurer offers the opinions of Dr. Howell, D.O., and Dr. Rosenbaum, neurosurgeon. Dr. Howell reviewed the medical records submitted to him by the insurer but did not examine claimant. Dr. Rosenbaum reviewed medical records and examined claimant. Neither Dr. Howell nor Dr. Rosenbaum reviewed claimant's actual X-ray films.

Dr. Howell in his lengthy report relied on the diagnosis of herniated nucleus pulposus at L5-S1 as confirmed by CT and myelogram with symptoms on the right side to distinguish any causal relationship in 1983 from the previously diagnosed herniated nucleus pulposus at L4-5 which produced left-sided symptoms. He concluded that claimant's "1983 condition is located in an entirely different area." Dr. Howell was convinced that there was a superseding intervening injury responsible for claimant's signs and symptoms which developed after the June 6, 1983 examination at Orthopaedic Consultants.

Dr. Rosenbaum submitted a report and testified at a deposition. In his written report, he concluded:

"In response to your specific questions, it is nearly impossible to make any type of judgement regarding the necessity for surgery from a review of the medical records. It does appear from review of the medical records that it was appropriate to proceed with a lumbar laminectomy and the patient has obtained what he describes as adequate results for that I believe one must state within a reasonable medical probability there was a need for surgery. The surgery performed on January [sic] 6, 1983, was at the lumbosacral space on the right side. This began with an abrupt onset when the patient was under his own employment. There was demonstrated to be a lumbosacral disc on the right side, at a level where the patient has not had previous surgery. The patient has also not had a diskectomy at the lumbosacral space on the left side. I would therefore state that although there may have been some slight (very slight) contribution from the patient's previous surgeries in relationship to his lumbar disc which came to surgery on January [sic] 6, 1983, it was within medical probability not related to his prior injuries or surgeries."

At the deposition, Dr. Rosenbaum was answering claimant's attorney's questions:

"Q. Now, Doctor, you have apparently reviewed, from what I can tell, just about every piece of medical information there is on Mr. Manley.

"Do you have records from Doctor Howell that you looked at?

"A. Yes.

"Q. Your file appears to be three quarters of an inch deep, so I've got to assume there's a lot of medical information in there; is that correct?

"A. That there's a lot of medical information in there?

"Q. Yes.

"A. Yes, I think that's correct.

"Q. It appears to be about three quarters of an inch deep?

"A. I'd say, it's deeper than that.

"Q. Doctor, now you're not telling us, are you, that you have read every inch of that --

from all of that printed material on Mr. Manley the day that he was here and had the examination by yourself?

"A. Well, I'm telling you that you don't need to read the entire operative report word for word other than to look at the top and see what disk space he went to and look at what the diagnosis is, that -- no I haven't reread word for word everything in this chart, but -- uh -- I felt comfortable -- in other words, I don't need to look at his temperature course through the hospital. I feel comfortable anything of significance is reread. Sometimes, quite honestly, vocational rehabilitation, etc., you don't hone in on."

Later in the deposition, in response to a question put by the insurer's counsel, Dr. Rosenbaum provided a narrative of his understanding of claimant's surgical history and the factors which he believed were significant.

"A. You have to understand the sequence of events of what happened to the patient, and what happened was that he had an industrial injury and had a lumbar 4-5 disk on the left side, which was removed; did relatively well, or fair. It's hard to evolve out of the chart exactly how well he did, but -- subsequently had a lumbar 4-5 disk on the right side with right leg pain.

"When you operate at a disk at a given level, you're taking out the nucleus or center part of the disk, not doing a fusion, and the patient has motion at the space. The majority of the disk tends to come off the left side or the side you're operating at, although the punch is passed across to take out some of that central material on the right side, not as much as evolved out on the left side.
"Because there is still motion there and because the nucleus has been removed, there is a slightly greater chance of getting a herniation on the opposite side because of stresses involved. It's not an overwhelming percentage. We don't tell the patient, 'This is necessarily going to happen to you,' because it doesn't.

"Often times when we talk to the patient -- uh -- you could get a piece of disk out at that same space or that side or the other side, and we tell the patient he may have trouble in the future, because he may get a disk ruptured at another level.

"The fact you mechanically alter that disk on the one side probably adds stress to the

right. I felt there was a significant argument, if it occurred within a reasonable period of time, one, two, three years; then it's probably related in some way, at least, to the initial surgery.

"The disk above or the disk below does not undergo that type of stress phenomenon, because that disk space is not fused, it still has its motion there, so a disk a space above or space below in the lumbar region wouldn't be related to the history unless there was a tie in on a historical basis.

"Q. Have you had an opportunity to review each of the myelograms that were performed at the three surgeries -- at the time of the three surgeries that were done?

"A. Yes, I did.

"Q. And having reviewed those and having done the examination of the claimant individually and with the group of orthopedic consultants [sic] in '81, could you explain -- uh -- why you don't believe that the industrial injury, the original one or the second incident, which the employer was required to pay for in terms of the medical treatment and so forth, were a material and contributing factor to this third surgery that he had in June of '83 and the incident that led to that or the --

"A. Well, the patient had a lumbar diskectomy first on the right and then left at the lumbar 4-5 space; obtained fair relief, which is documented in the medical records, and so we have to presume that the pathology was taken care of, and then subsequently, when engaged in other activities under his own employment or truck driving, began developing pain, which, although in the same distribution as his other pain, was eventually proven at surgery, and as the tests evolved, at a separate disk space, and the patient was operated on and has obtained relative relief. At least through the medical records of evaluation of that disk space, one has to presume that the operations were at the appropriate level for the appropriate pathology.

"If that's the case, his third operation was at a different level, not related to his initial two operations and his initial problems. A person with a -- that sustains a disk injury or a disk protrusion probably has a certain propensity to herniate his

disk, and, therefore, you'd have to presume his original injury was industrial related, because it happened at work, so this patient probably has a slightly greater propensity to a herniated disk than any person on the street.

"It's a little uncommon, certainly not unheard of, to have disk rupture in another space above or below. I sometimes get a patient referred to a neurosurgeon by an orthopedic surgeon who does his own disks. The patient has a recurrence, and he's not willing to do the surgery because it's a little trickier, and the patient ends up having a disk at the space above or the space below with an interval period of relief. It's a nice case for me, although the orthopedic surgeon presumed it was the same problem, and, therefore, didn't want to tackle it. It turns out to be quite an easy case. I see it, I suspect, about twice a year.

"Q. Do you believe the original surgery in the sequela and the second surgery in the sequela were -- they are a material contributing factor -- whether these two surgeries were material contributing factors to this last one?

"A. No, I don't believe they are a material contributing factor. If the patient was fused at that level, then you'd have the stress placed above and below, then it's probably a material factor. What percentage, I don't know. The fact the patient was not fused, never had pathology demonstrated at that space before, and temporarily had it relieved at a separate time, all of those are very strong evidence of the fact that it's an independent event."

Dr. Howell and Dr. Rosenbaum made no comment on the X-ray reports that discussed terminology relative to this claimant's back. They did not even appear to be aware of the anomalous first sacral segment, even though it is reported in the X-ray reports. There is no discussion of the tomography report that states that there are no defects, acquired or congenital, at any level except the one level at which claimant has had his three operations.

The Board carefully read all of the evidence offered at the hearing. It appears from the record that Dr. Rosenbaum did not rely on all of the evidence to arrive at his conclusion that claimant had surgery at a different level of his spine and that that surgery was not related to the industrial injury. We, therefore, find that Dr. Rosenbaum's conclusion is not persuasive.

Dr. Rosenbaum explained how a partially removed disc may lead to a symptomatic recurrence. His explanation, which he thought

was hypothetical, came nearer to the total fact picture than his alternative explanation, which he mistakenly thought to be the true facts in this case. In comparison, Dr. Howell's opinion was based on assumptions inconsistent with the facts as either we find them to be or as Dr. Rosenbaum assumed they were. We find that Dr. Howell's opinion is unpersuasive.

No doctor was asked to explain the substance of Exhibits 13, 26, 27, and 28. We are left with those documents as prima facie evidence of the matters asserted therein. ORS 656.310(2). We find that Dr. Borman's opinion supports the finding that claimant's condition involved only one disk space which was the subject of three surgeries.

We are persuaded by the record that claimant's condition has been confined to the one disk, whether it is called L4-5 or L5-S1, and that the explanations of Drs. Borman and Rosenbaum are persuasive that claimant's original industrial injury and two prior compensable surgeries were a material contributing cause of the third surgery in July 1983. The Board has no medical expertise and relies on the parties to have fully developed the facts in the case. Therefore, relying on the record presented to us for decision, we affirm the Referee's order and adhere to and republish our Order on Review dated August 29, 1985.

IT IS SO ORDERED.

DALE H. MARSHALL, Claimant
Welch, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-09242
October 22, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of that portion of Referee Neal's order which set aside its denial of claimant's occupational disease claim for hearing loss. The issue on review is compensability.

Claimant was 55 years old at the time of the hearing. He had been a Number Three paper machine tender for more than thirty years. Claimant suffered a hearing loss of approximately 45%. We adopt the Referee's findings of fact as our own.

The Referee found that claimant was a credible witness, but that the issue of compensability turned on the question of medical causation. We agree with the Referee's assessment that the question is one of medical causation.

The question of medical causation was addressed by three physicians. Claimant's internist, Dr. Bookin, who treated claimant for his acromegaly and pituitary tumor, opined that the signs of acromegaly caused claimant's hearing loss due to impingement on the auditory nerves. Otolaryngologist Dr. Myers opined that claimant's hearing loss was not consistent with noise exposure and that claimant's hearing loss was probably due to underlying hypertension. Dr. Myers also concluded that claimant's hearing loss was unrelated to his pituitary tumor and the therapy for that condition. Otologist and neuro-otologist Dr. Wilson opined that the major cause of claimant's hearing loss was his employment related noise exposure.

From the record, it appeared that Dr. Myers was claimant's

treating doctor regarding the hearing loss condition for at least part of the time. We are not persuaded by the record that Dr. Wilson became the treating doctor regarding the hearing loss condition. Whether any doctor's opinion is entitled to extra weight due to status as the "treating physician" would be illusory in the circumstances of this case, because it appears from the record that Dr. Myers and Dr. Wilson examined claimant only one time each. We are persuaded by the opinion of Dr. Myers because his opinion considers the contours of claimant's pattern of hearing loss in connection with claimant's documented hypertension condition, whereas Dr. Wilson's opinion does not mention the hypertension condition. We are further persuaded that although claimant's working environment was noisy, the pattern of his hearing loss was consistent with vascular causation rather than noise causation.

Dr. Myers's opinion that it would be impossible to assign precise degrees of contribution of the various possible contributing elements to claimant's hearing loss is also persuasive. It was claimant's burden to prove by a preponderance of the evidence that his work exposure was the major contributing cause of his hearing loss, and we find that he failed to carry his burden of proof.

ORDER

The Referee's order dated April 8, 1985 is reversed. The self-insured employer's denial is reinstated.

MELVIN L. O'BRIEN, Claimant
W. Daniel Bates, Jr., Claimant's Attorney
Ackerman, et al., Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-08672
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Howell's order that directed the payment of temporary disability compensation during a period of time in which claimant was unable, on account of his compensable injury, to "bump down" to a job with more strenuous duties during a seasonal layoff. The issue is entitlement to temporary disability compensation.

I

The facts are not disputed. During good weather, approximately May through October, claimant worked for the employer as a "cat-skinner." During bad weather there was less need for "cat-skinners" and claimant was "bumped" from that job by more senior workers. He would have remained laid off, but for the fact that he was able to "bump down" and work in the woods as a choker setter, hook tender or chaser on the landing for this same employer. Each of these positions were at slightly different rates of pay. "Bumping" rights were a part of the labor agreement under which claimant worked. When the weather improved and more "cat-skinner" positions became available, claimant would resume heavy equipment operation. Claimant had thus changed jobs by being "bumped" and in turn "bumping down" during each of the three years prior to the time in question, the winter of 1984-85.

Claimant compensably injured his right leg in September

1983. At the time he was injured, claimant was operating heavy equipment. He continued working until June 29, 1984 when his attending physician, Dr. Nagel, took him off work. Claimant remained off work until August 1, 1984 when his physician released him to return to work with limitations that were compatible with heavy equipment operation. Claimant worked as a "cat-skinner" until October 2, 1984 when he was laid off due to reduction in "cat-skinner" positions on account of reduced road building operations due to bad weather. Claimant was, however, unable to "bump down" into high lead logging work because his attending physician would not release him to that kind of work for more than two hours per day.

Claimant's attending physician ultimately released him for work without limitations effective February 1, 1985. On February 4, 1985 claimant returned to work as a chaser. SAIF paid temporary disability compensation for the period June 29 through July 31, 1984, but not for the period October 3, 1984 through January 31, 1985. Claimant requested a hearing, claiming entitlement to temporary disability compensation during the latter period and requesting a penalty and attorney fee for alleged unreasonable resistance to payment of compensation.

II

The Referee's decision turned upon his analysis of what should be characterized as claimant's "regular employment," his reasoning being that claimant would be entitled to compensation for temporary disability unless he returned to his regular employment, was medically released to return to his regular employment or was determined to be medically stationary by the Evaluation Division under ORS 656.268(4). ORS 656.268(2); Jackson v. SAIF, 7 Or App 109 (1971). There is no contention that claimant's claim was determined by the Evaluation Division. The Referee concluded:

> "I believe that the term 'regular employment' was intended to be given its common meaning and interpreted as being a worker's usual, permanent job with a particular employer. In this case, the facts establish a pattern which show that claimant's usual, permanent job involved routine, periodic changes in his duties. I, therefore, conclude that claimant's regular employment was as a cat-skinner/ choker setter-chaser and that the duties of that regular employment varied with the season.
>
> "Claimant was not released for his regular employment after October 2, 1984. He is entitled to temporary total disability from October 3, 1984 through January 31, 1985."

The Referee distinguished Georgia Pacific v. Awmiller, 64 Or App 56 (1983), and Ramon Robledo, 36 Van Natta 632 (1984), both of which held that the claimants' "regular employment" was the position held at the time of injury. The Referee concluded that both of the cited cases involved different jobs with different employers, while he saw this case as involving different duties with the same employer.

Although there is logic in the Referee's approach to this unique case, we are unable to accept the reasoning. It would be a different matter if claimant's contract of employment was specific in that it stated that his duties would change periodically, but that is not the case.

If claimant had but one job, which the Referee concluded was "cat-skinner/choker setter-chaser," he would not have had to "bump down" each time demand for "cat-skinners" decreased. Indeed, claimant did not "bump down" until after he was laid off as a "cat-skinner." We are further persuaded that claimant did not have the job attributed to him by the Referee because "bumping down" and, therefore, continuing to work, was solely in claimant's control. We are mindful that not working is a poor alternative to working at a different job; however, we believe that claimant's "regular employment" was as a "cat-skinner," and that high lead logging work, if available, was an alternative to his "regular employment." We say "if available" because claimant was required to "bump down," which means that he displaced a worker with less seniority. If no such worker was present, he would remain laid off.

III

Claimant has advanced a theory that he maintains does not require us to decide whether claimant's "regular employment" was as a "cat-skinner" or something else. Claimant argues that the phrase "regular employment" appears only in ORS 656.268, which by its own terms applies only to temporary disability payments made between the time a worker becomes medically stationary and claim determination. Because claimant in this case was not medically stationary during the relevant period, he asserts that his entitlement to temporary disability compensation arises out of either ORS 656.210 or 656.212. Claimant goes on to argue that the August 1, 1984 medical release was with restrictions and, therefore, claimant was partially disabled. Claimant's reasoning is that when a claimant is totally disabled from working, he receives temporary total disability (TTD) compensation under ORS 656.210. However, when a claimant's disability is no longer total and becomes partial, he receives temporary partial disability (TPD) compensation under ORS 656.212. Claimant's position appears to be strengthened by the Department's rule, OAR 436-54-222(3) (renumbered OAR 436-60-030, May 1, 1985), which provides:

> "An insurer or self-insured employer shall cease paying temporary total disability compensation and commence making payment of such temporary partial disability compensation as is due from the date an injured worker accepts and commences any kind of wage earning employment prior to claim determination."

Under claimant's theory, he was totally disabled during June and July of 1984. By virtue of Dr. Nagel's release for modified work on August 1, 1984, claimant was no longer totally disabled, but was partially disabled, in that he could do some, but not all, work. Claimant's theory breaks down at this point. Dr. Nagel's release to "modified" work was not a release to "modified" work at all. None of the restrictions imposed by Dr. Nagel posed a barrier to claimant's performing the job of "cat-skinner," which claimant in fact did perform with Dr. Nagel's specific approval.

Claimant was able to perform work at a gainful and suitable occupation, that of "cat-skinner," and was, therefore, not totally disabled under the statutory scheme. See Bold v. SAIF, 60 Or App 392, 396 (1982).

IV

Claimant agrees that he was not totally disabled; however, he argues that his "partial" disability entitled him to payment of compensation at the full TTD rate when he was no longer able to work as a "cat-skinner." We could accept this argument if claimant's injury was a material factor in his no longer being able to operate heavy equipment. However, as claimant admits, his ability to operate heavy equipment was undiminished during the period in question. The only reason claimant was unable to work as a "cat-skinner" is that no such job was available for him. Had a job been available, he would have been fully capable of performing it. We addressed a similar issue in Thomas C. Harrell, 34 Van Natta 589 (1982). We noted that,

> "No statute or decision directly addresses the issue of a claimant's entitlement to temporary disability compensation when the claimant is capable of performing modified employment during a time that the worker is not medically stationary, the worker has returned to modified employment at his regular wage and then is terminated for reasons not related to his compensable injury." Id.

We went on to hold that the claimant was not entitled to temporary disability compensation because his "inability to continue working in his modified job was not the result of his compensable injury." Id. at 591.

In Thomas C. Harrell, supra, we did not discuss the issue raised by claimant in this case, that of TPD, as opposed to TTD, compensation. However, in Gloria J. Bas, 36 Van Natta 175 (1984), we did. The claimant in Bas was working part-time and was receiving TPD benefits. Due to a misunderstanding about whether the claimant was authorized to take vacation time, she was terminated. The insurer continued to pay TPD benefits and the claimant requested a hearing, maintaining that she was entitled to benefits for TTD. After noting that the issue of TPD was not addressed in Harrell because the claimant had returned to modified work at his full wage, we analyzed the issues in light of the parties' arguments that various portions of former OAR 436-54-222 applied to the case. We ultimately concluded that in situations like that presented by Bas, where a claimant was unable to continue working for reasons unrelated to the compensable injury after having accepted modified work, former OAR 436-54-222(5) and (6) applied. Under the facts before us in the Bas case, we held that the offer of modified employment was, in effect, withdrawn and that the claimant was entitled to reinstatement of TTD. 36 Van Natta at 178-80.

This case is distinguishable, however, from both Thomas C. Harrell, supra, and Gloria J. Bas, supra. Both of those cases were decided under ORS 656.210, 656.212 and former OAR 436-54-222, and in neither case was the claimant released to perform other

than modified or part-time work. We have already concluded that in this case Dr. Nagel's unqualified approval of claimant's performing the job duties of "cat-skinner" constituted a physician's release to regular employment. In Bono v. SAIF, 298 Or 405, 409-10 (1984), the Supreme Court discussed the interrelationship between "interim" compensation and temporary total disability compensation, holding that the basis of "interim" compensation was temporary disability, either total or partial, that prevents an injured worker from working. The court concluded that, in order to be entitled to temporary disability benefits as "interim" compensation, a worker must have left work as the phrase is used in ORS 656.210(3), i.e., "as a result of his compensable injury . . . ." Id. at 410.

Although this case does not involve "interim" compensation, we interpret Bono v. SAIF, supra, as requiring that an injured worker must have "left work as that phrase is used in ORS 656.210(3) . . ." in order to be entitled to temporary disability compensation of any nature. See also Cutright v. Weyerhaeuser Co., 299 Or 290 (1985) (retired workers not entitled to temporary disability compensation after aggravation of industrial injury). Claimant's inability to continue working as a "cat-skinner," while not of his doing, also was not as a result of his compensable injury. Therefore, the employer in this case was no longer required to pay temporary disability benefits, total or partial, even though claimant was not medically stationary. We hold that claimant's entitlement to temporary disability compensation of any kind ceased upon Dr. Nagel's August 1, 1984 release for return to work as a "cat- skinner," and that reinstatement of the entitlement to such compensation would have required claimant's attending physician's statement that claimant was unable to continue to perform work as a "cat-skinner" on account of his industrial injury. Because no such physician's statement exists, claimant is not entitled to the temporary disability compensation directed by the Referee.

ORDER

The Referee's order dated February 14, 1985 is reversed.

KENNETH E. READ, Claimant
Quintin B. Estell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-11848
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Nichols' order that set aside its denial of claimant's aggravation claim involving his vision. Claimant cross-requests review of that portion of the order that denied his request for an increased award of unscheduled permanent partial disability for loss of vision over the 94° for approximately 30% unscheduled disability granted by a prior Determination Order and a stipulated settlement. The issues on review are compensability and extent of unscheduled disability.

On the issue of extent of unscheduled disability, we affirm. We reverse the Referee's order as it pertains to the compensability of claimant's aggravation claim.

Claimant is a logger who was compensably injured in 1975 when he was struck across the bridge of the nose by a tree limb. The injury initially caused uncontrolled nosebleeds. Headaches and various vision problems arose later after claimant underwent surgery to repair his damaged nose.

Claimant began treating with neurologist Dr. Knox for headaches. Dr. Knox ultimately suggested that claimant not return to logging because of claimant's sensitivity to light, which in turn increased his headaches.

Claimant's claim was closed with an award of 32° for 10% unscheduled permanent partial disability for injury to the head and face. By way of a June 4, 1979 stipulated settlement, claimant received an additional 62°, or slightly less than 20%. The stipulated agreement became the last arrangement of compensation.

Claimant's complaints continued into 1980, and in November of that year he was examined by Dr. Chaimov, an opthamologist. Dr. Chaimov noted a decrease in claimant's right eye vision since the injury, and suspected right eye optic nerve atrophy. Claimant filed an aggravation claim in October 1982, asserting that his vision had worsened since the June 1979 stipulation as a result of his 1975 injury.

When asked for a clarifying opinion regarding claimant's purported aggravation, Dr. Chaimov opined that claimant's problems had indeed worsened. In addition to the suspected eye atrophy, he noted a reduction in claimant's right eye acuity from 20/25 to 20/50 between December 1978 and November 1980. When asked for an opinion on causation, however, Dr. Chaimov could only say that it was "possible but not probable" that claimant's current problems were related to the industrial injury.

SAIF then sought an opinion from its internal medicine consultant, Dr. Girod, who essentially concurred with Dr. Chaimov that "there could possibly be" a relationship between claimant's injury and his vision conditions.

Dr. Knox issued two reports, the first of which stated that in the several times he had examined claimant, the neurological findings had remained unchanged. The second report stated that although Dr. Knox had been unable to demonstrate a visual field deficit in claimant, it was his opinion that claimant's ongoing problems were related to his industrial injury.

The Referee found the aggravation claim compensable, largely because no physician had stated that claimant's conditions were not related to his original injury, and because claimant had experienced no vision problems prior to that injury. SAIF presents alternative arguments on review: (1) that claimant has failed to prove that his conditions have worsened in the first instance; and (2) even if claimant's conditions have worsened, they are not related to the original injury.

In order to establish a compensable aggravation, claimant must prove both that his current conditions have worsened and that the worsening is causally related to the compensable injury. ORS 656 273(1); Hoke v. Libby, McNeil & Libby, 73 Or App 44 (1985). We agree with the Referee that claimant's condition has worsened.

Although we note claimant's testimony to the effect that his conditions have remained about the same since mid-1979, we find Dr. Chaimov's opinion that claimant's visual acuity and nerve atrophy have worsened to be more persuasive because of the medical complexity of the claim.

We disagree with the Referee, however, that claimant has proved the requisite causal connection between his current difficulties and the 1975 injury. There are three medical opinions in this case concerning causation. Dr. Girod states that there is a possibility of a causal connection. Dr. Chaimov, the opthamologist, states that there may be a connection, although it is "not probable." Only Dr. Knox affirmatively states that there is a connection. Dr. Knox, however, is a neurologist. To the extent that his opinion conflicts with that of claimant's opthamologist, we accept the opinion of the latter because of the opthalmic nature of claimant's claim.

After considering the medical opinions, we find that at most, claimant has proved a possible connection between his current visual difficulties and the 1975 injury. Proof of a possible connection, however, is not enough to establish a claim. Rather, the preponderance of the evidence must demonstrate that a causal connection is medically probable. Gormley v. SAIF, 52 Or App 1055, 1060 (1981); see Bonnie M. Danton, 37 Van Natta 561 (1985); Herbert E. Richards, 36 Van Natta 796 (1984).

ORDER

The Referee's order dated April 30, 1985 is affirmed in part and reversed in part. That portion of the order that denied claimant's request for increased unscheduled permanent partial disability compensation is affirmed. That portion of the order that set aside the SAIF Corporation's denial of claimant's aggravation claim is reversed and the denial is reinstated.

ROBERT D. SCOTT, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-00696
October 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order which declined to rule on the issue of premature closure on the ground that the Referee was without jurisdiction, and which upheld a Determination Order which granted claimant an award of 32° for 10% unscheduled disability. Jurisdiction over the premature closure issue, premature closure on the merits and extent of disability are the issues on review.

The parties agree that the facts material to the jurisdiction issue are that claimant requested a hearing to protest a Determination Order which found the claimant medically stationary as of June 24, 1980. Claimant subsequently entered a vocational rehabilitation program. Claimant's attorney and the employer's attorney entered into an agreement whereby claimant dismissed his request for hearing on the Determination Order. The parties agreed that all issues raised by the request for hearing to protest the Determination Order could later be raised following the close of the vocational rehabilitation program. The Referee was apparently unaware of the agreement between the parties. He

concluded that because the request for hearing protesting the Determination Order was dismissed and no other request for hearing filed within one year of the Determination Order he lacked jurisdiction to determine the issue of premature closure.

Whether or not the Referee was aware of the parties' agreement, subsequent to the Referee's decision, the Court of Appeals decided Hanna v. SAIF, 65 Or App 649, 652 (1983), in which it held that ORS 656.268(5) entitles a claimant to a total redetermination of extent of permanent disability upon termination of a vocational rehabilitation program. We conclude that, under Hanna v. SAIF, a claimant is entitled to contest all issues raised by the first Determination Order following a second Determination Order which is issued after termination of vocational rehabilitation under ORS 656.268(5). The issue of claimant's medically stationary status between June and December 1980 was in fact litigated before the Referee and the record is adequately developed for us to decide the question.

After having reviewed the medical opinions regarding claimant's status in June 1980, we conclude that Drs. Klump and Balme both opined in June 1980 that claimant was medically stationary and required no further treatment, but that Dr. Scheer, claimant's treating chiropractor, was expressing vascillating opinions. We find that the preponderance of the persuasive evidence is that claimant was medically stationary as of June 24, 1980, the date Dr. Scheer expressed his opinion that claimant could be released to return to work, albeit not his regular work. Accordingly, we find that claimant's claim was not prematurely closed.

On the issue of extent of disability, we conclude that claimant is entitled to a greater award than that granted by Determination Orders. Following our de novo review and considering the guidelines contained in OAR 436-65-500, et seq. (renumbered 436-30-120, May 1, 1985), we conclude that claimant is entitled to an additional 16° for 5% unscheduled disability in excess of the 32° for 10% previously awarded by Determination Orders.

ORDER

The Referee's order dated September 29, 1983 is affirmed in part and modified in part. Those portions of the Referee's order concerning extent of disability are modified. Claimant is awarded 16° for 5% unscheduled disability in addition to the 32° for 10% unscheduled disability previously awarded. Claimant's attorney is allowed 25% of the increased compensation not to exceed $3,000. The balance of the Referee's order is affirmed.

ROBERT D. SCOTT, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-09526
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Brown's order which set aside its denial of claimant's aggravation claim for a low back injury. On review, the employer does not argue that claimant's current condition is not causally related to his compensable injury. However, the employer contends that claimant failed to establish that his condition had worsened. We agree and reverse the Referee's order.

Claimant was 43 years of age at the time of hearing. He sustained his compensable low back injury in December 1979, while working for the maintenance department of a lumber company. Dr. Scheer, claimant's treating chiropractor, diagnosed the injury as a "major sprain of the intraspinous and supraspinous ligament in the lumbar spine."

Following conservative treatment, the claim was closed in July 1980 with claimant receiving a 5% permanent disability award. The claim was reopened in January 1981, as claimant participated in a two-year rehabilitation program in automobile mechanics. A January 1983 Determination Order reclosed the claim, awarding claimant an additional 5% permanent disability. Claimant's total permanent disability award of 10% was affirmed by a September 1983 Referee's order. In our Order on Review in WCB Case No. 83-00696, issued this date, we granted claimant an additional 5% unscheduled permanent partial disability.

Dr. Scheer examined claimant in August 1983, nearest to the time of claimant's last award of compensation. Dr. Scheer reported that claimant's examination was "impressive and amazing." Claimant attributed his normal findings to a recent weight training program. Dr. Scheer reviewed job descriptions which called for lifting capabilities of 50-60 pounds, as well as the performance of twisting work activities in awkward positions. If only based on claimant's present examination, Dr. Scheer stated that he would release claimant to work without limitation. However, in view of claimant's unstable low back history and chronic residual pain, Dr. Scheer opined that such work activities would certainly reactivate claimant's pain. Therefore, Dr. Scheer continued to recommend that claimant not return to his regular work as a tire repairman. Furthermore, Dr. Scheer did not alter his earlier opinion that had placed claimant under a 30 pound lifting restriction and advised him to avoid repetitive stooping, bending and twisting maneuvers.

In November 1983 claimant began working out of state as a motorhand for an oil drilling company. He injured his ribs in December 1983, prompting an approximately one month hiatus for medical treatment. Subsequently, he resumed working in January or February of 1984 and worked until April 1984. Thereafter, claimant returned to Oregon.

In August 1984 claimant was reexamined by Dr. Scheer. Claimant reported no serious back problems over the past year until the last few days. Specifically, claimant described a "severe catching type pain" which had arisen while he was walking across his back yard. The pain had eased with rest and ice, but claimant now complained of numbness and aching extending down his legs to his feet. Dr. Scheer noted range of motion findings at 40-50% of normal, restricted straight-leg raising, and moderate spasms. In Dr. Scheer's opinion claimant's condition represented an acute exacerbation of residuals from his 1979 injury. The doctor's "major concern" was a diminished left achilles reflex, which indicated a "possible worsening of his condition."

In September 1984 claimant was examined by Dr. Klump, neurosurgeon. Dr. Klump had last examined claimant in April 1982, concerning a 1981 off-the-job neck injury. Dr. Klump had also examined claimant twice in 1980 regarding his compensable low back

injury. Claimant reported that several chiropractic treatments and rest were improving his back problems. Dr. Klump noted a "reasonably full range of motion" and no palpable muscle spasms, with some low back pain on straight leg raising. There was no indication of a herniated disc nor of nerve root compression. Dr. Klump continued to consider claimant's condition medically stationary. Stating that claimant was "not significantly worse," Dr. Klump concluded that it was not unusual for low back pain to periodically appear throughout the years following a significant sprain injury.

In November 1984 Dr. Casey, orthopedist, performed an independent medical examination. Dr. Casey reported that claimant was no longer seeking chiropractic treatments and had stated that his current condition was no different than it had been prior to the recent "walking" incident. Dr. Casey noted reduced forward flexion, but an otherwise normal lumbar motion. Claimant's straight-leg-raising test was negative and no muscle spasms were detected. Referring to both Dr. Klump's report and claimant's statements, Dr. Casey concluded that claimant's overall condition had not changed.

Claimant testified that he was unemployed at the time of the August 1984 incident, but returned to the work force in October 1984. Following the August 1984 incident claimant experienced severe low back pain and "a tingling" which radiated down his left leg into his foot. Claimant believed that after the August 1984 incident there was a period of time when he was incapable of working due to his inability to bend or sit for any extended period. However, Dr. Scheer's treatments had "helped an awful lot." Claimant had not seen Dr. Scheer since his employment in October 1984.

To establish an aggravation claim, a claimant must establish by a preponderance of the evidence a worsening of his condition since the last award or arrangement of compensation and a causal relationship between that worsening and his compensable injury. ORS 656.273(1); Hoke v. Libby, McNeil & Libby, 73 Or App 44 (1985). Claimant is not required to show a substantial worsening. Mosqueda v. ESCO Corporation, 54 Or App 736, 739 (1981). Objective medical evidence is not necessarily required to establish an aggravation claim. Garbutt v. SAIF, 297 Or 148, 151-52 (1984). The worker's subjective complaints may or may not sustain the burden of proof. Garbutt v. SAIF, supra. In some cases a symptomatic worsening will be found sufficient to warrant claim reopening under the aggravation statute, while in other cases it will not. Billy Joe Jones, 36 Van Natta 1230, 1235 (1984).

The Referee found a compensable aggravation, primarily based upon Dr. Scheer's opinion, as the treating physician, claimant's subjective complaints and the differences between claimant's August 1983 and August 1984 range of motion and reflex response tests. We do not find this evidence sufficiently persuasive to establish compensability, particularly where similar tests taken nearly contemporaneously with those of Dr. Scheer suggested quite different results. Although the opinion of the treating physician is generally entitled to great weight, Weiland v. SAIF, 64 Or App 810, 814 (1983), we find the opinions of Drs. Klump and Casey more persuasive. Both physicians concluded that claimant's condition had not changed. In reaching our conclusion, we attribute special

significance to the opinion of Dr. Klump, a physician who had not only examined but treated claimant before the last award of compensation. It was Dr. Klump's opinion that claimant had experienced a periodic flareup of symptoms which was foreseeable given the gravity of claimant's injury. This flareup did not alter Dr. Klump's opinion that claimant's condition remained medically stationary.

Considering claimant's history of chronic back pain and proclivity for occasional exacerbations, we do not find it significant that claimant would periodically experience an increase of symptoms. Interestingly, Dr. Scheer's August 1983 opinion predicted that fluctuations in claimant's symptoms were to be expected. Moreover, claimant's return to work within two months of reseeking Dr. Scheer's chiropractic services supports the argument that the treatments were palliative in nature and lends further credence to Dr. Klump's opinion that claimant's condition had not worsened and remained medically stationary.

In view of the lack of persuasive objective medical evidence in support of a worsening and the persuasiveness of the medical opinions to the contrary, we conclude that claimant's subjective complaints are insufficient to establish an aggravation. See Hoke, supra.; Sharon C. Chase, 37 Van Natta 415 (1985).

ORDER

The Referee's order dated April 11, 1985 is reversed. The self-insured employer's denial dated August 27, 1984 is reinstated and upheld.

GARY L. STEPHENSON, Claimant
Gatti, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-09755
October 22, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Lipton's order which awarded claimant 48° for 15% unscheduled permanent partial disability in lieu of a Determination Order award of no permanent disability for his neck and upper back condition.

Claimant sustained a compensable injury on October 4, 1983 while lifting and carrying over his head a 100- to 150-pound counter top. About a year earlier he had sustained a non-disabling work injury to the same part of his body. Although he had been intermittently symptomatic since the prior injury, the prior injury was neither bothering him at the time of the August 1983 incident nor was it interfering with his heavy work.

Dr. Howard, the treating chiropractor, diagnosed cervical strain with vertebragenic cephalgia and treated claimant conservatively. Claimant's symptoms persisted, interfering with his ability to perform his job. On Dr. Howard's recommendation claimant quit his job in December 1983 and sought less strenuous work.

Dr. Isaacson, an orthopedic surgeon, examined claimant in February 1984 and found him to be entirely within normal limits. She stated:

"An individual who is involved in a job where he has to hold things above his head for an extended period of time will develop some neck and shoulder pain. This is a difficult position to maintain. The fact that the patient did have pain following this maneuver occasionally would not necessarily mean that he has to quit this type of work. At the current time, the patient is medically stationary. He needs no treatment. There is no evidence of disability."

Dr. Stellflug, another chiropractor, took over claimant's care on February 13, 1984. Claimant continued to have upper back, neck and head pain and neck spasms, but he responded well to Dr. Stellflug's care. Claimant was declared medically stationary as of April 16, 1984 and was released to modified work involving no overhead lifting or carrying objects with his head. Dr. Stellflug found claimant unable to work for a week in mid-May 1984. In again releasing claimant on May 21, 1984, he added a 25-pound lifting limit to the overhead lifting restriction. He opined that claimant was 15 to 20% permanently disabled. In December 1984 he added restrictions limiting driving and barring stressful work and exposures to dust, chemicals and extreme temperature changes. Dr. Stellflug provided no explanation as to the reason for these additional restrictions.

Dr. Hardiman, an orthopedist, examined claimant for the insurer on February 28, 1985. He noted abundant calluses on claimant's hands and excellent grip strength. He stated that his findings were not significantly different from those of Dr. Isaacson a year earlier. Dr. Hardiman recommended that claimant return to work without restriction, but stated that claimant had minimal disability based on subjective complaints.

Dr. Stellflug continued to treat claimant one to four times a month, as needed.

The Referee found claimant's testimony to be credible. Claimant testified that he continued to experience headaches and pain and tightness in his neck and shoulders. Shortly before the hearing he began working 32 to 40 hours per week in a convenience store. Job activities included stocking shelves and cleaning the store. Claimant testified of upper back pain from long standing on this job. He testified that lifting caused tension in his neck and could precipitate headaches. He was also bothered by reaching up, bending down and twisting his neck. He continued to do neck exercises at home and to use ice packs and massage when he was symptomatic.

Claimant is 26 years old. He has an eleventh grade education. Prior work experience includes loading soft drink trucks, moving furniture, working in a gas station and serving as a security guard in the Army.

We find that claimant has suffered a permanent physical impairment as a result of the compensable work injury; however, that impairment is minimal. On our de novo review of the record, considering claimant's impairment together with the pertinent social/vocational factors, see ORS 656.214(5); OAR 436-65-600, et

seq. (renumbered OAR 436-30-380, et seq., May 1, 1985), we find that claimant would be most appropriately compensated for his permanent loss of earning capacity due to the compensable injury by an award of 16° for 5% unscheduled permanent partial disability.

ORDER

The Referee's order dated March 25, 1985 is modified. Claimant is awarded 16° for 5% unscheduled permanent partial disability for his neck and upper back condition in lieu of the prior award. Claimant's attorney's fee is adjusted accordingly.

MARY K. TURNER, Claimant
Ackerman, et al., Claimant's Attorneys
Daniel DeNorch, Defense Attorney

WCB 83-04146
October 22, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order, as affirmed on reconsideration, that: (1) affirmed the Determination Order awarding 30% (96°) unscheduled permanent partial disability in addition to the 5% (16°) unscheduled disability awarded by a prior Determination Order; and (2) denied claimant's request for an award of temporary total disability for the period of September 15, 1980 through September 18, 1980. The insurer requests that claimant's brief on Board review be stricken as untimely filed.

We agree with the insurer that claimant's brief was untimely filed and hereby grant its request that the brief be stricken. Claimant's brief was originally due on May 28, 1985. Claimant requested and was granted an extension of 15 days, or until June 12, 1985, in which to file. Her brief was received by the Board on July 29, 1985, or 47 days after the period of extension had expired. In the interim, the insurer filed a Motion to Dismiss the claim on the ground that claimant had failed to file a brief. The motion was denied, for there is no requirement that Board briefs be filed. Mary K. Turner, 37 Van Natta 956 (1985). On review, the insurer has filed no respondent's brief but has asked that claimant's brief be stricken as untimely.

We have established time periods within which briefs are to be filed. OAR 438-11-010(3). In Nancy J. Rensing, 37 Van Natta 3 (1985), we discussed the recurrent problem of late filing of briefs on Board review and noted that it was then our general practice to allow consideration of briefs filed a day or two late. We also noted, however, that our practice of tolerating late submissions was under active reconsideration and we admonished the parties to thereafter adhere to the brief filing schedule.

We recently decided Vanessa Dortch, 37 Van Natta 1207 (1985), in which claimant moved to strike the insurer's brief on the grounds that it was untimely filed. We once again considered our acquiescence to the late submission of briefs and concluded that strict enforcement of our brief filing rule was both necessary and desirable. Accordingly, we held, "[H]enceforth OAR 438-11-010(3) will be strictly enforced, and . . .briefs not filed in conformity with that rule will not be considered by the Board." In the interest of fairness, however, we held that our policy of requiring strict conformity would only be applied prospectively.

Because we had not decided Dortch at the time this claimant's brief was filed, we must decide whether to grant the insurer's motion based on our previous policy of tolerance. We note that in Wanda M. Pruitt, 36 Van Natta 1504 (1984), we found a brief filed eight days late to be on the "borderline" of acceptability and we denied claimant's motion to strike the insurer's brief. The present brief was received 47 days late. Forty-seven days clearly exceeds the "borderline" of acceptability. Claimant's brief will not be considered on review.

On the merits, we affirm the order of the Referee.

ORDER

The Referee's orders dated January 4, 1985 and February 20, 1985 are affirmed.

DOROTHY H. DJODJIC, Claimant
Kelley & Kelley, Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 84-01340
October 23, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Neal's order which: (1) affirmed that portion of the Determination Order dated January 20, 1984 which approved termination of temporary disability compensation at the end of the authorized training program on October 28, 1983; (2) awarded 32° for 10% unscheduled permanent partial disability in addition to the Determination Order which awarded 16° for 5% unscheduled permanent partial disability as a result of injury to claimant's low back; and (3) upheld the insurer's denial of the aggravation claim. Claimant additionally cites as error the Referee's admission and consideration of Exhibit 159 on the grounds that it was offered too late and that it was the result of an improper ex parte contact with claimant's attending physician. The issues on review are the admissibility of Exhibit 159, whether the insurer's contact with claimant's attending physician was proper, temporary disability compensation, extent of unscheduled permanent partial disability, and compensability of an aggravation claim.

Exhibit 159 was a letter confirming the substance of the ex parte contact with the attending physician. If the contact were impermissible, then the letter would be inadmissible. As an alternative, claimant argued against admission of the exhibit on the grounds that it was not offered until the date of the hearing. On the issues of the insurer's ex parte contact with the attending physician and the late submission of Exhibit 159, the Board finds that the Referee did not abuse her discretion in admitting and considering the document. Allen W. Hays, 37 Van Natta 1179 (September 4, 1985).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 14, 1985 is affirmed.

MERLE BARRY, Claimant
Flaxel, et al, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07171
October 24, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Quillinan's order that awarded 15° for 10% scheduled permanent partial disability in addition to the Determination Order dated June 27, 1984 that awarded 37.5° for 25% permanent disability of claimant's right leg due to an industrial injury to his knee and affirmed the Determination Order dated May 24, 1983 that originally closed the claim because claimant was medically stationary. Claimant also requests review of the Referee's decision not to consider Exhibit 32. The issues on review are consideration of an exhibit, temporary total disability from May 9 through July 13, 1983 and extent of scheduled permanent partial disability.

I

Exhibit 32 was a reply from claimant's attending physician written on the face of a letter from claimant's attorney. Claimant's attorney obtained the letter on the day of hearing on his way to the hearing. Claimant's attorney's letter was dated 16 days before the hearing. The body of the letter requested clarification of an opinion authored by claimant's attending physician 21 months before the hearing.

The Referee considered the offer of the evidence, and denied admission based on untimely presentation. We reverse the Referee's decision. The Referee relied on the letter having been submitted too late and mentioned the "ten-day rule." OAR 438-07-005(3)(b) which became effective May 1, 1984 provides that an exhibit received by a party after ten days before hearing can be received if it is submitted with a supplemental index to the other parties within seven days of the submitting party's receipt of the exhibit. OAR 438-07-005(4) provides for the Referee to exercise discretion if an exhibit is offered which does not comply with the requirements of OAR 438-07-005(3), but there is no discretion if the rule was complied with. In this case, we find that claimant's attorney did comply with the technical requirements of OAR 438-07-005(3)(b), in that the exhibit was received within ten days before the hearing and was submitted to the opposing party with an index within seven days of receipt, and that the proffered exhibit should have been admitted. We also note that this is the type of dilatory hearing preparation which the rule was designed to prevent, but which the rule inadvertently allows to continue. Exhibit 32 is part of the record in the case and will be considered on review. Herbert D. Rustrum, 37 Van Natta 1291 (1985); Edward Morgan, 34 Van Natta 1590 (1982).

II

Claimant injured his right knee in the course of his employment on August 6, 1982. Two arthrograms and a venogram were performed. By the end of February 1983 claimant's condition was improving. On March 24, 1983 claimant suffered a broken right leg, among other injuries, when a car he was riding in was involved in a collision. On May 8, 1983 Dr. Mann reported his opinion "that [claimant] should be considered medically stationary

regarding his right knee until such time that he has recovered from his motor vehicle accident sufficiently whereby treatment for the industrial injury may be resumed." A Determination Order authorized the termination of temporary disability compensation as of May 20, 1983 but declined to award permanent disability as there was no information upon which to base an award.

By letter of August 8, 1983 Dr. Mann recommended reopening based on resumption of treatment of claimant's industrial injury on July 14, 1983. Treatment of the industrial injury continued until Dr. Mann completed a work restriction evaluation form on May 10, 1984 which reported claimant was medically stationary and released to return to work, although with many restrictions on his activities. Not all of the restrictions were due to claimant's industrial injury, however. Dr. Degge performed an independent closing examination on May 31, 1984. Dr. Degge concluded that claimant's leg was 55% impaired. He opined that claimant's leg was 15% impaired due to the industrial injury and 40% impaired due to preexisting unrelated factors. He further reported his opinion that claimant's need for an arthroplasty was unrelated to the industrial injury. A Determination Order dated June 27, 1984 awarded temporary disability compensation from August 6, 1982 through May 8, 1983 and from July 14, 1983 through May 31, 1984, and awarded 37.5° for 25% scheduled permanent partial disability.

Dr. Mann agreed completely with Dr. Degge's conclusions regarding the extent of claimant's impairment and the contribution of preexisting non-industrial factors to claimant's limitations on July 9, 1984, October 19, 1984 and October 22, 1984. Dr. Mann withdrew his concurrence with Dr. Degge's opinion that claimant's need for an arthroplasty was unrelated to the industrial injury.

III

We turn first to the question of entitlement to temporary disability compensation during the period from May 9 through July 13, 1983. We are persuaded that claimant was disabled by his industrial injury throughout that period. He was simultaneously disabled by a non-industrial injury. Each injury would have been sufficient by itself to disable claimant. Claimant's treatment of and recovery from his industrial injury would have continued but for the intervening injury which effectively prevented active treatment of the industrial injury. Claimant's doctor reported claimant was medically stationary because he could not treat the industrial injury, not because claimant's condition was not expected to improve with time or with additional curative treatment. Claimant did not refuse treatment.

We find that claimant's condition was not medically stationary and that the claim was prematurely closed by the Determination Order dated May 24, 1983. The question at issue is whether claimant was entitled to temporary disability compensation during a period in which he was disabled by separate conditions resulting from an industrial cause and from a non-industrial cause. We are persuaded that claimant would have been entitled to compensation for his disability during the period in question if there had been no intervening motor vehicle accident. We are not persuaded that the injuries sustained in the motor vehicle accident were intervening and superseding as the cause of claimant's disability; therefore, we find that claimant was entitled to temporary disability compensation during the period from May 9 through July 13, 1983.

On the issue of the extent of claimant's scheduled permanent partial disabilty, the Board affirms the order of the Referee.

ORDER

The Referee's order dated March 14, 1985 is reversed in part and affirmed in part. That portion of the order which affirmed the Determination Order dated June 27, 1984 is reversed. The Determination Order dated May 24, 1983 is set aside and the Determination Order dated June 27, 1984 is modified to award temporary total disability compensation from August 6, 1982 through May 31, 1984 and to date claimant's aggravation rights from June 27, 1984. That portion of the order which increased the disability award to the total of 52.5° for 35% scheduled permanent partial disability and allowed an attorney fee is affirmed. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $500 as a reasonable attorney fee for services at hearing and on Board review.

RICHARD J. GUERRERO, Claimant
Samuel A. Hall, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 84-03856 & 84-04470
October 24, 1985
Order on Reconsideration

EBI Companies requested that we abate and reconsider our Order on Review mailed August 29, 1985, 37 Van Natta 1128. We withdrew our previous order by issuance of our Order of Abatement on September 23, 1985. The request for reconsideration is allowed. After having thoroughly reconsidered the record in this matter and the arguments of counsel, we vacate our previous Order on Review and issue this order in its place.

Claimant requests review of Referee Seifert's order that upheld denials issued by the SAIF Corporation and EBI Companies denying the compensability of claimant's skin condition, diagnosed as allergic contact dermatitis. The issues are compensability and responsibility between subsequent employers.

Claimant is a 38 year old construction worker. Part of claimant's work over the years has been as a cement mason. (Throughout this order the terms "cement" and "concrete" are used. Cement is a powder that is used to manufacture concrete, a mixture of cement, sand, gravel, water and other materials. The terms are used interchangeably in this order.) Claimant's first exposure to wet cement occurred in the early 1960's when he worked as a laborer in the state of Nevada. He first developed a skin condition, which manifested as a small rash on the calf of each leg, in 1972 while working in Reno, Nevada. Claimant treated the rash himself with calamine lotion and it subsided after two or three weeks.

Claimant thereafter sought to avoid working with wet cement and performed mostly office work. In 1977 or 1978 claimant again worked with wet cement in Nevada, and he again developed a rash, this time over his calves, ankles and knees. Claimant sought medical treatment for his rash and eventually it subsided. Once again claimant stopped working with wet cement and worked as a carpenter. Claimant moved to Oregon in 1980 and worked as a carpenter until he was laid off in August 1981.

In August 1982 claimant was hired by SAIF's insured to work as a concrete finisher. His skin condition was asymptomatic when he began working for this employer. Claimant worked for approximately one month for SAIF's insured finishing curbs and gutters, duties that rarely resulted in direct contact with wet concrete. He was then laid off for one year. In August 1983 claimant again worked for SAIF's insured setting drains. He worked for one week, was laid off for one week and worked another two and one-half days on this project. The duties did not result in any direct contact with wet cement. At no time during his employment with SAIF's insured did claimant experience a rash or other sign of any skin condition.

In late September or early October 1983 claimant began working for EBI's insured. His skin condition remained asymptomatic when he began working for this employer. Claimant worked on two projects during six or seven days over the course of a month. Both projects required that claimant stand in, shovel and hand finish wet concrete. Although claimant wore rubber gloves and boots, wet concrete got inside them. Claimant's clothing also became saturated.

During his employment with EBI's insured, claimant did not experience a rash or other signs of a skin condition. However, three or four days after claimant last worked for this employer claimant broke out in a rash over his calves, ankles and feet. This rash was worse than any claimant had previously experienced while working in Nevada. After self-treatment did not resolve the rash, claimant sought medical treatment from Dr. Craig, who referred him to Dr. Moyer for a consultation. By the time claimant saw Dr. Moyer on December 8, 1983 he had numerous patches of nummular eczema from his ankles to his waist.

SAIF referred claimant to Dr. Olson, a dermatologist, who became claimant's treating physician. Dr. Olson diagnosed chromate allergic contact dermatitis manifested by nummular eczema and treated claimant through the spring and summer of 1984. In August 1984 Dr. Olson referred claimant for an evaluation by the Oregon Health Sciences University Contact Dermatitis Clinic.

In an August 31, 1984 report, Drs. Ebertz and Storrs of the Clinic reported their final diagnosis of significant chromate allergic contact dermatitis, the causative agent being in all probablity cement. Drs. Ebertz and Storrs opined that claimant's condition was work related and probably permanent, because chromate allergy tends to persist in spite of avoidance of chromates. Dr. Olson continued to treat claimant and by the time of the hearing in December 1984 claimant still experienced symptoms of his skin condition.

All physicians who gave evidence in this case agree with the diagnosis of chromate allergic contact dermatitis. The preponderance of the evidence establishes that it is more likely than not that claimant contracted this condition while working in the state of Nevada in 1972 or 1973.

The basis for the Referee's decision was that there was insufficient evidence from which he could conclude that the cement to which claimant was exposed during his Oregon employment contained chromates and, therefore, claimant did not establish legal causation of an occupational disease, i.e., that the

condition is one that "arose out of and in the scope of employment." ORS 656.802(1)(a). We conclude that the historical facts and the persuasive medical opinions establish that claimant's skin disease is typically found among workers exposed to wet and dry cement and that claimant becomes symptomatic when he is exposed on the job to wet cement. We, therefore, find that claimant has established legal causation. The Referee did not address the question of medical causation. We do so now.

We find that claimant's chromate allergic contact dermatitis preexisted his Oregon employment. Therefore, this condition was an "underlying preexisting condition" within the meaning of Weller v. Union Carbide, 288 Or 27 (1979). See also Wheeler v. Boise Cascade, 298 Or 452 (1985). In order for claimant to establish the compensability of his skin condition as an occupational disease under Oregon law, claimant must prove by a preponderance of the evidence that his underlying preexisting chromate allergic contact dermatitis pathologically worsened, as opposed to a mere recurrence or exacerbation of symptoms, Wheeler v. Boise Cascade, supra, 298 Or at 457-58; Weller v. Union Carbide, supra, 288 Or at 35; and that his Oregon work exposure was the major contributing cause of the worsened condition, Dethlefs v. Hyster Co., 295 Or 298, 310 (1983); SAIF v. Gygi, 55 Or App 570 (1982).

The most authoritative and persuasive medical opinion probative of medical causation is that of Dr. Storrs. She opined that, although claimant is extremely allergic to chromates, his Oregon work exposure did not make him "more allergic." She stated that, "[Y]ou can't be kind of allergic. You either are or you aren't." When Dr. Storrs was asked, "When the condition in 1983 flared up or aggravated or became exacerbated, did the underlying condition also become worse at that time . . . ," she responded:

> "Now, that is the same question I have been asked before so I am going to try on it again here. The underlying condition is one of allergy to chromate. He is allergic to chromate even when his skin is entirely clear. When it doesn't have any rash on it at all, he is still allergic to chromate. . . . If you are allergic to poison oak, you are allergic to poison oak right now even though you don't have any rash on your body at all. If you . . . walk through poison oak, somewhere between 24 hours and 72 hours later, you are going to break out in a dermatitis probably. By walking through poison oak, you do not make yourself more allergic to poison oak. You simply put yourself in a situation where you had an opportunity to manifest a sign, or what you call a symptom, a sign of your allergy. So you became -- your allergy, if you will, became aggravated by your exposure . . . ."

Dr. Storrs also explained that when she stated that claimant's chromate allergy is work-related, she did not mean to specify a particular work exposure. She meant that claimant became allergic to chromate in a work environment, probably in 1972 or 1973 based upon claimant's history.

In Bracke v. Baza'r, 293 Or 239 (1982), the court discussed occupational sensitivity to polyvinyl chloride fumes, known as "meat wrappers' asthma," in terms of worsening after repeat exposures to the fumes. The court analyzed the evidence as follows:

> "Some meat wrappers become sensitized to the fumes so that they have asthmatic symptoms when subsequently exposed to them. Although the symptoms come and go, depending upon conditions of exposure, the sensitization is permanent; once sensitized the person is sensitized for life. Sensitization does not get better or worse; it exists or it does not exist." 293 Or at 242.

The court concluded that the claimant's employer at the time she became sensitized to polyvinyl chloride fumes was liable for payment of workers' compensation benefits, because the evidence established that no subsequent employment caused, aggravated or exacerbated the underlying sensitivity. Id. at 250.

In SAIF v. Baer, 60 Or App 133 (1982), the Court of Appeals applied the Bracke analysis in a case in which the claimant had contracted allergic contact dermatitis from exposure to potassium dichromate. Claimant's employer's industrial insurer at the time accepted a claim for a nondisabling occupational disease. Two years later, after the claimant's symptoms had gradually worsened, he left work and filed a second occupational disease claim, which was ultimately denied by the employer's new insurer. The evidence in SAIF v. Baer, supra, was strikingly similar to the evidence in this case:

> "The medical evidence consists of Dr. Weiss' report and his deposition. He testified that contact dermatitis, once acquired, is a condition that remains constant and unchanged, although its symptoms (skin eruptions) may come and go depending upon the extent of the exposure to the offending substance. In sum, once allergic -- always allergic." 60 Or App at 136, footnotes omitted.

In Baer, the medical expert used an analogy to poison oak almost identical to the one used by Dr. Storrs in this case. 60 Or App at 136 n.5. In the face of this evidence, the court was unable to distinguish the case from Bracke v. Baza'r, supra, and held the first employer liable.

We find that the evidence establishes by a preponderance that claimant's preexisting chromate allergic contact dermatitis did not pathologically worsen as a result of his Oregon employment exposure to wet cement. Therefore, no Oregon employer is liable for claimant's present condition, which is the same condition he has had since 1972 or 1973, nor is any Oregon employer liable for the present symptoms claimant is experiencing. Wheeler v. Boise Cascade, supra; Bracke v. Baza'r, supra; Weller v. Union Carbide, supra; SAIF v. Baer, supra. We, therefore, affirm the Referee's order for the reasons set forth in this order.

ORDER

Our previous Order on Review dated August 29, 1985 is withdrawn. The Referee's order dated January 10, 1985 is affirmed.

WILLIAM E. HORNER, Claimant
Welch, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys
Lindsay, et al., Defense Attorneys

WCB 83-02728, 84-00041 & 84-07980
October 24, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Fink's order which set aside its denial of claimant's aggravation claim for a low back condition. On review, the employer contends that Fireman's Fund Insurance, as insurer for a subsequent employer, is responsible for claimant's condition. We agree and reverse.

Claimant was 58 years of age at the time of hearing. For approximately 30 years he delivered furniture for a department store. The store, as a self-insured employer, was on the risk until August 1983, at which time the delivery functions for the store were transferred to Fireman's insured. Thus, although claimant continued to perform the same duties, Fireman's insured became his employer beginning in August 1983.

In January 1981 claimant compensably injured his low back while lifting a hide-a-bed. Dr. King, claimant's treating chiropractor, diagnosed thoraco-lumbar sprain and lumbosacral disc syndrome. Dr. Duff, orthopedist, opined that claimant was "very marginal in terms of continuing for long with his present duties" and suggested that claimant consider light work because his very heavy work duties undoubtedly aggravated his chronic condition. Dr. Rosenbaum, neurosurgeon, diagnosed a chronic lumbar strain. The neurosurgeon doubted that claimant could perform heavy lifting in the future, but noted that claimant's supervisor had been accommodating claimant's lifting limitations. Dr. Rosenbaum rated claimant's loss of function as mild. Dr. King agreed with Dr. Rosenbaum's report.

A March 1983 Determination Order closed the claim effective February 1, 1983. Claimant was awarded approximately four months of temporary total disability and approximately 18 months of temporary partial disability. He also received 25% unscheduled permanent disability.

Claimant returned to his regular work following the January 1981 injury. However, his lifting activities were confined to light items or executed with the assistance of coworkers. Claimant periodically missed time from work and continued to seek chiropractic treatments from Dr. King once or twice a month. In claimant's opinion, he never recovered from his January 1981 injury.

In May 1983, while lifting a mattress, claimant suffered another compensable low back injury. Dr. Kelley, chiropractic orthopedist, opined that the May 1983 incident had not materially worsened claimant's condition and that his condition had returned to its pre-injury status. Dr. Rosenbaum reexamined claimant and concluded that claimant had not sustained any additional loss of function as a result of the May 1983 incident.

A September 1983 Determination Order closed the May 1983 injury claim. Claimant was awarded approximately three weeks of temporary total disability and no permanent disability.

Once again claimant returned to his regular work. As before, his lifting activities were limited and he continued to receive chiropractic treatments from Dr. King.

In April 1984 claimant "jarred" his back when a king-sized mattress he and a coworker were carrying struck some porch steps. The mattress and its carton weighed between 400 and 500 pounds. Claimant described his pain as "worse than it's ever been now." He immediately stopped working and sought treatment from Dr. King. Claimant has not returned to work since the injury and feels that he is physically incapable of performing his duties.

Dr. Johnson, neurosurgeon, examined claimant and performed a myelogram. The myelography was unremarkable other than a mildly elevated protein count which could have been compatible with diabetic neuropathy. In addition to the possibility of diabetic neuropathy, Dr. Johnson diagnosed cervical disc disease and chronic lumbar strain.

Dr. King opined that claimant sustained further injury to his back as a result of the April 1984 "jarring" incident. Dr. King conceded that if the previous injuries had not occurred and if claimant had a healthy back, claimant would not have sustained any injury. However, as a result of the "jarring" incident claimant now experienced throbbing pain and worsened straight leg raising tests. Concluding that claimant's condition was "definitely made worse" from the April 1984 incident, Dr. King stated as follows:

> "[A]s to whether or not this incident constitutes a new injury I am not sure of the legal aspects of the situation, but I do know that the condition was already in place and pre-existing from the earlier injuries and that there was a worsening of the existing condition from the April 24 incident."

Where the trier of fact is convinced that claimant's disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability, the "last injurious exposure" rule is applied. Boise Cascade Corp. v. Starbuck, 296 Or 238, 245 (1984). Inasmuch as we are not convinced that claimant's disability was caused by any one of his work-related incidents, we conclude that the "last injurious exposure" rule is applicable.

In successive injury cases, "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 244. However, 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. Industrial Indemnity Co. v. Kearns, 70 Or App 583 (1984); Smith v. Ed's Pancake House, 27 Or App 361 (1976).

The preponderance of the evidence establishes that the April 1984 "jarring" incident independently contributed to claimant's disability. Therefore, application of the "last injurious exposure" rule rests responsibility on Fireman's. Dr. King acknowledged that claimant would not have sustained an injury in April 1984 but for his previous injuries. However, Dr. King also emphatically concluded that the April 1984 incident evoked new symptoms and worsened claimant's condition. The treating physician's conclusion is further supported by claimant's testimony that his back became worse after the April 1984 incident and that he was unable to return to his delivery duties. Accordingly, we conclude that Fireman's, as insurer on the risk at the time of the April 1984 incident, is responsible for claimant's back condition.

Claimant submitted a brief in which he contended that he suffered a new injury rather an aggravation. Inasmuch as he has taken a position adverse to one of the potentially responsible parties and that position has prevailed on Board review, he is entitled to an attorney's fee for his "active and meaningful participation." OAR 438-47-090; Robert Heilman, 34 Van Natta 1487 (1982); William H. O'Bryan, 36 Van Natta 1272, 1273 (1984).

ORDER

The Referee's order dated April 8, 1985 is reversed. The self-insured employer's denial is reinstated. Fireman's Fund Insurance's denial is set aside. Fireman's is directed to reimburse the self-insured employer for all claim costs, including attorney fees, paid or payable pursuant to the Referee's order. Claimant's attorney is awarded $600 for his active and meaningful participation on Board review, to be paid by Fireman's Fund Insurance.

STEVE KRAJACIC, Claimant
Robert J. Guarrasi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-02476
October 24, 1985
Order on Reconsideration

Claimant has requested that the Board reconsider its Order on Review issued September 30, 1985. In that order, we affirmed the Referee's holding that claimant had failed to perfect a claim for aggravation within the time period allowed by ORS 656.273(1). We reversed the Referee's holding that claimant was entitled to payment for out-of-state chiropractic services. Claimant specifically asks that we reconsider that portion of our order pertaining to his alleged claim for aggravation. Claimant's request is granted.

Claimant was compensably injured on September 27, 1977. His claim was accepted as nondisabling. Claimant did not request that his claim be reclassified as disabling within one year after the injury. Nor was the claim closed by way of Notice of Closure or the issuance of a Determination Order pursuant to ORS 656.268(3).

ORS 656.262(12) provides that a claim that a nondisabling injury has become disabling, if made more than one year after the injury date, shall be made as a claim for aggravation which must be filed within five years of the injury date. ORS 656.273(4)(b). Therefore, in order to perfect the present claim, claimant was required to file it by September 27, 1982. He

asserts now, as he did before the Referee and the Board on review, that several chartnotes and letters from various physicians received by the SAIF Corporation before the end of the five-year period constituted effective notice of a claim for aggravation so as to bring claimant's claim within the statute of limitations. He also argues that this case is essentially indistinguishable from Gerald I. Halle, 37 Van Natta 515 (1985), in which we held that a series of chartnotes was sufficient to constitute a claim for aggravation.

In Halle, claimant asserted that a series of three chartnotes from his treating physician constituted a claim for aggravation. In the first chartnote, the physician diagnosed a herniated nucleus pulposus, described claimant's symptoms as a recurrence of his compensable injury and scheduled claimant for a myelogram. In the second chartnote, the physician described claimant's increasing symptoms, which had been worsening for a period of three months. In the last chartnote, the physician noted the presence of possible extradural defects. He also discussed the possibility of exploratory surgery and suggested that claimant "rest his back" and return for a check up in three weeks. From these chartnotes, we found that claimant's physician was clearly "relating claimant's recurrence of symptoms and need for further medical treatment to the compensable injury." See Douglas Dooley, 35 Van Natta 125, 127 (1983).

On reconsideration, claimant asserts that four physicians' reports in this record are sufficient to constitute a claim for aggravation. The first is a report from Orthopaedic Consultants stating that claimant's claim should remain open for six weeks. Read in context, however, the report merely suggests that claimant return to his doctor to learn how to do exercises designed to prevent future exacerbations. The Consultants further opine that claimant could return to his previous occupation without restriction and that his level of impairment is "zero."

The second report is from Dr. Streitz, who at one point in the report states that the claim should remain "open." Again, however, when the report is read in context, it is clear that the physician is not recommending that claimant receive further medical services or other compensation. Dr. Streitz notes that claimant "feels about the same" and that he continues to be employed in his previous occupation without limitation. He states that claimant is medically stable and that no further treatment is indicated. Dr. Streitz's comment regarding the claim remaining open merely suggests that claimant be examined by another physician, apparently because claimant is dissatisfied with Dr. Streitz's opinion that claimant needs no further services.

The third report is from Dr. Rethwill. It notes that claimant had an exacerbation of his condition in April of 1982. The general tenor of the report, however, is that claimant's condition is improving with a "minimum of pain."

The last report is also from Dr. Rethwill. It is a general discussion regarding the number of chiropractic treatments claimant should obtain per month.

After reviewing the record once again, we remain of the opinion that none of the reports offered by claimant rises to the level of a claim for aggravation. Whereas in Halle, supra, the reports of claimant's physician clearly pointed to new and

increased symptoms possibly requiring radical medical treatment, the current reports are little more than discussions of claimant's ongoing subjective complaints, without a direct or indirect suggestion that claimant's condition is in fact worsening as a result of the original injury, or that further medical services are required.

Now, therefore, having granted claimant's request for reconsideration, we adhere to and republish our previous order dated September 30, 1985.

IT IS SO ORDERED.

DARLA LUTZ, Claimant
Frederick L. Bennett, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-05520
October 24, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Quillinan's order that upheld the insurer's denial of claimant's thoracic outlet and cervical radiculopathy conditions. In addition, claimant requests that the insurer's brief before the Board be stricken as having been untimely filed. The insurer cross-requests review of those portions of the Referee's order that: (1) remanded the claim to the insurer for reopening as an aggravation of claimant's cervico-scapular strain; (2) ordered the insurer to resume payment for claimant's transcutaneous nerve stimulator (TNS) unit; and (3) assessed a penalty and an associated attorney fee for the insurer's alleged unreasonable termination of claimant's TNS therapy. The issues on review are the compensability of claimant's alleged aggravation, medical services, penalties and attorney fees, and whether the insurer's brief should be stricken.

We first address claimant's motion to strike the insurer's brief. The brief was originally due on June 17, 1985. The insurer requested and was granted an extension of eleven days, or until June 28, in which to file. The brief was received by the Board on July 8, 1985, ten days after it was due. We have established time periods within which briefs are to be filed. OAR 438-11-010(3). In Nancy J. Rensing, 37 Van Natta 3 (1985), we discussed the recurrent problem of late filing of briefs on Board review and noted that it was then our general practice to allow consideration of briefs filed a day or two late. We also noted, however, that our practice of tolerating late submissions was under active reconsideration and we admonished the parties to thereafter adhere to the brief filing schedule.

We recently decided Vanessa Dortch, 37 Van Natta 1207 (1985), in which claimant moved to strike the insurer's brief on the ground that it was untimely filed. We once again considered our acquiescence to the late submission of briefs and concluded that strict enforcement of our brief filing rule was both necessary and desirable. Accordingly, we held, "[H]enceforth OAR 438-11-010(3) will be strictly enforced, and . . . briefs not filed in conformity with that rule will not be considered by the Board." In the interest of fairness, however, we held that our policy of requiring strict conformity would only be applied prospectively.

Because we had not decided Dortch at the time the present insurer's brief was filed, we must decide whether to grant

claimant's motion based on our previous policy of tolerance. We note that in Wanda M. Pruitt, 36 Van Natta 1504 (1984), we found a brief filed eight days late to be on the "borderline" of acceptability and we denied claimant's motion. The present brief was received ten days late. Without deciding where the outer limits of "borderline" acceptability are, we find that ten days is within that limit. Accordingly, claimant's motion to strike is denied and we will consider the insurer's brief on the merits of the issues before us.

On the merits, we adopt and draw from the Referee's recitation of the facts.

Claimant is a former crab shaker who sought medical attention on January 13, 1978 for dorsal back pain, headaches, right shoulder and arm pain and right hand numbness. Claimant's employment required extensive and vigorous use of the hands and arms. Her claim was accepted and she was declared stationary and able to resume work on January 30, 1978. On June 15, 1978 claimant incurred injury to the right wrist while employed by the same employer. Subsequent nerve conduction tests revealed bilateral carpal tunnel syndrome. This second claim was also accepted and in September of 1978 claimant underwent right carpal tunnel release performed by Dr. McGee.

Approximately one month after claimant's surgery, she reported near complete relief from her median nerve symptoms. She also reported, however, the presence of new symptoms referrable to the left ulnar nerve.

Claimant was examined by Dr. Nathan in February of 1979 for her ongoing symptoms. Dr. Nathan reported right shoulder discomfort with aching in the forearm and under the edge of the shoulder blade. That same month, Dr. Halferty opined that claimant was suffering from a chronic subscapular strain on the right. Claimant also continued to visit Dr. McGee for intermittent right shoulder discomfort. Claimant was ultimately declared stationary and a July 9, 1979 Determination Order awarded her 16° for 5% unscheduled disability for the right shoulder.

Claimant revisited Dr. McGee on July 31, 1979, at which time Dr. McGee stated for the first time that claimant might be suffering from "early thoracic outlet syndrome." Dr. McGee did not know whether this tentatively diagnosed condition was related to claimant's prior work as a crab shaker.

In early 1980 Dr. Rosenbaum suggested three possible diagnoses: recurrent carpal tunnel sydrome, thoracic outlet syndrome, or cervical nerve root compression. Dr. Rosenbaum could confirm only the carpal tunnel condition, however. EMG studies were compatible with either thoracic outlet syndrome (otherwise known as brachial neuropathy) or cervical radiculopathy. The etiology of neither condition was known. Further tests revealed the possibility of a C7-C8-T1 radiculopathy, and claimant was also thought to suffer from an unrelated bursitis condition.

In October of 1980 Dr. Knox reported what he felt was clear evidence of the C7-C8-T1 radiculopathy. He declared claimant stationary and a December 12, 1980 Determination Order awarded no further permanent partial disability. The insurer thereafter denied claimant's bursitis condition. Claimant requested a

hearing on the denial as well as the Determination Order. An April 30, 1982 Opinion and Order set aside the denial and awarded claimant an additional 30% unscheduled disability for the right shoulder, bringing her total award to 35%. The Opinion and Order became the last arrangement of compensation.

In June of 1982 claimant's cervical X-rays revealed spurring at C5-6, but no evidence of spondylolysis, sponylolisthesis or narrowing of the disc spaces. No causal connection was made at that time between claimant's work activity and the cervical spurring.

In late 1982 claimant reinjured her right shoulder playing racquetball. She visited Dr. Knox complaining of muscle spasm.

In January 1984 further nerve conduction testing revealed right C5-6 radiculopathy for the first time. At that time, however, claimant's previous thoracic outlet and/or ulnar neuropathy symptoms had resolved. Claimant was hospitalized for observation and Dr. Knox stated that the cause of the C5-6 radiculopathy was unknown. A myelogram showed traces of hypertrophic C5-6 spurring, but it could not be determined whether there was in fact nerve root irritation at that level.

Dr. McGee also reexamined claimant while she was hospitalized and stated that at least some of claimant's symptoms continued to suggest irritation of the right brachial plexus. The possibility of surgery at that site was suggested but further confirmation of claimant's condition was needed.

In March of 1984 claimant exhibited a reduction in neck range of motion for the first time. She was examined by a panel of the Orthopaedic Consultants on March 22, 1984 and was found to exhibit C5-6 spondylosis, which the panel felt was not related to claimant's other symptoms or her prior work activity. Rather, the panel attributed the cervical spondylosis to a 1971 motor vehicle accident that involved claimant's striking her face and neck against a windshield.

On May 7, 1984 the insurer issued a denial of claimant's claim for aggravation, asserting that claimant was suffering from a "newly diagnosed symptom complex" unrelated to her 1978 work activity. Although the denial did not so specify, the Referee found that it pertained to both the possible thoracic outlet and C5-6 cervical radiculopathy conditions.

Dr. Knox, who has followed claimant's condition since soon after the industrial injury in June 1978, is of the opinion that all of claimant's symptoms and neurological problems are related to claimant's 1978 work exposure. He does not feel that claimant has developed a new symptom complex or "new neurological condition." He feels that because claimant is relatively young, her symptoms are more likely the result of trauma than degenerative changes. He also feels that if claimant suffers from thoracic outlet syndrome, it is resolving and has not worsened since the last arrangement of compensation. He states that if claimant suffers from C5-6 spondylosis, its most likely cause is the 1971 motor vehicle accident, although claimant's work activity could have aggravated the development of cervical spurring.

Dr. McGee, who was claimant's initial treating physician and has remained involved in the case throughout, initially felt that

claimant's work activities were the most likely source of what Dr. McGee feels is an underlying cervical disc injury. He later retracted that opinion, however, stating that a causal connection was unlikely, either for cervical radiculopathy or thoracic outlet syndrome. Dr. McGee testified that he considered the possibility of nerve root irritation when he initially examined claimant, but rejected it because of the absence of cervical radicular symptoms in 1978 and 1979. He felt that the most likely cause of claimant's later radicular and osteophyte findings was an acute trauma such as claimant's auto accident.

Claimant was also examined by Dr. Zivin, who essentially agreed with Dr. McGee and noted that claimant's complaints are ill-defined without objective findings. Dr. Zivin feels that claimant does not suffer from a C5-6 radiculopathy because there is no evidence of osteophytic impingement on the nerve root at that level. He is also of the opinion that if claimant suffers from thoracic outlet syndrome, it is not related to her employment because of the absence of thoracic outlet symptoms until more than a year after claimant left work.

Claimant testified that her symptoms, consisting of neck, shoulder and arm pain, aching and numbness, have worsened in the last eighteen months. Although her pain is of the same quality as it always has been, it has resulted in her restricting her activities more.

The Referee found in part that neither claimant's cervical radiculopathy nor the possible thoracic outlet syndrome are related to claimant's 1978 work activity. In so finding, the Referee applied the standards set forth in Weller v. Union Carbide, 288 Or 27 (1979) and Wheeler v. Boise Cascade Corp., 298 Or 452 (1985), i.e., that if claimant suffers from a preexisting condition she must prove that her work activity caused a worsening of her underlying condition rather than a mere worsening of symptoms. The Referee further held that if claimant does not have a preexisting condition, she must prove a causal relationship between the 1978 work activity and her current symptom complex.

We disagree with the Referee that Weller and Wheeler are applicable in this case. Neither Weller nor Wheeler involved claims for aggravation; they were cases in which the initial compensability of an occupational disease was at issue. We have previously held that Weller does not apply to aggravation claims. James W. Foushee, 36 Van Natta 901 (1984). See also Jameson v. SAIF, 63 Or App 553 (1983). The present case is one for aggravation.

For claimant to establish a compensable aggravation, she must prove that she has worsened since the last arrangement of compensation and that the worsening is related to her original work exposure. ORS 656.273(1); Anderson v. West Union Village Square, 43 Or App 295 (1980). A mere symptomatic worsening may or may not be sufficient to establish an aggravation claim, depending on the attendant facts. Foushee, supra 36 Van Natta at 904; Billy Joe Jones, 36 Van Natta 1230 (1984).

Although we disagree with the legal standard set forth by the Referee, we agree with her conclusion that neither claimant's possible thoracic outlet syndrome nor cervical radiculopathy are related to her 1978 work activity. The medical evidence is

complex, confusing and equivocal. There is no consensus among the attending and consulting physicians with regard to the diagnosis of claimant's current condition. Nor is there persuasive medical opinion that any of claimant's potential diagnoses are related to her work activity. Dr. Knox is of the opinion that whatever claimant suffers from, it is related. His opinion is weakened, however, by his admission of uncertainty regarding the causal relationship between claimant's degenerative condition and her work activity. He also admits that if claimant has cervical spondylosis, it is likely related to her noncompensable motor vehicle accident. Drs. McGee and Zivin are of the opinion that claimant's 1978 work activity is not related to her current condition. We find that the medical evidence preponderates against a finding of compensability, either as to the thoracic outlet or cervical radiculopathy conditions.

Although the Referee found the aforementioned conditions to be unrelated to claimant's work, she found that claimant had suffered a compensable worsening of her original "cervico-scapular strain." After a review of the medical evidence, we find little support for the Referee's finding. No physician has definitively stated that claimant's original shoulder strain is the same condition that she suffers from now. In fact, as this claim has progressed, so have the number and complexity of the diagnoses. Along with the increase in suggested diagnoses has been increasing uncertainty regarding the possible causal connection between claimant's work and her condition. Because of the complexity of the claim, we feel that claimant must establish a connection between her work activity and at least one of the conditions tentatively diagnosed by her physicians. No physician has stated that it is probable claimant has suffered a worsening of her original, and relatively uncomplicated, shoulder strain. Having found no medical opinion in that regard, we find that it was improper for the Referee to so conclude.

We find that claimant has failed to establish the requisite causal connection between her 1978 work exposure and her current condition, whatever it may be. Claimant's claim for aggravation must, therefore, fail.

The remaining issue is penalties and attorney fees. The Referee held that it was unreasonable for the insurer to terminate payment for claimant's TNS unit and assessed a penalty and fee for unreasonable conduct. The Referee found that regardless of claimant's diagnosis, her symptom complex has remained essentially the same since the inception of the claim. Therefore, the Referee found that it was unreasonable for the insurer to "unilaterally conclude that claimant's symptoms are the result of some new condition." We disagree.

An insurer need only provide medical services for conditions related to the compensable injury or work exposure. ORS 656.245(1). It is not unreasonable for an insurer to deny payment for services that it has reason to believe are not related to the compensable injury. See Clyde Wyant, 36 Van Natta 1067 (1984). In this case, we believe the reports of the various physicians regarding claimant's multiple diagnoses, as well as the uncertainty regarding the required causal connection, gave the insurer reason to believe that claimant's TNS unit was no longer being used for a condition for which the insurer was responsible. Under these circumstances, we find that the insurer's conduct was not unresonable and that no penalty nor attorney fee is warranted. The penalty and attorney fee shall be set aside.

ORDER

The Referee's order dated February 14, 1985 is reversed in part and affirmed in part. Those portions of the order that set aside the insurer's denial of claimant's aggravation claim involving a cervico-scapular strain, ordered the insurer to resume payment for claimant's TNS therapy, and assessed penalties and attorney fees for the insurer's alleged unreasonable termination of medical services are reversed. The remainder of the order is affirmed.

FREDDIE L. SEIBER, Claimant
Emmons, et al., Claimant's Attorneys
Callahan, et al., Attorneys
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 84-01212 & 83-07400
October 24, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

EBI Companies requests review of that portion of Referee Podnar's order which set aside its denials of responsibility and compensability of claimant's left knee injury and upheld the responsibility denial of the SAIF Corporation. SAIF requests review of an offset issue which was not raised at hearing and which the Referee did not address in his order. The issues on review are responsibility, compensability, and whether an offset for overpaid temporary disability compensation should be allowed.

The Board affirms and adopts the order of the Referee. On the issue of the offset, we find that the issue was waived at hearing by the insurer's express acquiescence to claimant's representation of the issues to be heard. Cf. Kenneth D. Kirkwood, 37 Van Natta 43 (1985) (insurer and claimant waived hearing on issue raised in pleadings pending determination of threshhold issue). The issue of allowing an offset was not considered on Board review.

ORDER

The Referee's order dated February 21, 1985 is affirmed. Claimant's attorney, Mr. Hittle, is awarded $750 for services on Board review on the issues of responsibility and compensability, to be paid by EBI Companies. Claimant's attorney, Mr. Kryger, is awarded $200 for services on Board review on the offset issue, to be paid by the SAIF Corporation.

WAYNE E. WILLIAMS, Claimant
Noreen K. Saltveit, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 84-09794
October 24, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of those portions of Referee Shebley's order which awarded 80° for 25% unscheduled permanent partial disability in lieu of the Determination Order dated September 7, 1984 which awarded 32° for 10% unscheduled permanent partial disability and which modified the award for temporary disability compensation to terminate entitlement to compensation on February 14, 1984 rather than August 1, 1984. Claimant requests an award of 160° for 50% unscheduled permanent partial

disability. Argonaut Insurance Company requests reduction of claimant's disability award and argues that claimant's disability is the responsibility of the SAIF Corporation, which is not a party in this case. The issues on review are extent of unscheduled permanent partial disability, responsibility for claimant's permanent disability, and temporary total disability.

Claimant first injured his back in the course of his employment on January 27, 1981 while working for an employer insured by the SAIF Corporation. His attending physician, Dr. Reynolds, agreed with Orthopaedic Consultants that claimant had no permanent impairment as a result of his injury. The claim was closed by Determination Order dated August 7, 1981 which awarded no permanent disability.

In June 1982 Dr. Reynolds requested reopening of the claim because claimant's condition worsened. Orthopaedic Consultants examined claimant in July 1982 and opined that claimant was not impaired by his industrial injury but was physically incapable of engaging in heavy physical labor for unrelated reasons, although the panel of doctors also opined that claimant was minimally to mildly impaired due to his 1981 industrial injury.

On September 14, 1983 Dr. Reynolds reported that claimant suffered severe pains that increased during the previous three to four weeks with sharp radiation of pain down each leg. Claimant then filed new injury claims against each of two later employers, one insured by SAIF and one by Argonaut. Claimant was examined on February 14, 1984 by Dr. Higgins who obtained a complete history and performed a thorough physical examination. Dr. Higgins concluded that claimant was medically stationary and that he had suffered an aggravation of his 1981 injury condition rather than a new injury, although Dr. Higgins qualified that opinion by indicating that the subsequent employment could have increased the symptoms. He rated claimant's impairment in the minimal category. At his subsequent deposition, Dr. Higgins indicated that he believed that claimant's disability had been contributed to by the employment with Argonaut's insured, although that continued to make the condition an aggravation of the original industrial injury in Dr. Higgins's estimation. Referee Knapp found that claimant had suffered a new injury while employed by Argonaut's insured, and ordered Argonaut to accept the claim by his Opinion and Order of June 26, 1984. The order became final by operation of law when the Board dismissed Argonaut's request for review at Argonaut's request.

On August 1, 1984 Orthopaedic Consultants reexamined claimant. The doctors reported they were in essentially complete concurrence with the opinion of Dr. Higgins as expressed in his examination report of February 14, 1984. They reported that there was no evidence of injury at the time of their examination. They opined that claimant's impairment was at the upper end of minimal or lower end of mild, that claimant should be limited to medium duty work, and that claimant's impairment was due to his original industrial injury because his subsequent employments had not contributed to his impairment. The claim was closed by a Determination Order dated September 7, 1984 which awarded temporary disability compensation from September 14, 1983 through August 1, 1984 and awarded 32° for 10% unscheduled permanent partial disability.

Subsequently, Dr. Jones, of the Orthopaedic Consultants panel who examined claimant on August 1, 1984, answered two requests for clarification from Argonaut. Argonaut sought clarification of the opinion that claimant was medically stationary on February 14, 1984 when Dr. Higgins examined claimant. Dr. Jones believed that claimant was probably medically stationary at the time of Dr. Higgins's examination, but could not state it directly because Dr. Jones had not examined claimant except on August 1, 1984.

Claimant continued to obtain treatment of his back condition through August 1984, and his attending physician opined that claimant continued to improve through July 1984. The record does not indicate that claimant's condition changed after the February 1984 examination by Dr. Higgins.

"'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). We are persuaded that claimant's condition was medically stationary at the time of Dr. Higgins's examination on February 14, 1984 and, therefore, we agree with the Referee that claimant's entitlement to temporary disability terminated at that time. Jackson v. SAIF, 7 Or App 109 (1971).

To prevail on the issue of unscheduled permanent partial disability, claimant must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971); Barrett v. D & H Drywall, 73 Or App 184 (1985).

We rely on medical assessment and claimant's testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985). Howerton v. SAIF, 70 Or App 99 (1984).

As the court has stated:

> "A determination of the degree of partial incapacity or loss of earning power cannot be made with mathematical precision. A fact finder can do no better than to intelligently identify a range and arbitrarily choose a number within that range which seems to be consistent with that assigned to other similar injuries. There is a necessarily subjective element of experience-based intuition and exact consistency is not attainable." Owen v. SAIF, 33 Or App 385, 388 (1978).

See also, Fraijo v. Fred N. Bays News Co., 59 Or App 260 (1982).

Considering claimant's testimony, his attending physician's assessment and the assessments of the many independent examiners, and considering the relevant social and vocational factors, we find that claimant was appropriately compensated by the

Determination Order award of 32° for 10% unscheduled permanent partial disability for his low back condition. Compare Michael D. Sorensen, 37 Van Natta 292 (1985) (10%, 27 year-old millworker, some post-high school education, mild impairment); and Timothy H. Tatom, 36 Van Natta 1591 (1984), aff'd mem., 74 Or App 151 (1985) (10%, 30 year-old millworker, high school education, neck and shoulder injury); with Jose G. Perez, 36 Van Natta 720 (1984), affirmed, 72 Or App 663 (1985) (50%, 48 year-old, chronic full-length back strain, sub-normal IQ, language barrier, and no transferrable skills) and Violet R. Jones, 35 Van Natta 1765 (1983), aff'd mem., 70 Or App 731 (1984) (50%, 36 year-old, 11th grade education, 2 surgeries, residual chronic back and leg pain, 10 pound lifting limit, 90 minute sitting limit, 40 minute standing limit, 20 minute walking or driving limit).

Responsibility for compensation for unscheduled permanent partial disability is a mixed question of medical and legal causation. In this case, the question of legal causation was settled by Referee Knapp's order, which was the final determination that Argonaut was responsible for compensation for claimant's condition since September 1983. Although Dr. Higgins and Orthopaedic Consultants believed that claimant's impairment was due to the original injury, it is apparent from their reports that they also do not consider the employment at Argonaut's insured to have caused a new injury. We are not persuaded that claimant's impairment and disability are the responsibility of the previous employer. See Kuhn v. SAIF, 73 Or App 768 (1985). Claimant was not disabled by his original injury until after he sustained the new injury in the employ of Argonaut's insured. We find that Argonaut was the responsible insurer at the time claimant's injury-related impairment and disability became permanent.

Although claimant prevailed on the issue of whether Argonaut was the insurer responsible to pay unscheduled permanent partial disability, the underlying claim was for an increase in unscheduled permanent partial disability and claimant did not prevail on the underlying substantive issue. Claimant is awarded no attorney fees on Board review because "'prevailing' in technical issues while losing on the claim itself should not allow an award." Korter v. EBI Companies, Inc., 46 Or App 43, 54 (1980), remanded on other grounds, 290 Or 301, remanded for further proceedings, 51 Or App 206 (1981).

ORDER

The Referee's order dated May 21, 1985 is reversed in part and affirmed in part. That portion which awarded 80° for 25% unscheduled permanent partial disability in lieu of the Determination Order award of 32° for 10% permanent disability is reversed. The remainder of the order is affirmed.

KENNETH L. PERKINS, Claimant
Bottini & Bottini, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-10776
October 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Mongrain's order which found that claimant's central nervous system/low back injury had been prematurely closed. On review, SAIF contends that the claim was properly closed.

The Board affirms the order of the Referee with the following comment.

This case presents an issue similar to that recently decided in Rogers v. Tri-Met, 75 Or App 470 (October 2, 1985). In Rogers, the court found that references to the claimant's psychological state were sufficient to require a determination whether that condition was medically stationary before issuance of a Determination Order. In the present case, claimant was apparently not receiving therapy at the time of claim closure. However, we are persuaded that references in prior reports concerning the severity of claimant's psychological condition and the treatment of that condition were sufficient to require a closing evaluation of claimant's psychological condition before issuance of a Determination Order.

In reaching this conclusion we appraised evidence available at the time of claim closure and not evidence subsequently developed. Maarefi vs. SAIF, 69 Or App 527, 531 (1984). Moreover, we did not exercise hindsight. Alvarez v. GAB Business Services, 72 Or App 524, 527 (1985).

ORDER

The Referee's orders dated December 28, 1984 and February 19, 1985 are affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the SAIF Corporation.

GRACE M. RANDALL, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03023
October 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Thye's order which increased her unscheduled permanent disability award for a low back injury from 35% (112°), as awarded by an August 7, 1984 Determination Order and prior awards, to 75% (240°). On review, the issue is extent of permanent disability, including permanent total disability.

Following our de novo review of the medical and lay evidence, including claimant's testimony concerning her physical limitations and disabling pain, and considering the combined effect of claimant's physical and psychological impairment, we are not persuaded that claimant is permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(1)(a). In addition, claimant has failed to establish that a combination of medical and non-medical conditions have effectively foreclosed her from gainful employment. See Livesay v. SAIF, 55 Or App 390 (1981). Furthermore, the evidence does not preponderate that claimant is willing to seek regular gainful employment nor that she has made reasonable efforts to obtain such employment. ORS 656.206(3). Finally, we are not persuaded that it would be futile for claimant to seek work. See Butcher v. SAIF, 45 Or App 313 (1980).

We further conclude that the Referee's award of permanent disability adequately reflects claimant's permanent loss of

earning capacity resulting from her compensable injury. See ORS 656.214(5). Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated April 19, 1985 is affirmed.

BETTIE L. ROGERS, Claimant
Roger D. Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
WCB 83-06697
October 30, 1985
Order on Review (Dismissing)

Reviewed by Board Members Ferris and Lewis.

Claimant requests and the SAIF Corporation cross-requests review of Referee St. Martin's order which modified the Determination Order dated June 27, 1983. The Determination Order at issue closed an aggravation claim which was the subject of a prior Order on Review which reinstated the insurer's denial. Bettie L. Rogers, 36 Van Natta 615 (1984). The Court of Appeals affirmed the Board's order. Rogers v. SAIF, 73 Or App 344 (1985). The Oregon Supreme Court denied review on June 18, 1985. The underlying claim for compensation having been finally denied, there is no issue to decide regarding whether the Referee's order adequately compensated claimant for permanent disability because claimant is not entitled to any compensation for permanent disability. Therefore, the Board dismisses the requests for review.

ORDER

The requests for review filed by claimant and the SAIF Corporation of the Referee's order dated March 12, 1984 are dismissed.

HEINZ J. U. SAUERBREY (dba Heinz Auto Europe)
Buckley, et al., Attorneys
Allan H. Coons, Attorney
SAIF Corp Legal, Attorney
WCB 85-08722
October 30, 1985
Order of Dismissal

The alleged noncomplying employer has requested Board review of Presiding Referee Daughtry's order that dismissed his request for hearing. Our review of the record discloses that this case does not involve any "matters concerning a claim" as that term is defined by ORS 656.704(3). We are, therefore, without jurisdiction. ORS 656.740(4). The alleged noncomplying employer's request for Board review is dismissed.

IT IS SO ORDERED.

JAMES W. THOMASON, Claimant
Cramer, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
WCB 79-05982
October 30, 1985
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Thomason v. SAIF, 73 Or App 319, rev den, 299 Or 443 (1985). We have been directed to determine an attorney fee for claimant's attorney. The court increased claimant's unscheduled permanent partial disability compensation by 10% (32°). Claimant's attorney is entitled to and is hereby allowed 25% of that award, payable out of and not in addition thereto. OAR 438-47-045(1).

IT IS SO ORDERED.

DEBRA L. WILSON, Claimant
Emmons, et al., Claimant's Attorneys
EBI Companies, Defense Attorney

Own Motion 85-0453M
October 31, 1985
Order Vacating Own Motion Determination

Claimant has requested reconsideration of our Own Motion Determination issued August 20, 1985. Initially, claimant requested reconsideration on the ground that we had incorrectly designated the period during which claimant was entitled to temporary disability compensation. Claimant now requests that we vacate our determination entirely and remand this matter to the Evaluation Division of the Workers' Compensation Department for claim closure pursuant to ORS 656.268. For the reasons that follow, we conclude that this claim should have been closed by the Evaluation Division. We, therefore, vacate our previous Own Motion Determination and refer this matter to the Evaluation Division of the Workers' Compensation Department for further proceedings.

We observe at the outset that we were handicapped in this case by a phenomenon that is all too familiar in our exercise of our own motion jurisdiction -- an incompletely developed record. When a case is submitted to us for closure under ORS 656.278, we must make our determination based upon the documents that appear in the record as it is provided to us by the parties. It is not feasible for us to search through records and files of previous hearings, or even Board review proceedings, most of which have been stored in archives, to determine the historical facts of each case. The determinative historical facts of this case were not made available to us until well after we had issued our August 20, 1985 order. On the basis of the historical facts now revealed to us, we conclude that we were without jurisdiction to close claimant's claim, ORS 656.278(2), and we now terminate our former finding, ORS 656.278(1).

Claimant sustained an industrial injury on May 10, 1978 and her claim was first closed by a Determination Order issued August 28, 1978. Claimant's aggravation rights expired, therefore, as of August 28, 1983. Claimant made a valid claim for aggravation of her industrial injury on July 25, 1983, prior to the time her aggravation rights expired. The claim was neither accepted nor denied by the insurer and on November 30, 1983 claimant filed a request for a hearing, which was assigned WCB Case No. 83-11353.

We have now concluded that claimant's request for hearing was subsequently dismissed by operation of a stipulation approved by a Referee by which claimant's aggravation claim was accepted and claimant's claim reopened for payment of temporary disability compensation. The stipulation further recited that the claim would remain open "until closed pursuant to ORS 656.268." While we express no opinion on the effect of the parties' agreement that claim closure was to be under ORS 656.268 as opposed to ORS 656.278 had the facts been other than they are, we conclude that the claim reopening in this case was pursuant to a valid claim for aggravation made within the period of claimant's aggravation rights under ORS 656.273. See Carter v. SAIF, 52 Or App 1027 (1981); Coombs v. SAIF, 39 Or App 293 (1979); Roxanne D. Kennison, 37 Van Natta 1051 (1985). Closure of such a claim is not a proper subject for Board's own motion jurisdiction. ORS 656.278(2).

The Board's Own Motion Determination dated August 20, 1985 is hereby set aside. The insurer is ordered to submit this claim to the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268.

IT IS SO ORDERED.

THOMAS A. BEASLEY, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09576
November 1, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Menashe's order which dismissed claimant's request for a hearing on a denial issued March 6, 1984 of which claimant had no knowledge until approximately September 1, 1984 and applied the denial to a claim for medical services and treatment which began in August 1984. The issues on review are compensability and the applicability of a denial issued before a claim for services.

Claimant attended school part way through the second grade in Arkansas. Claimant cannot read nor write. Claimant was injured on May 29, 1969 in the course of his employment as a log truck driver. He had surgery on his cervical spine in February 1970. His claim was ultimately closed by a judgment of the Circuit Court dated April 4, 1972 with an award of 176° for 55% unscheduled permanent partial disability. This was the last arrangement of compensation. Claimant mistakenly believed that the final judgment also terminated his entitlement to medical services related to the injury. Claimant has not worked since the industrial injury.

Claimant moved out of state and obtained medical services for his cervical condition for which he made no claim with the SAIF Corporation. He returned to Oregon in January 1978. Claimant sought the opinion of Dr. Parsons in August 1983 whether something could be done for worsening pain in claimant's neck and left shoulder and for headaches. Dr. Parsons reported that Dr. Eilers had examined claimant three or four years earlier and had recommendated no further medical treatment at that time. Dr. Parsons obtained diagnostic testing through Good Samaritan Hospital. The substance of Dr. Parsons's opinion was that there was nothing that could be done for claimant's symptoms medically and that he could not determine whether the current symptoms were causally related to the industrial injury.

SAIF referred the file to Dr. Reilly who summarized the medical file and concluded: "In answer to the question, is there a relationship between treatment now and his original injury, I feel that his examination is for pain which we accepted as caused by the initial injury; however, his problem is pre-existing degenerative disc disease."

SAIF paid Dr. Parson's bill in November 1983. SAIF denied compensability "of your current treatment" by letter dated March 6, 1984. No reason was given on the record for this denial or for the delay of four months after paying the doctor's bill for the diagnostic tests. Claimant was not receiving any "treatment" at the time of the denial.

The denial letter was sent certified to claimant's correct post office box number, but was returned marked "unclaimed." In May 1984 claimant's wife talked by telephone with a claims representative at SAIF about an unpaid bill from Good Samaritan Hospital. No mention was made by the SAIF representative of the denial and claimant's wife was assured that SAIF would pay the hospital. SAIF did pay the hospital bill.

On August 8, 1984 claimant sought treatment from Dr. Leistikow, chiropractor, for numbness in claimant's left shoulder and pain in his neck. Dr. Leistikow submitted a "Change of Attending Physician" notice to SAIF. Claimant submitted a mileage reimbursement form to SAIF. SAIF responded to claimant's mileage reimbursement claim with a letter dated August 27, 1984 which stated:

> "We are returning your request for mileage reimbursement to Dr. Leistikow's office. SAIF Corporation has denied responsibility for treatment to your neck. Please see enclosed copy of the letter sent to you on March 6, 1984.
>
> "Pursuant to this denial, it is our position that this expense is not SAIF Corporation's responsibility."

Dr. Leistikow opined that claimant's cervical spine condition was related to the industrial injury of 1969 and requested that SAIF reopen the claim for medical treatment only.

Claimant obtained counsel and requested a hearing by letter of September 10, 1984. The Referee found that claimant and his wife were credible witnesses and that they had not thwarted delivery of the denial notice. He also found that claimant had not received actual notice of the denial before the August 27, 1984 letter from SAIF.

We are confronted with the issue of whether a denial letter sent to but not received by a claimant, and issued after the insurer has paid or agreed to pay all bills, is to be given prospective effect if no hearing is requested on the denial within statutory limits. This issue is also confined to the question of medical services after an accepted injury claim has been closed with a large award for permanent partial disability and there has been no intervening injury.

The insurer's argument relies primarily on the issue of notice to claimant. The cases cited discuss denial of medical services already obtained. The Referee and insurer reason from the Board's order in Robert R. Delugach, 37 Van Natta 63 (1985), and the line of cases culminating with Margaret J. Sugden, 35 Van Natta 1251 (1983), aff'd mem., 68 Or App 384 (1984), that claimant's failure to timely request a hearing on the denial of Dr. Parson's services precludes claimant from obtaining compensation for Dr. Leistikow's services.

In Delugach, the claimant was injured in an intervening superseding motor vehicle accident. The insurer denied compensability of the claimant's first surgery after the accident,

which denial became final. The claimant later claimed compensation for a third surgery, subsequent to the denial. The Board found that the third surgery was not related to the claimant's industrial injury but was a sequela of the initial motor vehicle accident surgery and its necessity grew out of the same operative facts as the first surgery. In Sugden, the insurer mailed notice of the denial of the original claim three times and notifed the claimant by telephone once that her claim was denied. The claimant did not file her request for hearing until five months after actual notice was achieved by telephone and eleven months after the first certified mailing. The Board found that the claimant had not shown good cause for requesting a hearing after the statutory limits and upheld the denials.

We find that these cases are distinguishable from the present case because claimant is not disputing the denial of Dr. Parsons's services. If the issue was the compensability of Dr. Parsons's services in 1983, claimant's request for a hearing was too late. Claimant requested a hearing because of the denial of Dr. Leistikow's bill and related costs in 1984, one year later. SAIF denied Dr. Leistikow's bill by its letter of August 27, 1984 and claimant requested a hearing on September 10, 1984. We find that claimant requested a hearing within the 60 days set by statute. ORS 656.262(8).

In this case, SAIF is attempting to foreclose claimant prospectively from claiming that any condition requiring medical treatment involving his neck is related to his accepted injury. SAIF denied treatment for claimant's condition on the basis that the condition was not caused by the industrial injury. That claimant had a condition that may not have been related to his original industrial injury at one point in time does not foreclose the possibility that claimant's industrial-injury-related condition could worsen at a later time. Claimant must prove that connection at the time he makes his claim. Claimant cannot be prospectively denied compensation for medical services. David A. Smith, 35 Van Natta 1400 (1983). The insurer cannot retroactively deny compensability of the original claim by alleging alternative causes, in the absence of fraud, misrepresentation or other illegal activity. Bauman v. SAIF, 295 Or 788 (1983). There is in this case no allegation of fraud, misrepresentation, or other illegal activity. We are persuaded that claimant's request for a hearing on the issue of the denial of compensation for medical services by Dr. Leistikow was made in timely fashion and that the denial of treatment, of which there was none to deny, in relation to services performed by Dr. Parsons in 1983 was not applicable to the claim for medical services in 1984 by Dr. Leistikow.

The record appears not "improperly, incompletely or otherwise insufficiently developed or heard by the referee," therefore, we proceed to review the record de novo. ORS 656.295(5). Dr. Leistikow opined that claimant's need for medical services arose out of "degenerating effects from his injury that was sustained in 1969, as well as degeneration at the post-surgical site. . . ." There is no evidence of an intervening injury. We are persuaded by claimant's credible testimony and the opinion of his attending physician that the claim for medical services in 1984 was compensable.

ORDER

The Referee's order dated April 5, 1985 is reversed. The

claim is remanded to the SAIF Corporation for processing. Claimant's attorney is awarded $1,200 for services at hearing and $750 for services on Board review, to be paid by the SAIF Corporation.

LARRY G. CAMPBELL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-12616
November 1, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Seymour's order which upheld the denial of the SAIF Corporation of claimant's low back injury claim. The issue on review is compensability.

Claimant was a resaw operator in a sawmill. On October 16, 1984 claimant was knocked to the ground by a timber which also knocked over the control panel. The worker at the nearest location came over and assisted claimant for a few minutes and then returned to his work station. Claimant completed his shift, but was unable to return to work for two weeks.

Claimant went to Dr. Walborn, chiropractor, on October 17, 1984. The chiropractor examined claimant and reported low back and hip pain related to heavy lifting at work with one particular episode being most significant. Dr. Walborn also reported that he had been treating claimant for minor strains to the neck and shoulders and for headaches for approximately one year. Claimant continued chiropractic treatment for about a month, but felt he was not improving with that mode of treatment.

Dr. Kooiker, general practitioner, examined claimant on November 19, 1984. He reported that claimant complained of pain in the neck and low back pain on the right since the October 16 incident at work. He reported claimant's history of major injuries from a motorcycle accident in 1979, none of which involved claimant's back. It was significant to Dr. Kooiker that claimant had performed the very heavy labor of oil well rigging and the heavy work of land surveying since the 1979 motorcycle accident. Dr. Kooiker concluded that claimant had probably strained his sacroiliac and neck.

X-ray and nuclear bone scintigraphy revealed a spina bifida oculta at L5-S1 but was otherwise within normal limits from T-4 to claimant's pelvis. There was no change in the low back X-ray compared to an X-ray examination of May 12, 1977. On December 17, 1984 Dr. Kooiker referred claimant to Dr. MacRitchie for treatment. Dr. MacRitchie became claimant's treating doctor. There are no reports from Dr. MacRitchie in the record.

Claimant was also involved in a minor motorcycle accident in August 1984 which resulted in minor abrasions to claimant's right arm. Claimant did not seek medical treatment for the abrasions and had no complaints of low back pain related to the motorcycle accident. Claimant did not ride his motorcycle after the August 1984 accident.

The Referee made no finding of witness credibility based on demeanor at hearing. Claimant has the burden to prove that his low back pain condition arose out of and in the course of his

employment. Poole v. SAIF, 69 Or App 503 (1984). Claimant had no complaints nor treatment for low back or hip pain before his industrial accident. He sought and obtained treatment the day after the accident. Expert medical opinion on causation is not necessary when the injury sustained is apparently consistent, to a layman, with the description of the injurious event and when the case is not medically complex. Uris v. Compensation Department, 247 Or 420 (1967). We are persuaded by the evidence in this record that claimant carried his burden of proof and that his low back condition is compensable.

ORDER

The Referee's order dated May 3, 1985 is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing. Claimant's attorney is awarded $1,250 for services at hearing and $750 for services on Board review, to be paid by the SAIF Corporation.

DARYL W. HUGULET, Claimant
Elliott Lynn, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 82-10769
November 1, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Peterson's order that found claimant was not entitled to Oregon workers' compensation benefits for an injury that occurred in the State of Washington. The sole issue on review is compensability.

Claimant is a resident of Oregon. He is a member of an Oregon-based union that contracts with various employers in Oregon and southwest Washington to provide workers for temporary jobs. One employer with whom the union contracts is the Oregon corporation with whom claimant has filed the present claim.

Claimant worked for the employer in Oregon for a few days approximately one month before the out of state injury at issue occurred. The Oregon work was temporary and there was no expectation that claimant's employment would extend beyond the end of the temporary job. A few weeks after the job ended, the employer contacted claimant and invited him to work on another temporary job, this time in Vancouver, Washington. That job, too, was to last no more than a few days. Claimant accepted the employer's offer after his union apparently approved. He was injured the first day on the job.

Claimant testified that he contacted the employer with the intent of filing an Oregon workers' compensation claim, but was told by the employer that he should file in Washington for Washington benefits. Claimant did so and was awarded compensation in that state. Claimant apparently remained convinced, however, that he had a valid claim in Oregon as well. He ultimately filed in Oregon. The insurer issued a denial on the ground that claimant was not an Oregon subject worker at the time of his injury.

The Referee upheld the denial, correctly noting that ORS 656.126(1) controls. That statute provides:

> "If a worker employed in this state and subject to ORS 656.001 to 656.794 temporarily leaves this state incidental to that employment and receives an accidental injury arising out of and in the course of his employment, he, or his beneficiary if the injury results in death, is entitled to the benefits of ORS 656.001 to 656.794 as though he were injured in this state."

The Referee held that claimant's employment in Washington was not "incidental to" employment in which claimant was engaged in Oregon, for claimant's prior relationship with this employer had been temporary. After reviewing the facts of this case and the pertinent case law, we agree that claimant was not an Oregon subject worker at the time of his injury.

In Jackson v. Tillamook Growers Co-op, 39 Or App 247, 250 (1979), the court noted: "The critical determinant in deciding if a worker falls within ORS 656.126(1) is whether the worker is permanently, as opposed to temporarily, employed in Oregon." In denying the claimant's claim, the court held that the fact that the claimant was hired in Oregon and believed that he was an Oregon worker did not in and of itself establish that he was permanently employed in Oregon.

In Kolar v. B & C Contractors, 36 Or App 65 (1978), the claimant was an Oregon resident hired in Oregon by a California-based corporation licensed to do business in Oregon. The claimant worked for the employer for three days in Oregon before leaving for Washington, where he worked for the employer for six months before being injured in that state. There was evidence that the employer intended to retain the claimant to work in Oregon after the completion of the Washington job. Under these circumstances, the court held the claimant to be entitled to Oregon benefits under ORS 656.126(1). The court found the claimant's Washington job to be "incidental" to the work the claimant did for the employer in Oregon. Important to the court's decision, however, were the facts that the claimant had worked for the employer immediately prior to being sent to Washington and that there was an expectation that the claimant would continue working for the employer upon the claimant's return to Oregon. Id. at 69.

In Don Winters, 34 Van Natta 586 (1982), we decided a case similar to the one before us. In Winters, the claimant was hired by an Oregon corporation to do a temporary job in Seattle, Washington. The employer hired workers by the job and each job was temporary. The claimant had worked briefly for the employer in the past. He was injured 11 days after the Washington job began. He filed claims in both Oregon and Washington. The SAIF Corporation denied on behalf of the Oregon employer, alleging that the claimant was not an Oregon worker at the time of his injury.

We upheld SAIF's denial, noting:

> "Although claimant previously performed work for [the employer] in Oregon, maintained a residence in Oregon and apparently paid his dues to a Portland union local, he was not a subject worker at

> the time of his injury. Claimant was employed on a job-by-job basis with the employer. Claimant's employment with [the employer] would have terminated following completion of the Portland project, had he not applied for and been accepted for work on the Seattle project. There is no indication in the record that claimant had any form of employment with [the employer] to return to [in] Oregon, following completion of the Seattle assignment. Since each work project with the employer is severable, with no employment being extended beyond the completion date of each specific project, claimant cannot be said to have suffered an industrial injury while temporarily out of the state, incidental to his Oregon employment. Claimant had no work that his Seattle employment could have been incidental to on the date of the injury, and is, therefore, not a subject worker for purposes of that injury."

On review, claimant argues that although his job assignments are temporary, 90 percent of them are performed in Oregon, albeit for different employers. He argues, therefore, that any temporary work he does out of state is necessarily "incidental" to the remainder of his work, which is done in Oregon. He further argues that it would be unfair to deny workers in his unique category (i.e., workers whose employment consists of a series of temporary appointments) the benefits available to all other Oregon workers merely by virtue of their unique status.

While we recognize claimant's dilemma, we find that the pertinent statute, as interpreted by the aforementioned cases, requires that the insurer's denial be upheld. We find that in order for a claimant who is injured outside of Oregon to establish entitlement to Oregon benefits, he must prove that there was an established employment relationship between him and this employer in Oregon before the out of state injury occurs. Without this relationship, claimant's out of state employment cannot be said to be "incidental" to the work to be done for the employer in Oregon.

In the present case, although claimant had worked briefly for the employer in the past, he had no established employment relationship with the employer in Oregon at the time he was hired to do a few days work in Washington. Under these circumstances, the out of state work cannot be said to have been incidental to claimant's Oregon employment. Therefore, claimant was not an Oregon subject worker at the time he was injured.

ORDER

The Referee's order dated May 29, 1985 is affirmed.

KENNETH R. KASHUBA, Claimant
Francesconi & Cash, Claimant's Attorneys
Beers, Zimmerman & Cash, Defense Attorneys

WCB 84-06918
November 1, 1985
Order on Reconsideration

On October 17, 1985 we issued our Order on Reconsideration in which we allowed the employer's and insurer's motion to dismiss claimant's request for Board review on the ground that we lacked jurisdiction. See Argonaut Insurance v. King, 63 Or App 847 (1983); Junior L. Weatherford, 36 Van Natta 1705 (1984). We have now been advised that on July 10, 1985 the insurer submitted claimant's claim to the Evaluation Division of the Workers' Compensation Department for determination pursuant to ORS 656.268. The Referee's failure to order that claimant's claim be submitted to the Evaluation Division was the basis of claimant's request for Board review.

Because claimant has received the relief he requested by seeking review of the Referee's order, the request for Board review was rendered moot prior to the issuance of our October 17, 1985 order. We, therefore, withdraw our previous Order on Reconsideration dated October 17, 1985. Claimant's motion that his request for Board review be dismissed as moot is allowed and this matter is dismissed for that reason.

IT IS SO ORDERED.

RANDY A. NOONKESTER, Claimant
Coons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10481
November 1, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Myers' order that: (1) affirmed the Determination Order that established claimant's medically stationary date and granted no permanent disability award; (2) upheld the SAIF Corporation's denial of claimant's low back aggravation claim; and (3) denied claimant's request for additional "interim" compensation and a penalty and attorney fee for unreasonable resistance to payment of compensation. The issues are premature claim closure, aggravation and "interim" compensation, penalty and attorney fees.

The Board affirms the Referee's order with the following comments relating to the aggravation claim. Based upon claimant's demeanor at hearing, the Referee found that claimant was not a credible witness. We ordinarily defer to a Referee's observations of credibility, particularly when those observations are based upon a witness' demeanor at hearing, unless there is a strong basis in the record to do otherwise. See Humphrey v. SAIF, 58 Or App 360 (1982); Miller v. Granite Construction Co., 28 Or App 473 (1977); Donald W. Hardiman, 35 Van Natta 664 (1983). There is no basis in this record upon which we are inclined to question the Referee's observations regarding claimant's credibility.

Dr. Freeman's opinion that claimant's condition worsened after claim closure is based solely upon his examination findings of muscular tension and reduction in active ranges of motion. Dr. Freeman ultimately stated that limitation in range of motion is a result of "subjective feelings on the part of the patient . . . ," and he related claimant's "worsening" to industrial causes by claimant's history as provided by claimant. We have previously

held that medical findings based upon a suspect history are themselves suspect. Kenneth L. Frisby, 37 Van Natta 280, 281 (1985). Weighing claimant's and Dr. Freeman's testimony against the contrary medical opinions, we find that claimant has failed to prove by a preponderance of the evidence that his condition worsened since the last award or arrangement of compensation. ORS 656.273(1).

ORDER

The Referee's order dated March 15, 1985 is affirmed.

NANCY E. CUDABACK, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Noreen K. Saltveit, Defense Attorney
Moscate & Byerly, Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08031, 83-03359, 84-05661, 84-12695 & 85-01701
November 4, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Kemper Insurance Company requests review of those portions of Referee Foster's order that: (1) held it to be the insurer responsible for claimant's low back condition; (2) set aside its denial of chiropractic treatments provided in excess of the guidelines suggested by the administrative rules; and (3) affirmed the Determination Order granting claimant 64° for 20% unscheduled permanent partial disability for the low back, in addition to the 40° for 12.5% unscheduled disability awarded by way of a prior Determination Order and a stipulated settlement between claimant and the SAIF Corporation.

Liberty Northwest Insurance Corporation requests review of that portion of the order that awarded claimant 32° for 10% unscheduled permanent partial disability for an exacerbation of claimant's low back symptoms while she was employed by Liberty Northwest's insured.

There are three insurers and three work-related incidents in this case. Claimant's original injury occurred in October 1980 at a nursing home insured by the SAIF Corporation. Claimant incurred a low back strain, and remained somewhat symptomatic thereafter. She was declared medically stationary in August 1981 and subsequently received 16° for 5% unscheduled disability by way of a September 1981 Determination Order. Claimant requested a hearing on the order and later received an additional 24° for 7.5% unscheduled disability from SAIF by way of a stipulated agreement.

After several months off work, claimant was hired by General Foods, which is insured by Liberty Northwest. After working on the employer's cannery belt for four days, claimant's low back symptoms returned. She left work and returned to her chiropractor, who diagnosed a recurrent low back strain. Claimant was also examined by an orthopedist, Dr. Poulson, who diagnosed a strain superimposed on preexisting degenerative disc disease. Claimant's objective findings were nearly identical to those she exhibited before her employment with General Foods, and she testified that she had no new symptoms as a result of that employment exposure. Neither could claimant recall a specific injurious incident while at General Foods.

Claimant remained off work until May of 1983, when she became employed by the Smuckers Company. Smuckers is insured by Kemper. Claimant worked for approximately two months at Smuckers before suffering a second exacerbation. She "felt something pop" in her low back, and the incident was followed by leg pain, which was a new symptom. Claimant's treating chiropractor and Dr. Snider, a consulting physician, stated their opinions that claimant's last work incident independently contributed to the worsening of her low back condition.

The Referee held Kemper, the insurer on the risk at the time of claimant's last injury, to be responsible. We agree and affirm that portion of the Referee's order. Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Industrial Indemnity v. Kearns, 70 Or App 583 (1984).

The Referee also awarded claimant 32° for 10% unscheduled disability for what the Referee thought was a disability producing incident while claimant was employed by General Foods. The record does not support the Referee's award. As was noted, claimant experienced no more than a flare-up of her previous symptoms following the incident at General Foods. There is no evidence that the injury worsened her condition so as to entitle her to an award of permanent disability over that granted by prior awards. The 10% award will be set aside.

The Referee also set aside Kemper's denial of chiropractic treatments provided in excess of the four-visits-per-month guideline set forth in the administrative rules at the time of claimant's injury. OAR 436-69-201(2)(a) (renumbered OAR 436-10-040, May 1, 1985). ORS 656.245 mandates provision of medical services, regardless of frequency, so long as they are reasonable and necessary. Kemp v. Workers' Comp. Dept., 65 Or App 659, modified on other grounds, 67 Or App 270 (1984). An insurer may not rely on a Department rule to deny payment for services shown to be reasonable and necessary. West v. SAIF, 74 Or App 317 (1985). It remains claimant's burden, however, to prove the reasonableness and necessity of the chiropractic treatments provided. See e.g. SAIF v. Belcher, 71 Or App 502 (1984); Teresa L. Bogle, 37 Van Natta 615 (1985). After reviewing the medical evidence, we are not persuaded that claimant's treatments are necessary. The only opinion offered in support of treatment comes from the chiropractor who is providing it. While we generally defer to a treating doctor's opinion on questions of medical care, we will not do so when there are persuasive reasons not to. See Weiland v. SAIF, 64 Or App 810, 814 (1983). We recognize that in Lucine Schaffer, 33 Van Natta 511 (1981), we stated: "On questions of the need for medical treatment, the Board will always defer to the treating doctor absent some compelling reason not to do so." (Emphasis added). We now further recognize that our use of the term "compelling" in Schaffer suggested a standard of persuasion stricter than that required in workers' compensation law. The correct standard when the medical evidence is divided is to give greater weight to the conclusions of a claimant's treating physician unless there are persuasive reasons not to do so.

In the present case, three physicians, including a consulting chiropractor, have advanced well-reasoned and persuasive opinions in which they explain why frequent chiropractic treatment is not necessary to claimant's recovery. Only claimant's chiropractor

asserts that frequent treatment is needed. The medical evidence in this case weighs heavily against a finding of necessity, and we are persuaded to reject the treating doctor's opinion in favor of the remaining evidence. See John Verhoef, 37 Van Natta 1171 (1985); Stephanie A. Grimsley-Bruni, 37 Van Natta 437 (1985). Accordingly, we find that claimant's chiropractic treatments are not necessary and, therefore, are not compensable. Kemper's denial will be reinstated.

The remaining issue is the extent of claimant's permanent partial disability. Following her last injury, a Determination Order awarded claimant 64° for 20% unscheduled disabilty. This award was in addition to prior awards, bringing claimant's total unscheduled award to 120° for 37.5%. The Referee approved the award. We find that it was excessive. After considering claimant's impairment, limitations, transferable skills, age, education, adaptability, work experience and labor market findings, we find that claimant's disability does not exceed 20%. The Referee's award will be modified accordingly.

Because claimant's attorney did not participate on Board review, no attorney fee will be awarded.

ORDER

The Referee's order dated April 24, 1984 is reversed in part, modified in part and affirmed in part. That portion of the order that set aside Kemper Insurance Company's denial of chiropractic treatment is reversed and the denial is reinstated. That portion of the order that granted claimant 32° for 10% unscheduled permanent partial disability for an exacerbation occurring at Liberty Northwest Insurance Company's insured's is set aside.

PETER J. ELIA, Claimant
Francesconi & Cash, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 82-10149, 82-10150 & 83-09116
November 4, 1985
Amended Order on Review

Claimant has requested that we amend our Order on Review dated October 22, 1985, which affirmed Referee Shebley's December 21, 1984 Opinion and Order. Claimant calls our attention to the inadvertent failure of our order to reflect that the Referee subsequently reconsidered and amended his Opinion and Order on February 1, 1985. Although we noted in the introductory paragraph of our Order on Review that the Referee's order had been amended, we inadvertently affirmed the Referee's original Opinion and Order, rather the amended order, in the Order portion of our document.

Claimant's request that we amend our Order on Review is granted. The Order portion of our order is hereby corrected to read:

> "The Referee's amended order dated February 1, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the insurer."

We adhere to and republish the remainder of our order.

IT IS SO ORDERED.

FAY L. HUMPHREY, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-01477
November 4, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of that portion of Referee Fink's order which found that claimant was entitled to additional vocational assistance. On review, the insurer contends that the termination of claimant's vocational assistance was justified. We agree and reverse.

Claimant was 40 years of age at the time of hearing. In March 1980 he sustained a compensable low back injury while working as a carpenter. His condition was diagnosed as lumbar strain. Following conservative treatment, his claim was closed by a July 1980 Determination Order. Claimant received approximately three months of temporary total disability and no permanent disability.

Claimant returned to carpentry work following his compensable injury. However, his back pain persisted, causing him to continue to seek chiropractic treatments from Dr. Robinson, his treating physician. In December 1981 claimant started his own scrap metal business, in which he purchased old cars, removed the reusable parts, and sold the remaining shells as scrap metal.

In November 1983 claimant's pain worsened, prompting the reopening of his claim. In January 1984 Dr. Grossenbacher, orthopedist, performed an independent medical examination. Dr. Grossenbacher discouraged a return to heavy construction work, suggesting a 35 to 50 pound weight restriction with a two hour sitting limitation. "Strongly" encouraging vocational counseling, Dr. Grossenbacher rated claimant's permanent disability between minimal and moderate. Dr. Robinson essentially agreed with Dr. Grossenbacher's findings.

By letter dated March 1, 1984 Germain-Bennett advised claimant that the insurer had requested that a return to work plan be developed. The letter set forth several requirements which claimant needed to follow in order to remain eligible. Among others, these requirements included: (1) maintaining regular contact with his counselor; (2) participating in any requested evaluation and providing any information requested for evaluating vocational plans; and (3) cooperating in developing the return to work plan.

By report dated March 23, 1984 Ms. Findley, rehabilitation specialist, described her two meetings with claimant. Claimant, a high school graduate, had primarily performed carpentry work in heavy construction. Between 1967 and 1980 claimant operated his own contracting business. Except for an occasional one week job in framing, he had been unemployed since 1981. Claimant was currently collecting and selling scrap metal. He estimated that he was earning between $100 and $300 per week, which was sufficient for him and his son to reside on an eight acre parcel of property. He also raised and slaughtered cattle and pigs. Since his scrap metal business was seasonal and dependent on his health, claimant realized that this was not a reliable source of income.

Based on claimant's skills, Ms. Findley suggested three potential job opportunities through a Direct Employment Program: (1) estimator; (2) carpenter supervisor; and (3) claims adjustor. Although claimant had experience estimating damage and bidding repair jobs, the counselor noted that claimant felt he could not perform the duties required of a claims adjustor. Claimant felt that the carpenter supervisor job might work, provided there was some accommodation for his physical limitations. Ms. Findley reported that direct employment contacts would be made concerning the three potential job opportunities, including the scrap metal industry. The counselor also intended to assist claimant in preparing his resume, setting interview appointments, and updating his job search skills.

By report dated April 30, 1984 Ms. Meers, rehabilitation specialist, described her April 16 telephone conversation with claimant. According to Ms. Meers' report, claimant had indicated that he was not interested in receiving return to work services. Ms. Meers noted that claimant had been extremely difficult to reach and engage throughout his association with Germain-Bennett, apparently because of his scrap metal business. It was Ms. Meers' conclusion that claimant was apparently not interested in return to work services due to his self-employment and to his lack of interest in structured return to work procedures. Therefore, she was closing the file pursuant to claimant's and the insurer's request.

Claimant was subsequently notified of his ineligibility for vocational assistance. The reason given for the termination was that claimant had declined services, indicating that he did not desire services from Germain-Bennett or any other provider.

A July 1984 Determination Order reclosed the claim. Claimant was awarded approximately one week of temporary total disability and approximately three months of temporary partial disability. He also received 15% unscheduled permanent partial disability.

Claimant testified that he had declined Germain-Bennett's services, but that he desired services from a "different outfit." Germain-Bennett wanted him to contact three potential employers per week for interviews. He did not follow their request because he "couldn't afford to." The loss of time from his scrap metal business caused by these contacts would be "just financially impossible." Claimant conceded that if another provider had suggested three weekly contacts he would have also refused their request. In addition, he does not conduct his scrap metal business every day, as it is dependent on his physical and financial condition. His income last year was $6,000. He has applied for maintenance work with approximately six or eight employers and had "asked a couple construction people" about potential foreman positions, but his efforts have been fruitless.

Claimant and his son continue to reside on claimant's parcel of property. However, he recently sold two of his eight acres for $27,500. The remaining six acres is used for the grazing of his two cows and two calves. His son has two goats. As he has previously done, claimant also intends to raise and slaughter pigs. Claimant's monthly payment on the property is $200.

The Referee found claimant's testimony to be essentially credible. Questioning whether personnel managers would consider claimant's application on his own initiative, the Referee

concluded that claimant's vocational assistance was inadequate. The Referee further found claimant's explanation for declining assistance reasonable. Consequently, the insurer was ordered to arrange for further evaluation of claimant to determine what vocational assistance should be provided.

The eligibility of a worker for vocational assistance shall end if the worker, without reasonable cause, has declined or is unavailable for further vocational assistance. OAR 436-61-126(5). Assistance shall also end if the worker has failed to fully participate in the return-to-work plan. OAR 436-61-126(8). (OAR 436-61-126 was renumbered OAR 436-120-090 effective May 1, 1985.)

We conclude that under either of the above-mentioned sections the insurer was justified in terminating claimant's vocational assistance. Claimant contended that in order to continue to earn a living it was necessary to focus his efforts entirely on his scrap metal business. To quote him, it was "financially impossible" to make the job contacts that Germain-Bennett had suggested. Yet, claimant acknowledged that he would have refused to contact potential employers had another provider made a similar request. Furthermore, he testified that the pursuance of his scrap metal business was not on a daily basis and depended upon his physical and financial condition. Thus, the evidence preponderates that there were portions of claimant's workweek in which he could have participated in the proposed return to work plan had he been so inclined and that he was unwilling to pursue potential job opportunities, regardless of which vocational rehabilitation provider had so requested.

Consequently, we do not consider claimant's explanation to be a reasonable excuse for his refusal to continue with his vocational assistance nor for his failure to fully participate in his return to work plan.

ORDER

The Referee's order dated April 29, 1985 is reversed in part. That portion of the order which ordered the insurer to arrange for further vocational assistance is reversed. The remainder of the Referee's order is affirmed.

RALPH E. MOEN, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05511
November 4, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Daron's order which found that claimant's back injury claim had been prematurely closed. SAIF contends that claimant has failed to establish that his condition was not medically stationary at the time of claim closure. Since the Referee found that the claim had been prematurely closed, he did not address the alternative issues of aggravation and extent of scheduled and unscheduled permanent disability.

We agree with SAIF that the evidence fails to establish that the claim was prematurely closed. However, we find that claimant has proven a worsened condition since claim closure.

In February 1978 claimant sustained a compensable injury while working as a millwright. The primary injury was to his right leg, particularly the knee. In September 1978 claimant underwent a medial meniscectomy. He returned to work in March of 1979. However, his right knee problems continued, eventually resulting in a right lateral tibial osteotomy in September 1980.

Following vocational assistance, claimant obtained employment with a different employer as a plant foreman. Although no physical work was required, claimant continued to experience right knee problems.

In June 1983 Dr. Young, claimant's attending physician, performed a total knee replacement. Claimant enjoyed short term relief, but his knee pain soon returned. In addition, while claimant's knee pain was in remission, he began to experience increasing problems with low back pain.

Dr. Young referred claimant to Dr. Rockey, another orthopedic surgeon, for evaluation of claimant's ongoing back problems. In December 1983 Dr. Rockey diagnosed chronic moderate arthritis of the lower lumbar spine without evidence of disc herniation or nerve root irritation. Dr. Rockey prescribed a sacroiliac brace. Stating that the right knee's joint alignment appeared excellent and the joint stable with a good range of motion, Dr. Rockey diagnosed post-traumatic arthritis of the right knee.

Dr. Young agreed with Dr. Rockey's findings and stated that claim closure was planned at the time of claimant's next visit. He further indicated that the back support had improved claimant's back condition, making re-employment appear more feasible.

In February 1984 Dr. Young referred claimant to the Orthopaedic Consultants. Dr. Young anticipated that claimant should be nearing a stationary level and a return to modified employment. However, claimant continued to complain of severe right knee pain, which Dr. Young was unable to substantiate through any objective findings.

In March 1984 the Orthopaedic Consultants diagnosed a chronic pain syndrome of the right knee and chronic lumbosacral strain with mild degenerative arthritic changes. The Consultants considered claimant medically stationary from an orthopedic and neurologic aspect. However, the Consultants noted a "severe degree of interference from a functional disturbance manifested by refusals and inconsistencies." In April 1984 Dr. Young concurred with the Orthopaedic Consultants' report.

An April 17, 1984 Determination Order reclosed the claim. Claimant received permanent disability awards of 10% unscheduled disability and 10% scheduled disability. These awards gave claimant awards totalling 20% unscheduled low back permanent disability and 60% scheduled right leg (knee) permanent disability.

On May 4, 1984 claimant returned to Dr. Young. Claimant testified that Dr. Young merely discussed the Consultants' report with him. Dr. Young advised SAIF that claimant was very angry and hostile concerning the Orthopaedic Consultants' examination and was "still totally lacking insight into his continuing disability." Although he suspected that claimant would seek alternative medical care, Dr. Young reiterated his concurrence with the Orthopaedic Consultants' report:

"I feel that he is stationary, that he should not have further surgery or additional major treatment unless it would be a Pain Center type program, which I do not think he will accept at this time. I will be seeing him on a p.r.n. basis at his request."

In June 1984 claimant was examined by Dr. Morrison, orthopedist. Dr. Morrison reviewed claimant's recent X-rays and found what appeared to be a structural abnormality at the lumbosacral junction on the right side, which he thought might account for claimant's apparent right-sided sciatic nerve symptoms. In order to determine whether his apparent abnormality was traumatic in origin, Dr. Morrison suggested a CT scan. Regarding claimant's right knee, Dr. Morrison suggested tests to investigate the possibility of an occult subclinical infection in claimant's right knee joint. Stating that claimant had significant problems which needed further work-up, Dr. Morrison opined that claimant was basically unemployable as a result of his compensable injury.

Since his claim was closed, claimant has experienced increasing right knee and low back pain. His increased back pain has limited his walking ability since he was last examined by Dr. Young. Although the use or function of his right leg apparently is essentially the same as it was when he was last examined by Dr. Young, claimant presently experiences more pain and swelling. In addition, his inability to properly bear weight on his right leg has increased his back pain.

Claimant's daily activities are quite limited. He has not looked for work since his claim was closed because "I'd have to lie right off the bat on the form, and I couldn't do the eight hours of work to begin with." His former job as a foreman is no longer available since that employer has gone out of business. Furthermore, he believes he is incapable of performing that type of work, since it required standing for long periods.

To support a conclusion that a claimant is "medically stationary," ORS 656.005(17) requires 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 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 (1984). Furthermore, hindsight should not be exercised in determining whether the claim was prematurely closed. Sullivan v. Argonaut Ins. Co., 73 Or App 694, 697 (1985); Alvarez v. GAB Business Services, 72 Or App 524, 527 (1985).

Following our de novo review of the record, we are not persuaded that the claim was prematurely closed. Accordingly, we reverse the Referee's order and reinstate the April 17, 1984 Determination Order.

Dr. Young, claimant's then-attending physician, expressed the opinion that claimant's condition was medically stationary. The Orthopaedic Consultants considered both claimant's knee and back conditions stationary. The only evidence to suggest otherwise is claimant's testimony of continued, chronic pain and Dr. Morrison's

report two months after claim closure which indicated that claimant had significant problems. Based on the evidence available at the time of closure, as required by the principles expressed in Maarefi, Alvarez, and Sullivan, we conclude that the claim was not prematurely closed.

Although we are not persuaded that the claim was prematurely closed, we find that claimant's compensable condition has worsened since the April 1984 Determination Order.

To establish an aggravation claim, a claimant must establish by a preponderance of the evidence a worsening of his condition since the last award or arrangement of compensation and a causal relationship between that worsening and his compensable injury. ORS 656.273(1); Hoke v. Libby, McNeil & Libby, 73 Or App 44 (1985). Claimant need not show a substantial worsening. Mosqueda v. ESCO Corporation, 54 Or App 736, 739 (1981). Objective medical evidence is not necessarily required to establish an aggravation claim. Garbutt v. SAIF, 297 Or 148, 151-52 (1984). The worker's subjective complaints may or may not sustain the burden of proof. Garbutt v. SAIF, supra. In some cases a symptomatic worsening will be found sufficient to warrant claim reopening under the aggravation statute, while in other cases it will not. Billy Joe Jones, 36 Van Natta 1230, 1235 (1984).

The evidence in support of claimant's aggravation claim consists of his testimony and Dr. Morrison's chart notes and report. There is no reason to doubt claimant's testimony that although his right knee and back pain have been ongoing, his limitations and pain have worsened in the months following claim closure and preceding the hearing. Although Dr. Morrison does not state that claimant's condition has worsened since the April 1984 claim closure, he opined that claimant's injury-related conditions have prevented him from performing gainful employment. We do not understand his statement to be that claimant is permanently totally disabled. Rather, we believe his statement to be that claimant was temporarily totally disabled, thus verifying claimant's inability to work. Six months prior to this examination, both Dr. Rockey and Dr. Young had opined that claimant was capable of performing sedentary or light work. Thus, whereas claimant was previously considered capable of performing gainful employment, his present attending physician now believes he is not.

Moreover, Dr. Morrison noted claimant's complaints of intermittent coccygeal and low back pain with radiation into the right side. These symptoms suggested to Dr. Morrison that claimant was experiencing right-sided sciatic nerve symptoms. Furthermore, these symptoms were not specifically mentioned in claimant's previous examinations. When Dr. Rockey examined claimant, he had found the sciatic nerves non-tender and detected no other evidence of nerve involvement. The Orthopaedic Consultants' report made no mention of right-sided radiating pain, although occasional left-sided pain was noted.

We find that the evidence slightly preponderates in favor of concluding that claimant's condition has worsened since his claim was closed on April 17, 1984. See Mosqueda, supra. Claimant's testimony, together with the reported findings, conclusions and recommendations of his new attending physician, are sufficient, in the absence of objective medical evidence to the contrary, to

sustain his burden of proof. Cf. Hoke v. Libby, McNeil & Libby, supra; Sharon C. Chase, 37 Van Natta 415 (1985).

Inasmuch as we have concluded that the claim should be reopened, any determination concerning extent of permanent disability is premature. Gary A. Freier, 34 Van Natta 543, 545 (1982); Thomas D. Craft, 36 Van Natta 1649 (1984).

ORDER

The Referee's order dated October 18, 1984 is reversed. The Determination Order dated April 17, 1984 is reinstated and affirmed. The SAIF Corporation's denial dated July 23, 1984 is set aside, and claimant's aggravation claim is remanded to SAIF for processing in accordance with law. In lieu of the attorney's fee allowed by the Referee, claimant's attorney is awarded $900 for services at hearing and $500 for services on Board review, for prevailing on this denied aggravation claim, to be paid by the SAIF Corporation.

PAUL ROGERS, Claimant
David C. Force, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 85-00270
November 4, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee Nichols's order that set aside its denial of claimant's injury claim involving the low back. Claimant cross-requests review of that portion of the order that denied his request for penalties and attorney fees for an alleged unreasonable denial. The issues on review are compensability and penalties and attorney fees.

This claim was preceded by multiple injuries from which multiple claims have been filed over the course of several years. A chronology of those claims is necessary to an understanding of the posture of the present case. Claimant's first claim involved an on the job injury to the low back in June of 1976. That injury was followed by a second industrial injury in early 1978. The third injury was off the job, but was ultimately adjudged to be the compensable result of claimant's previous compensable injuries.

The fourth incident was also off the job and involved claimant's being injured in a serious motor vehicle accident. Claimant's subsequent claim was denied by the self-insured employer, and the denial was ultimately upheld by the Court of Appeals. Rogers v. Weyerhaeuser Co., 74 Or App 366 (1985).

Claimant alleged a fifth injury in February of 1984. He later underwent surgery as a result of that injury. The self-insured employer once again denied. The denial was overturned by way of an Opinion and Order, but was later reinstated by the Board. Paul Rogers, 37 Van Natta 949 (1985).

The present claim involves yet a sixth injury. Claimant asserts that he incurred further injury as a result of an off the job fall, and that his current condition is related to his prior compensable injuries. Indeed, one of claimant's physicians reported that claimant's current condition is related to scarred lumbar nerve roots that were apparently irritated during the surgery performed as a result of claimant's February 1984 injury.

Based on the physician's report, the Referee held the present claim to be compensable, reasoning that because claimant's current condition is related to surgery performed as a result of a prior compensable injury, the condition is compensable. As the self-insured employer properly points out on review, however, the Referee's order was issued before the Board held claimant's February 1984 claim to be noncompensable. Therefore, the Referee was proceeding on the assumption (which was correct at the time) that the injury for which claimant underwent surgery was compensable. Because of the Board's subsequent action on the February 1984 claim, however, neither the Referee's assumption nor the reasoning behind her order, remain valid. If claimant's current condition is related to surgery performed for a noncompensable condition, which we find that it is, the condition is not compensable.

With regard to the remaining issue of penalties and attorney fees, we affirm.

ORDER

The Referee's order dated May 2, 1985 is reversed in part and affirmed in part. Tnat portion of the order that set aside the self-insured employer's denial of claimant's current low back condition is reversed and the denial is reinstated. The remainder of the order is affirmed.

ALFRED W. ARMSTRONG, Claimant
Galton, et al., Claimant's Attorneys
John E. Snarskis, Defense Attorney

WCB 83-02703
November 7, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Mulder's order that found claimant to be permanently and totally disabled. The sole issue on review is extent of unscheduled disability, including permanent total disability.

Claimant, a 62 year old former warehouseman, compensably injured his low back on February 8, 1982 while lifting a case of food. After a week of conservative chiropractic treatment from Dr. Urban, claimant was released to return to work. Claimant continued to work for approximately nine months before suffering an exacerbation after jumping down from a lift truck.

Subsequent to the flare-up claimant continued to experience remissions and exacerbations, and in July of 1983 he was found to suffer from probable right L5 or right S1 nerve root irritation and grade I spondylolisthesis at L5 on S1. A subsequent myelogram revealed a minimal extradural L4-5 defect, along with moderately narrowed disc spaces at L4-5 and L5-S1. Claimant's treatment continued to be conservative. At the time of the hearing, he had undergone no surgeries.

On September 27, 1983 Dr. Urban opined that claimant had been totally disabled from employment since November of 1982. Of note, however, is Dr. Urban's March 3, 1983 recommendation that claimant be reassigned to office or inventory work. Using a list of restrictions developed by Dr. Urban, the employer implemented a plan to return claimant to work in a light duty "order checker" position. The position involved virtually no bending, lifting or

climbing, which were activities from which claimant was precluded by his injury. The position was such that claimant could move about frequently and rest when necessary.

Because the order checker job appeared to be within claimant's skills and capabilities, he was released to attempt it. Just a few days before it was to begin, however, claimant rolled over in bed and experienced a recurrence of his low back symptoms. After this last flare-up, Dr. Urban stated that claimant was no longer capable of employment. Claimant was thereafter referred to orthopedist Dr. Cherry, who felt that claimant was incapable of performing his previous warehouseman employment and could not do any work requiring lifting, bending and climbing.

Claimant's Field Services Division file was ultimately closed on May 4, 1984 because he was receiving social security and union retirement benefits and did not feel physically able to pursue vocational rehabilitation. His claim was closed on May 24, 1984 with an award of 128° for 40% unscheduled permanent partial disability for the low back.

At hearing, each party produced the testimony of a physician and a vocational consultant. Claimant called orthopedist Dr. Cherry, who reiterated his opinion that claimant is precluded from work involving lifting, bending and climbing. Although Dr. Cherry felt that claimant would be unlikely to succeed as an order checker, he stated that it would be reasonable for claimant to attempt the light duty job in order to determine whether he is, in fact, precluded from light work.

Claimant also produced vocational consultant Dennis Milholm, a child development specialist whose former employment included work as a vocational rehabilitation counselor. It was Mr. Milholm's opinion that claimant is totally disabled and unable to perform even light duty work, including work as an order checker.

The insurer called Dr. Raaf, a neurologist and surgeon with medical experience totalling nearly 50 years. Dr. Raaf examined claimant and the medical reports generated by other physicians. In Dr. Raaf's opinion, claimant is capable of work not requiring lifting over 30 pounds and that allows him to regularly change positions. Dr. Raaf saw no contraindication to claimant's accepting and performing the light duty job offered by the employer. Dr. Raaf rated claimant's impairment as "moderate" due to the combination of claimant's work-related and nonrelated disabilities.

Claimant testified that although he feels qualified and knowledgeable regarding the employer's order checker job, he does not feel physically capable of performing it on a regular basis. He further testified that he currently receives approximately $1,850 per month in pension and rental property income. Although the record contains several references to claimant's intention of retiring, he testified that he is available for any work within his physical capabilities. Claimant has not looked for employment since leaving work in late 1982.

The Referee concluded that claimant is incapable of gainful, regular work and granted an award of permanent total disability. In doing so he accepted the opinions of Dr. Cherry and Mr. Milholm over those of the other physicians and witnesses called.

It is claimant's burden to prove entitlement to an award of permanent total disability. ORS 656.206(3). In Allison v. SAIF, 65 Or App 134 (1983), the court discussed the standards by which permanent total disability is determined:

> "There are two types of permanent total disability: one arising entirely from medical or physical incapacity, and the other arising from conditions of less than total physical incapacity plus additional conditions such as age, education aptitude, adaptability to nonphysical labor, and mental and emotional condition, which together result in permanent total disability. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Unless a claimant shows that he comes within the first type of total disability, making it futile to attempt to find work, he must make reasonable efforts to obtain employment before an award of permanent total disability will be granted. [Citations omitted.]"

In the present case, it is clear that claimant is not totally incapacitated from a physical standpoint alone. Of the two orthopedists who testified, one has rated claimant's disability as only moderate and feels that claimant can return to work as an order checker. The other, Dr. Cherry, is more skeptical about claimant's return to work, but has agreed that it would be reasonable for claimant to at least attempt the light duty job developed for him. This suggests to us that Dr. Cherry does not consider claimant to be physically incapacitated.

Because claimant is not physically and totally disabled, it is incumbent on him to prove that he is motivated to return to work. After reviewing the record, we are not satisfied that claimant is motivated. We note that his income from nonemployment sources is sufficient to meet his monthly needs and that there is little in the way of financial motivation for him to seek work. We also note that the record reflects claimant's fear of losing union benefits if he were to accept the order checker job, which is nonunion. Although the record is unclear that claimant would in fact lose benefits, claimant's concern in that regard is well-documented. Finally, we note the several references to claimant's possible retirement in the record. Although claimant testified that he would be willing to accept appropriate employment, the record reveals that when offered the light duty job by his employer, he did not visit the work site nor speak to his foreman about what the job would entail.

The foregoing factors lead us to conclude that an award of permanent total disability is not warranted. We find the evidence to be that claimant is capable of regular employment in the position developed by his employer. Two physicians have so opined, as has a skilled vocational rehabilitation counselor who visited the job site and conducted a thorough job analysis, taking into consideration the restrictions imposed by claimant's treating physician. Although claimant is capable of work, he has made no effort to search for it. Nor has he demonstrated reasonable enthusiasm for returning to work.

Although we find that claimant is not permanently and totally disabled, we find that he is entitled to an increased award of unscheduled permanent partial disability. The only Determination Order issued in this case granted an award of 40%. After considering claimant's impairment, age, education and other pertinent factors, we conclude that he is entitled to an award of 192° for 60% unscheduled permanent partial disability. This award shall be in lieu of the 40% granted by the Determination Order.

ORDER

The Referee's award dated March 4, 1985 is reversed. In lieu of the Referee's award and all prior awards, claimant is awarded 192° for 60 % unscheduled permanent partial disability. Claimant's attorney's fee shall be adjusted according to the provisions of this order.

LARRY J. MURPHY, Claimant
Harper, et al., Claimant's Attorneys
Nancy Meserow, Defense Attorney

WCB 82-00389
November 7, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Brown's order that denied claimant's request for increased scheduled and unscheduled permanent partial disability above the 10% (15°) scheduled permanent partial disability for loss of use or function of the right forearm (wrist) granted by two Determination Orders. Claimant asserts that he is entitled to a larger scheduled award and to an award of unscheduled disability for injury to his low back. The issues are extent of scheduled and unscheduled disability.

Claimant was injured while digging a hole in a river bank in September 1980. His claim was accepted for bilateral forearm complaints and for a low back strain. Claimant subsequently had surgery for left and right carpal tunnel releases. He has not undergone back surgery. There is no persuasive evidence that claimant suffers any impairment in his left forearm or wrist. The preponderance of the persuasive medical and lay evidence is that claimant has sustained a minimal loss of right hand grip strength and suffers some pain and numbness of the the right forearm. We conclude that claimant has been adequately compensated for the loss of use or function of the right forearm (wrist) and affirm that portion of the Referee's order that affirmed the Determination Orders' awards of scheduled disability.

On the issue of unscheduled permanent partial disability of the low back, we conclude that claimant has suffered a loss of earning capacity on account of his compensable back injury. Claimant's treating physician, Dr. Saez, has imposed permanent limitations relating to the low back that preclude claimant's return to heavy work in the construction trades, which comprises the vast bulk of claimant's work experience. While several consulting physicians have opined that claimant's low back symptoms are of a functional origin, we are persuaded by the preponderance of the medical and lay evidence that claimant's impairment, while minimal, is real.

Claimant is age 36 and has completed the eighth grade. There is evidence that claimant is learning disabled and that his full

scale intelligence quotient is in the dull-normal range, see OAR 436-65-606 (renumbered 436-30-440, May 1, 1985); however, claimant has a general amateur radio operator's license, which requires the ability to receive Morse code at a minimum of 13 words per minute, and has successfully completed the majority of a retraining program in welding. Considering claimant's physical impairment and all of the relevant social and vocational factors, we conclude that claimant is entitled to an award of 10% (32°) unscheduled permanent partial disability for injury to his low back.

ORDER

The Referee's order dated February 8, 1985 is modified to grant claimant an award of 10% (32°) unscheduled permanent partial disablity for injury to his low back. In all other respects, the Referee's order is affirmed. Claimant's attorney is allowed a reasonable attorney fee of 25% of the increased compensation awarded by this order, not to exceed $2,000, for services at hearing and on Board review.

BRAD J. REYNOLDS, Claimant
Bottini & Bottini, Claimant's Attorneys
James R. Greenfield, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09614
November 7, 1985
Interim Order Denying Motion for Remand

The employer requested Board review of Referee Knapp's order that found that claimant was a subject worker under ORS 656.029. The employer has moved the Board for an order remanding this matter to the Referee for the taking of additional evidence that was allegedly not available at the time of the hearing. In conjunction with the motion for remand, the employer has requested abatement of the briefing schedule.

The employer's request for abatement of the briefing schedule is allowed. We have considered the employer's motion for remand and have concluded that it would be premature to allow the motion at this time. We, therefore, will defer our decision on the motion to remand until such time as we conduct our de novo review of the record as a whole.

The employer has 21 days from the date of this order, or until November 29, 1985 to file an appellant's brief. Respondent has 21 days from receipt of the appellant's brief to file an answering brief. The Board will consider a reply brief from appellant if received within 14 days of respondent's brief. Thereafter, the Board will proceed to docket for review on the basis of the file then developed.

IT IS SO ORDERED.

ROBERT J. WARREN, Claimant
Brown & Tarlow, Claimant's Attorneys
Nancy J. Meserow, Defense Attorney

WCB 84-08697
November 7, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Baker's order which awarded 112° for 35% unscheduled permanent partial disability in addition to the Determination Order dated June 27, 1984 which awarded only temporary disability compensation

for injury to claimant's low back. The issue on review is extent of unscheduled permanent partial disability.

Claimant strained his low back while working as a lumber truck driver on October 18, 1983. He obtained chiropractic treatment and other conservative care.

Claimant has spondylolysis at L5-S1 which was made symptomatic by the industrial injury. One month before the industrial injury, claimant's chiropractor had imposed a 40 pound lifting limit due to residual discomfort remaining from a previous unrelated injury. X-ray examinations have also revealed a minimal spina bifida oculta at S1 and that one of claimant's legs is shorter than the other by seven millimeters.

Claimant was examined by Orthopaedic Consultants in May 1984. The panel opined that claimant had no impairment. Claimant testified that he had been off work before the examination at Orthopaedic Consultants and that the testing done on him there had caused pain and stiffness. Claimant's attending physician, Dr. Cummings, opined that claimant is limited to 25 pounds lifting as a result of his injury and that claimant needs vocational rehabilitation into a lighter job. Dr. Cummings reported that claimant had a "recurrent chronic back strain."

Claimant holds an Associate of Arts degree in photography. His previous jobs have been manual labor at mobile home manufacturing plants and a dental equipment manufacturer. Claimant has been refused re-employment at a mobile home factory on the recommendation of a doctor who examined claimant.

To prevail on the issue of unscheduled permanent partial disability, a worker must demonstrate by a preponderance of the evidence that as a result of the industrial injury/occupational disease there has been a permanent loss of earning capacity. "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971); Barrett v. D & H Drywall, 73 Or App 184 (1985).

We rely on medical assessment and claimant's testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985). Howerton v. SAIF, 70 Or App 99 (1984).

As the court has stated:

> "A determination of the degree of partial incapacity or loss of earning power cannot be made with mathematical precision. A fact finder can do no better than to intelligently identify a range and arbitrarily choose a number within that range which seems to be consistent with that assigned to other similar injuries. There is a necessarily subjective element of experience-based intuition and exact consistency is not attainable." Owen v. SAIF, 33 Or App 385, 388 (1978).

See also, Fraijo v. Fred N. Bays News Co., 59 Or App 260 (1982).

Considering all of the relevant factors, including claimant's preclusion from returning to the manual labor which has been his principal source of employment, we find that claimant would be adequately compensated by an award of 80° for 25% unscheduled permanent partial disability.

ORDER

The Referee's order dated February 26, 1985 is modified. Claimant is awarded 80° for 25% unscheduled permanent partial disability in lieu of the Referee's award of 112° for 35% permanent disability. Claimant's attorney fee shall be adjusted accordingly.

FREDERICK G. WEST, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-01504
November 7, 1985
Order on Remand

This matter is before the Board on remand from the Court of Appeals. West v. SAIF, 74 Or App 317 (1985). The court has remanded this case for payment of the medical expenses that were denied by the SAIF Corporation and formed the basis of the litigation of this claim. The SAIF Corporation is, therefore, ordered to pay within the time and in the manner provided by law and regulation all expenses billed by Drs. Kelley and Moore for the treatment and examination of claimant.

IT IS SO ORDERED.

WILLIAM J. WILSON, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06345
November 7, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee McCullough's order which granted claimant permanent total disability, whereas a May 16, 1984 Determination Order had awarded no permanent disability in addition to the 55% (82.5°) scheduled permanent disability for loss of use of his right leg (knee) he had previously received. On review, SAIF contends that claimant is neither totally physically incapacitated nor entitled to an award of permanent total disability under the so-called "odd lot" doctrine. We agree and reverse.

Claimant was 49 years of age at the time of hearing. On September 26, 1973, while working as a psychiatric aide, claimant sustained a compensable injury to his right shoulder, arm and knee when he attempted to restrain a patient. Following conservative treatment, he returned to work on October 1, 1973.

Claimant apparently sought no further treatment until March 1979, when he was examined by Dr. Stevens, orthopedist. Dr. Stevens has since performed five operations on claimant's right knee. Dr. Stevens initially performed a right knee arthrotomy and total medial meniscectomy with a partial synovectomy. In July 1979 Dr. Stevens performed a right knee arthroscopy and arthrotomy with a total lateral meniscectomy. Claimant's pain and swelling persisted, prompting another arthroscopy in January 1980. In

September 1981 claimant underwent a patellar shaving. Finally, in October 1983, Dr. Stevens performed a patellectomy and debridement of osteophytes of the knee joint.

Claimant received an award of 40% scheduled right leg (knee) permanent disability by virtue of a January 21, 1983 Determination Order. This award was subsequently increased to 55% by an August 1983 stipulation. Following claimant's most recent surgery, a May 16, 1984 Determination Order awarded no additional permanent disability.

In April 1984 Dr. Stevens performed a closing examination. In addition to his right knee pain, claimant also complained of back, left buttock and thigh pain. These latter complaints were apparently attributable to a 1972 back injury and subsequent fusion for which claimant had previously received 15% permanent disability. Claimant was unable to ambulate without a cane. Dr. Stevens opined that claimant was limited to sedentary work. However, in a May 1, 1984 prescription note Dr. Stevens seemingly contradicted this opinion, stating that claimant was "[T]otally disabled for competitive employment."

In November 1984 claimant was interviewed by Mr. King of King Rehabilitation Services. Mr. King also discussed claimant's physical conditions with Dr. Stevens. Mr. King reported that although claimant was precluded from returning to his previous work as a psychiatric aide, he possessed many transferable skills related to the medical, clerical and security services. No additional training appeared necessary for claimant's successful return to work. Mr. King further reported that Dr. Stevens had placed a 20 pound weight restriction upon claimant and had advised claimant to avoid stairs, not to walk or stand for more than four to five hours per day, and to frequently change positions. Mr. King noted that claimant did not appear motivated and had no vocational aspirations, but apparently was not distressed or worried in that he had no financial need to return to work.

In December 1984 Dr. Stevens reported that he had last examined claimant in October 1984. The treating surgeon continued to hold the opinion that claimant was totally disabled for competitive employment based on claimant's difficulty in sustaining standing, walking, and sitting postures for a reliably sufficient period to allow employment.

Mr. King testified at the hearing. In addition to supporting the representations made in his report, Mr. King concluded that claimant had a "good shot" at becoming employed. In Mr. King's opinion claimant could physically perform jobs in which he was allowed to sit and stand at will. Specifically, Mr. King felt claimant was both vocationally and physically capable of performing the duties of a medical ward clerk, a patient insurance clerk, and an information clerk/receptionist.

Mr. McNaught, a vocational rehabilitation counselor, also interviewed claimant, reviewed the record, and testified at the hearing. Mr. McNaught was unable to identify any jobs which claimant could presently perform. Claimant's chances of direct employment were "very slim if not nil." In Mr. McNaught's opinion, claimant's inability to ambulate without the use of a cane, his need to elevate his right leg, and his typing deficiencies made him incapable of performing the jobs suggested by Mr. King. However, Mr. McNaught thought that claimant "quite possibly" could be trained for a job within his capabilities.

Claimant testified that he worked as a psychiatric aide for approximately 26 years. He initially began in the medical and surgical section, but also has worked in the diabetics section and admitting ward. For the last 20 years of his employment claimant worked in the communications center. Claimant's duties included answering phone calls, providing information, and admitting patients which would include transporting court-committed patients. He has a high school education, which included a typing course. Although his communications job required some typing, claimant felt that his skills were not competitive, primarily because of his lack of speed and poor spelling habits. Claimant wanted to return to his old job, but knew he could no longer meet the job's requirements. He was unaware of any work he was capable of performing. Claimant has not worked since his October 1983 surgery.

Claimant also described his physical complaints. He experiences constant right leg pain which radiates down the outside of his leg. Too much activity evokes swelling in his right knee, which requires the elevation of his right leg until the problem subsides. He uses a cane constantly, favors his right leg while walking on stairs, and avoids squatting or kneeling. Claimant suffered a 1972 low back injury, resulting in a 1973 fusion for which he received a 15% permanent disability award. He experiences sharp jabbing low back pain, which radiates down his left hip and leg. Claimant frequently changes position to relieve these pains.

The Referee found that claimant was permanently and totally disabled from a physical standpoint alone. The Referee relied upon the opinion of Dr. Stevens, the residuals from claimant's preexisting low back injury, and claimant's "completely credible" testimony. Assuming that claimant's physical impairment was not total, the Referee was persuaded that his physical impairment and social/vocational factors combined to entitle claimant to a permanent total disability award. The Referee reasoned that absent retraining, claimant was unable to sell his services in the general labor market.

We are not persuaded that claimant's physical condition, including preexisting disabilities, entitles him to an award of permanent total disability. Further, when his physical conditions and social/vocational factors are combined, we find that claimant has failed to establish his entitlement to permanent and total disability under the so-called "odd lot" doctrine.

Dr. Stevens' opinions fail to persuade us that claimant is physically incapacitated from working. Dr. Stevens, as claimant's treating physician, concluded that claimant's physical limitations left him totally disabled for competitive employment. Generally, the opinion of the treating physician is entitled to great weight on review. Hamlin v. Roseburg Lumber Co., 30 Or App 615 (1977). However, Dr. Stevens does not discuss what prompted him to modify his previous opinion that claimant was capable of sedentary work, subject to certain restrictions. This apparent ambiguity requires an explanation and lacking one, causes us to call the treating physician's most recent pronouncement on claimant's condition into question. Moreover, Dr. Stevens does not specifically address why claimant could not perform the jobs which Mr. King had suggested. Interestingly, Mr. King produced these potential positions after consulting Dr. Stevens concerning claimant's physical limitations.

Lacking total physical incapacity, claimant must establish entitlement to permanent total disability pursuant to the so-called "odd lot" doctrine by proving that the combination of physical and social/vocational factors permanently incapacitates him from performing work. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Although the combination of claimant's physical impairments and non-medical factors are significant, we are not persuaded that claimant is foreclosed from regularly performing work at a gainful and suitable occupation. Claimant is 49 years of age and is a high school graduate. More important, he has approximately 26 years of experience in the medical, clerical, and security services. The preponderance of the persuasive evidence suggests that these experiences have provided claimant with a number of transferable skills, which can be utilized in several employment opportunities within his physical restrictions. In reaching our conclusion, we find the opinion of Mr. King persuasive in that he had the opportunity to discuss claimant's physical capabilities with claimant's treating physician and also provided a thorough analysis of claimant's employment prospects in the labor market.

Finally, inasmuch as claimant has not attempted to investigate future employment possibilities, other than to submit to an interview with Mr. King, we find that claimant has failed to establish that he is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. See ORS 656.206(3).

Turning to a determination of the extent of claimant's scheduled permanent disability, we conclude that claimant's previous scheduled awards totalling 55% should be increased. After completing our de novo review and considering the guidelines contained in OAR 436-65-555 (renumbered OAR 436-30-340, May 1, 1985), we conclude that an award of 80% scheduled permanent disability for loss of use of the right leg (knee) would more appropriately compensate claimant.

ORDER

The Referee's order dated January 30, 1985 is reversed. Claimant is awarded a total of 80% (120°) scheduled right leg (knee) permanent disability, that being an increase of 25% (37.5°) scheduled disability from that awarded by the May 16, 1984 Determination Order and previous awards. Claimant's attorney's fee shall be adjusted accordingly and shall not exceed $2,000.

ILA R. BAY, Claimant
Gatti, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-08803
November 15, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Lipton's order that set aside its denial of responsibility for claimant's chiropractic treatment. The sole issue on review is compensability of medical services.

Claimant compensably injured her low back in August of 1977 when she slipped and fell at work. The fall resulted in a left leg radiating pain in addition to low back pain. Claimant had sustained a similar low back injury in 1971, for which she sought

medical treatment and was prescribed pain medication. She was treated regularly for the effects of that injury for approximately ten months before the 1977 compensable fall.

Following the 1977 injury, claimant was treated by chiropractors until mid 1983. She then received no treatment for approximately ten months. Ultimately, she sought chiropractic treatment from Dr. Crockett.

Claimant's attorney requested an opinion from Dr. Crockett regarding whether the treatment he was providing was related to claimant's 1977 fall. He answered in the affirmative and stated his opinion that claimant's condition, diagnosed as degenerative disc disease, had been accelerated by the 1977 injury. Dr. Crockett, however, was unaware that claimant had suffered a similar injury in 1971, for claimant's attorney specifically stated in his letter to Dr. Crockett that claimant had no prior injuries nor preexisting pain.

Dr. Langston, an orthopedic surgeon, examined claimant on behalf of the insurer. It was Dr. Langston's opinion, based partly on X-rays taken about a year after the 1977 injury, that claimant's preexisting degenerative disc disease was made temporarily symptomatic, but was not caused, by the 1977 fall.

Despite noting that Dr. Crockett's opinion was based on an inaccurate history, the Referee accepted that opinion over that of Dr. Langston. The Referee felt that evidence of claimant's progressive L5-S1 disc space narrowing subsequent to the 1977 injury made Dr. Crockett's explanation for the onset of claimant's condition and need for treatment the more reasonable opinion. He felt Dr. Langston's opinion regarding a preexisting condition was questionable when the X-rays reviewed by Dr. Langston were generated a year post-injury.

The Referee also found the insurer's denial, which followed five years of chiropractic treatment, to be precluded by the retroactive denial principles set forth in Bauman v. SAIF, 295 Or 788 (1983).

We disagree with the Referee regarding the application of Bauman to this case. Bauman, with certain exceptions, provides that once an insurer has officially accepted a claim, it cannot retroactively deny it once the 60-day period in which it must accept or deny has run. Bauman, supra, 295 Or at 794. Bauman, however, does not preclude partial denials for continuing medical services that the insurer has reason to believe are not causally related to the accepted claim. Clyde Wyant, 36 Van Natta 1067 (1984). The insurer in the present case is not attempting to retroactively deny the compensability of claimant's claim; it has merely issued a partial denial regarding claimant's current medical treatment. Under Wyant, the denial is permissible.

Neither do we agree with the Referee's holding on the merits. We disagree that Dr. Crockett's opinion is entitled to more weight than that of Dr. Langston. In fact, we afford Dr. Crockett's opinion very little weight because it was clearly based on incomplete information. Because he did not know of claimant's prior injury nor of the lengthy treatment she obtained therefor, Dr. Crockett could not have considered the effect of the prior injury on claimant's current need for treatment. As a result, Dr. Crockett's opinion was necessarily incomplete.

The compensability of medical services is generally an issue requiring expert medical opinion, and it is claimant's burden to prove the compensability of the services provided. Poole v. SAIF, 69 Or App 503 (1984). We normally accept the opinion of the treating physician regarding the need for medical services. Laura Jones, 34 Van Natta 581 (1982). However, if there are persuasive reasons for not accepting that opinion, we will not. See Weiland v. SAIF, 64 Or App 810, 814 (1983); Nancy E. Cudaback, 37 Van Natta 1522 (November 4, 1985).

In the present case, the treating doctor's opinion is based on a history that lacks information clearly pertinent to the issue of causation. We find this inadequate history to constitute a persuasive basis for not accepting the opinion resulting therefrom. Without the treating doctor's opinion, claimant is without expert medical opinion in support of her claim. We also note that claimant's testimony is not persuasive, for the Referee found her testimony, as well as that of her witness, to be unreliable. Claimant has failed to prove that her chiropractic care is related to her compensable injury. The insurer's denial will be reinstated.

ORDER

The Referee's order dated May 2, 1985 is reversed and the insurer's denial is reinstated.

MICHAEL W. CANTRELL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-12888
November 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Foster's order which found that it should not have unilaterally terminated claimant's temporary total disability benefits. On review, SAIF contends that the Referee misapplied the test for terminating temporary total disability benefits as enunciated in Jackson v. SAIF, 7 Or App 109, 115 (1971).

Following our de novo review of the record, we are not persuaded that claimant's attending physician released claimant to his regular work. Therefore, SAIF was not justified in terminating claimant's temporary disability benefits prior to claim closure pursuant to ORS 656.268. Accordingly, we affirm the Referee's order.

ORDER

The Referee's orders dated April 24, 1985 and May 3, 1985 are affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

KENNETH L. ENO, Claimant
SAIF Corp Legal, Defense Attorney

WCB 84-05874
November 15, 1985
Order Denying Request to Dismiss

The Board has received SAIF Corporation's request to dismiss claimant's request for Board review on the grounds claimant has not filed his appellant's brief.

There is no requirement in the workers' compensation law or the

Board rules which indicates that a brief must be filed by appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

CURTIS R. HOUGLAND, Claimant
Philip H. Garrow, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-12972
November 15, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Seymour's order that upheld the insurer's denial of claimant's industrial injury claim for a fractured left ankle. The issue is compensability.

Claimant worked as a gasoline station attendant. He testified as follows: On August 14, 1984 he worked from 2 p.m. to 9 p.m. At approximately 2:20 p.m. on that day claimant was getting a gasoline hose to fuel a car when he stepped into a pothole and twisted his left ankle. He believed he had sprained his ankle and worked out the remainder of his shift. After his shift, claimant went home and elevated his left foot for a while, then went to bed. The next morning claimant's left ankle was swollen and he experienced excruciating pain when he tried to bear weight on the left. He called a neighbor who accompanied him to the hospital. At the hospital, he was told he had a fractured ankle. He was placed in a cast and placed on crutches. At about 11 a.m. he went to his employer's and reported the incident.

Claimant's employer testified that she was present at the gasoline station throughout claimant's entire shift on August 14, 1985 and that she did not see claimant have an accident, did not see him limping, and that claimant did not report any incident. Claimant agrees that he did not report any incident to his employer on August 14, 1985. The Referee did not make specific findings regarding the credibility, or lack thereof, of any witness.

The medical evidence establishes that on the morning of August 15, 1985 claimant was diagnosed as having an avulsion fracture of the left distal fibula, of indeterminant age.

The Referee based his decision on the following reasoning:

> "Owing to the fact that the claimant was not observed at any time limping during the day, and that he had ample opportunity to report the incident to the co-owner, there is doubt in my mind as to whether the claimant actually did sustain an on-the-job injury. That doubt keeps me from finding that it is more probable than not that the claimant sustained an injury on August 14, 1985. This being so, the claimant's claim must fail for lack of proof."

In order to establish his claim, claimant must prove that it is more probable than not that claimant's injury occurred on the

job. The Referee so stated; however, he went on to state that claimant had failed to remove all doubt as to whether he was injured on the job. Claimant is not required to remove all doubt.

We do not find the fact that claimant's employer did not observe the incident described by claimant to be significant. Nor do we find the fact that the employer did not notice claimant to be limping to be inconsistent with the fact that he was injured. Finally, in view of claimant's believable testimony that he did not report the incident because he thought it was a very minor twisted ankle, we do not believe his failure to report the incident until the next day, when its significance became known, defeats his claim. There is no evidence that tends to establish that claimant was injured anywhere other than on the job.

Likewise, we do not believe that the arguably inconsistent descriptions of the mechanism of injury are significant. Claimant testified that he stepped in a pothole. The history given at the emergency room relates that claimant "stepped off curbing into edge of hole . . . ." The 801 form relates that claimant "fell in a hole and twisted [his ankle]." The employer testified that the area where claimant allegedly injured himself is an irregular surface where a concrete apron joins an asphalt surface. Photos of the gasoline station are in evidence. Having reviewed those photos, we conclude that there are numerous irregularities in the surface of the ground that could be characterized as "holes" or "potholes."

After our de novo review of the record as a whole, we conclude that the weight of the evidence establishes that it is more probable than not that claimant injured himself on the job, as he claims. Accordingly, the Referee's order will be reversed and the insurer's denial set aside.

ORDER

The Referee's order dated May 6, 1985 is reversed. The insurer's denial dated October 11, 1984 is set aside and this claim is remanded to the insurer for acceptance and processing according to law. Claimant's attorney is awarded $1,550 as a reasonable attorney fee for services at hearing and on Board review, to be paid by the insurer in addition to compensation.

ADOLPH T. HUHNHOLZ, Claimant
Haugh & Foote, Claimant's Attorneys
David O. Horne, Defense Attorney

WCB 85-00963
November 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee St. Martin's order that set aside its denial of claimant's low back claim. The sole issue on review is compensability.

Claimant is a former spray painter of fireplace set parts. He alleges that in early June of 1984 a reduction in the employer's workforce resulted in an increase in claimant's workload. He asserts that this increased activity led to an onset of low back pain, resulting in eventual time lost from work and the need for medical services.

The medical record reveals that claimant exhibited an osteoarthritis condition that preexisted his 1984 work exposure.

Claimant's treating physician is of the opinion that claimant's 1984 exposure, as well as the work he had done for several years prior, probably precipitated claimant's present disability. He is uncertain, however, whether the exposure actually worsened the underlying osteoarthritis disease process or merely caused an onset of symptoms. Dr. Rosenbaum, a rheumatologist who examined claimant on behalf of the insurer, agrees with claimant's physician that claimant's repetitive work activity could have precipitated increased symptoms. He does not feel that the activity caused or worsened the underlying disease unless it involved a direct trauma.

Although the Referee did not specifically address the issue, we find that a disposition of this case requires a determination of whether it involves an occupational disease or an accidental injury. If the case involves an occupational disease, claimant must prove that his work exposure resulted in a worsening of his underlying osteoarthritis, Weller v. Union Carbide, 288 Or 27 (1979), and that the exposure was the major contributing cause of the worsening, Dethlefs v. Hyster Co., 295 Or 298 (1983). A showing of a mere increase in symptoms is insufficient to establish the compensability of a preexisting condition in an occupational disease context. Weller, supra, 288 Or at 35-36. We find that claimant has failed to prove compensability in an occupational disease context because there is no persuasive evidence that his preexisting condition was worsened by his employment exposure.

If, however, this case is one involving an accidental injury, Weller does not apply. Jameson v. SAIF, 63 Or App 553 (1982). Rather, in order to establish the compensability of his condition in an accidental injury context, claimant must prove that his work was a material contributing cause of his disability. A "material" contribution is one that causes the worker to become disabled or to need medical services earlier than he otherwise would have absent the industrial injury. Wilma H. Ruff, 34 Van Natta 1048 (1982).

In James v. SAIF, 290 Or 343 (1981), the court distinguished accidental injuries from occupational diseases, stating:

> "What set[s] occupational diseases apart from accidental injuries [is] both the fact that they can [not] honestly be said to be unexpected . . . and the fact that they [are] gradual rather than sudden in onset."

In Valtinson v. SAIF, 56 Or App 184 (1982), the court clarified that the phrase "sudden in onset" does not necessarily require that there be a single, identifiable event resulting in instantaneous pain or disability. Rather, if a discrete period of work activity can be identified as having precipitated claimant's disability, the claim may be viewed as one involving accidental injury. Valtinson, supra, 56 Or App at 188.

After reviewing the record, we find claimant's claim to be one for accidental injury. Claimant testified that although he had intermittent back pain before the June 1984 work exposure, he missed no time from work and did not seek medical attention until he experienced his exacerbation in June. He could remember no

specific trauma at work, but he did recall that on June 6, 1984, he had been lifting heavy pieces of plastic. Claimant testified that it was this repetitive lifting that precipitated the onset of his symptoms. There is no evidence to rebut claimant's assertion and the Referee found him to be completely credible. Under these facts, we find that claimant's symptoms arose within a discrete and identifiable period of work, Valtinson, supra, and that the claim is, therefore, one for accidental injury.

We also find that claimant's accidental injury is compensable. As was noted, supra, the physicians in this case agree that claimant's increased work activity was capable of producing the increased symptoms that led to his disability. These opinions, coupled with claimant's credible testimony regarding the onset of symptoms, Garbutt v. SAIF, 297 Or 148 (1984), lead us to conclude that it is more likely than not that claimant's work was a material causal factor in the onset of his disability. Claimant's claim is compensable.

ORDER

The Referee's order dated May 8, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the insurer.

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

WCB 82-11763
November 15, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order which upheld the self-insured employer's denials of claimant's request for surgery and his aggravation claim. On review, claimant contends that his medical services and aggravation claims are compensable and that he is entitled to an award of permanent total disability.

The Board affirms the order of the Referee with the following comments.

An insurer/employer is required to provide medical services for conditions resulting from the compensable injury. ORS 656.245. However, the medical services must be reasonable and necessary. Poole v. SAIF, 69 Or App 503 (1984); McGarry v. SAIF, 24 Or App 883 (1976). Moreover, where the preponderance of the medical opinions weighs against the reasonableness and necessity of the surgery proposed by the attending physician, surgery will not be authorized. Stephanie A. Grimsley-Bruni, 37 Van Natta 437 (1985).

Following our de novo review of the record, the evidence establishes that the proposed surgery is not reasonable and necessary medical treatment and, indeed, could be detrimental to claimant's low back condition.

We also affirm that portion of the Referee's order which upheld the employer's denial of claimant's aggravation claim. Inasmuch as claimant's aggravation claim was filed within the five year statutory requirement of ORS 656.273(4), we have considered evidence which not only was in existence prior to the end of the five year period, but also evidence generated beyond the five year period. See generally Wilma Kim Buhman, 34 Van Natta 252 (1982).

The consideration of this evidence during our de novo review of the record does not alter our ultimate conclusion that claimant has failed to establish that his condition has worsened since the last award of compensation.

ORDER

The Referee's order dated April 22, 1985 is affirmed.

HERBERT L. McDONALD (Deceased), Claimant
Robert L. Burns, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-00048
November 15, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Thye's order which: (1) affirmed the January 4, 1984 Determination Order's award of 50% (160°) unscheduled permanent disability for a low back and right shoulder injury; and (2) awarded 40% (60°) scheduled permanent disability for loss of use of the right leg (knee), whereas the aforementioned Determination Order awarded 10% (15°). On review, claimant asserts entitlement to permanent total disability. The insurer contends that claimant's permanent disability awards should be decreased.

The Board affirms the order of the Referee with the following comment.

The Referee's order suggests that he considered claimant's preexisting noncompensable conditions in determining the extent of claimant's permanent disability. The Referee cited Barrett v. D & H Drywall, 70 Or App 123 (1984), and Brech v. SAIF, 72 Or App 388 (1985). Subsequent to the Referee's order, the Court of Appeals withdrew its previous opinion in Barrett, stating that a permanent disability award is to be rated on the basis of the permanent loss of earning capacity due to the compensable injury. Barrett v. D & H Drywall, 73 Or App 184 (1985).

Following our de novo review of the medical and lay evidence, we conclude that a 50% unscheduled permanent disability award is a fair and adequate assessment of claimant's permanent loss of earning capacity due to the compensable injury. ORS 656.214(5). Furthermore, we find that a 40% scheduled permanent disability award fairly and adequately compensates claimant for loss of use or function of the right leg (knee) due to the compensable injury. ORS 656.214(2)(c).

ORDER

The Referee's order dated May 1, 1985 is affirmed.

ABDUL W. MOHAMMADY, Claimant
Doblie & Assoc., Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 84-09746
November 15, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of that portion of Referee Podnar's order which directed it to provide claimant with additional vocational assistance. On review, the insurer contends that the Referee lacked jurisdiction or, alternatively, that the evidence does not support the Referee's conclusion.

The Board affirms the order of the Referee with the following comment.

The insurer's jurisdictional argument is resolved by OAR 436-61-191(1) (renumbered 436-120-210(1), May 1, 1985), which provides as follows:

> "[U]nder ORS 656.283, a worker may at any time request a hearing on a vocational assistance question, although until July 1, 1984, a prerequisite under ORS 656.278 to making the hearing request is that the worker has first applied to the director for review of the matter."

Inasmuch as claimant's request for hearing was made subsequent to July 1, 1984, he need not comply with the rule's former prerequisite of initially seeking relief from the director. Accordingly, the Referee had jurisdiction to address the vocational assistance question.

Furthermore, following our de novo review of the record, the preponderance of the evidence supports the Referee's decision that claimant was entitled to additional vocational assistance.

Since claimant filed no brief in response to the insurer's request for Board review, claimant is not entitled to an attorney fee. See Richard N. Couturier, 36 Van Natta 59 (1984).

ORDER

The Referee's order dated May 13, 1985 is affirmed.

JAMES L. SAMPSON, Claimant
Brian L. Pocock, Attorney

WCB 83-02349
November 15, 1985
Order Denying Motion to Dismiss

The self-insured employer has moved the Board for an order dismissing claimant's request for Board review on the ground that neither it, its claims adjusting agency nor its attorneys were served with a copy of claimant's request for Board review within the time provided by law. ORS 656.289(3); 656.295(2). The Referee's order was mailed June 12, 1985. Claimant's request for Board review was mailed July 2, 1985 and received by the Board July 3, 1985. On July 8, 1985 the Board sent its computer generated letter to all parties acknowledging the request for review.

On the record before us, we conclude that claimant did not mail a copy of his request for Board review to anyone other than the Board. The employer's attorney's affidavit is uncontroverted that neither the employer, its attorney nor its adjusting company ever received a copy of the request for review. However, no representation has been made that the moving parties did not receive the Board's acknowledgment letter.

In Argonaut Insurance v. King, 63 Or App 847, 852 (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." (Emphasis added.) The "actual notice" referred to by the court in King was the Board's computer generated acknowledgement letter, which the evidence established was received by the insurer between 34 and 38

days after the Referee's order was mailed. The Board's acknowledgement letter in this case was mailed four days before the statutory period expired.

Although we are not bound by formal rules of evidence, we find the Oregon Evidence Code helpful when dealing with matters such as presumptions and burdens of persuasion. OEC 311(q) establishes a presumption that, "A letter duly directed and mailed was received in the regular course of the mail." OEC 308 provides that a party against whom a presumption operates has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Given the presumption of regular receipt in the course of the mail and the absence of evidence or a representation that the moving parties did not receive our acknowledgement letter within the statutory period, we conclude that it is more probable than not that the employer and its representatives did receive actual notice of claimant's request for review within the statutory period. The employer's motion to dismiss the request for review is, therefore, denied.

We note that the appellant's brief was due to be filed by August 27, 1985 and that no such brief has been filed. The employer shall be allowed 21 days from the date of this order to file a respondent's brief, should it wish to do so. The Board will consider a reply brief if filed within 14 days after the respondent's brief, if any, is filed.

IT IS SO ORDERED.

DANA R. SMITH, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-09178
November 15, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of Referee Galton's order which: (1) set aside the Determination Order dated June 29, 1984 as premature; (2) awarded temporary disability compensation for the period from June 12, 1984 through September 10, 1984; and (3) awarded 56° for 17.5% unscheduled permanent partial disability in lieu of the Determination Orders dated June 29, 1984 and February 5, 1985, which awarded a total of 32° for 10% unscheduled permanent partial disability for injury to claimant's low back. The insurer also requests authorization to offset compensation paid pursuant to the Referee's order against future amounts awarded. The issues on review are premature closure, temporary disability compensation, extent of unscheduled permanent partial disability, and offset for compensation awarded by the Referee.

Claimant injured his low back on November 3, 1983 in the course of his work as a lift truck driver. He received conservative care for his strain injury. His attending physician was Dr. Noall, orthopedic surgeon.

On May 8, 1984 Dr. Langston, on referral from Dr. Noall, examined claimant for evaluation of permanent impairment resulting from the industrial injury. Dr. Langston concluded that claimant was medically stationary, had no objective evidence of impairment,

had marked functional overlay, and could return to regular work without limitation. On May 14, 1984 Dr. Noall reported that claimant's low back pain was not changing and that there was nothing further to offer claimant in the way of improvement or cure. Computerized tomography and X-rays had shown no abnormality. Dr. Noall wrote that he would release claimant to return to light work if the employer had light work available, but otherwise he would prescribe three additional weeks of physical therapy then release claimant to light work. On May 29, 1984 Dr. Noall responded to Dr. Langston's report regarding claimant's permanent impairment but did not comment on whether claimant was medically stationary. On May 31, 1984 Dr. Noall released claimant to return to light duty work.

On June 11, 1984 claimant was examined by a panel of doctors at Orthopaedic Consultants. The panel concluded that claimant was medically stationary, had no permanent impairment, and could return to regular work without limit. On June 21, 1984 Dr. Noall examined claimant and reported that claimant's "condition is remaining unchanged." Dr. Noall also recommended vocational rehabilitation and a change to a lighter capacity occupation.

On July 19, 1984 claimant requested a release to return to work as a lift truck driver. Dr. Noall reluctantly released claimant to return to regular work, but noted his suspicion that "this will result in recurrence of symptoms. . ." and advised the insurer by telephone and letter that "if [claimant] returns to his work as a forklift operator, he probably will have recurrent symptoms."

The insurer requested a Determination Order which was issued on June 29, 1984. There was no medically stationary date stated on the order, however, the Evaluator's Worksheet of the Evaluation Division of the Workers' Compensation Department showed the Department considered claimant to be medically stationary as of June 11, 1984.

Claimant returned to work. He suffered a worsening of his condition in September 1984 and the claim was voluntarily reopened.

At the time of the first Determination Order, claimant's condition had been unchanged for several months, according to the attending physician. Additional treatment was not considered curative. No further improvement was expected with the passage of time. When Dr. Langston and Orthopaedic Consultants opined that claimant was medically stationary, Dr. Noall did not disagree. That Dr. Noall predicted that claimant would have recurrence of his symptoms if he returned to his job at the time of injury is not evidence that claimant was not medically stationary. Maarefi v. SAIF, 69 Or App 527 (1984). The fact that claimant's condition did worsen when claimant did return to work is not evidence that claimant was not medically stationary at the time of the Determination Order. Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985); Alvarez v. GAB Business Services, 72 Or App 524 (1985). We find that the evidence preponderates that claimant was medically stationary by June 11, 1984 and, therefore, reverse the Referee's order and reinstate the Determination Order.

Since claimant was medically stationary and returned to work, he was not entitled to temporary disability compensation until the attending physician verified claimant's inability to work

resulting from the worsening of his condition. ORS 656.273(6); Jackson v. SAIF 7 Or App 109 (1971). That portion of the Referee's order which awarded temporary disability compensation from June 12, 1984 through September 10, 1984 is, therefore, reversed.

On the issue of extent of unscheduled permanent partial disability, we affirm the order of the Referee.

No offset will be granted for amounts paid pursuant to the Referee's order. ORS 656.313.

ORDER

The Referee's order dated March 6, 1985 is reversed in part and affirmed in part. That portion of the order which set aside the Determination Order dated June 29, 1984 is reversed. The Determination Order dated June 29, 1984 is reinstated with the modification that claimant was medically stationary on June 11, 1984. The remainder of the order is affirmed. For prevailing on the issue of extent of unscheduled permanent partial disability, claimant's attorney is awarded $500 for services on Board review, to be paid by the self-insured employer.

LAWRENCE M. SULLIVAN, Claimant
Evohl F. Malagon, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 82-10103
November 15, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of that portion of Referee Menashe's order which upheld the insurer's partial denial of benefits related to claimant's attempt to commit suicide. The insurer cross-requests review of that portion of the order which set aside its partial denial of the claim for an injury to claimant's right shoulder. The issues on review are compensability of services related to an attempt to commit suicide and compensability of an injury to claimant's right shoulder. The Referee reserved the question whether claimant was entitled to psychiatric or psychological services related to his industrial injury but not related to the suicide attempt and that question is not presented on review.

This case was remanded to the Referee on September 20, 1985 to complete the record because a page of the treating psychiatrist's chartnotes which had been offered, objected to, and made part of the record at the post-hearing deposition was neither ruled inadmissible nor attached to the doctor's deposition transcript. The page was not part of the deposition transcript as it was offered to the Referee. We have been advised by a letter from the Referee and a letter from claimant that claimant withdraws his objection to the admission of the page of chartnotes and that it will not be made part of the record.

The Board affirms and adopts the order of the Referee.

Claimant prevailed on the issue of compensability of the right shoulder condition. Claimant's attorney is awarded a fee for prevailing on this issue only. Shoulders v. SAIF, 73 Or App 811 (1985).

ORDER

The Referee's order dated October 1, 1984 is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the insurer.

TROY E. CHEEK, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-04955
November 18, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Tuhy's order that set aside its denials of claimant's aggravation claim for his cervical spine and for a C6-7 discectomy and interbody fusion. The issues are aggravation and medical services. SAIF also argues on review that if the Board finds the requested surgery to be reasonable and necessary, that claimant not be awarded temporary disability compensation until he actually submits to the surgery.

The Board affirms the Referee's order with the following observations. In this case, claimant has established that his cervical spine condition worsened objectively since the last award or arrangement of compensation. Although claimant's neck pain has remained more or less the same since the last arrangement of compensation, we find that the aggravation claim is not based upon "neck pain," but upon radicular symptomatology consistent with an objectively confirmed herniated C6-7 disc. The weight of the medical evidence is that the present disc herniation is related to the December 10, 1983 accident, in which claimant fell down a flight of stairs.

We also find that the Referee was correct in giving greater weight to the opinions of Dr. Franks, the treating neurosurgeon, over those of Dr. Dow, the consulting neurologist. While it is apparent that both doctors' opinions are sincerely held and are at variance, Dr. Franks' opinion that surgery is reasonble and necessary is the more persuasive, both because he is claimant's treating physician, and because his opinion is well-reasoned and backed by persuasive objective findings.

Because we affirm the Referee's order that claimant is entitled to further compensation on account of a worsening of his condition, ORS 656.273(1), it is unnecessary to consider SAIF's argument that temporary disability compensation should not be awarded until claimant actually submits to surgery.

ORDER

The Referee's order dated December 24, 1984 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the SAIF Corporation.

OZETTA L. DOMITROVICH, Claimant
Francesconi & Cash, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-11038
November 18, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Menashe's order that: (1) ordered the insurer to accept claimant's low back aggravation claim; (2) awarded a penalty for unreasonable failure to process

the aggravation claim; and (3) awarded a penalty-associated attorney fee. The issues are aggravation, penalty and attorney fees.

The Board adopts the Referee's findings of fact as its own and adopts and affirms that portion of the Referee's order that found that claimant had perfected a valid aggravation claim, ordered the claim accepted as of November 15, 1982, determined that claimant was medically stationary as of September 6, 1983 and ordered the claim submitted for closure by the Evaluation Division.

The Referee found that the insurer's conduct in failing to accept or deny the aggravation claim within 60 days was unreasonable and ought to be penalized. ORS 656.262(10). He also found that claimant was not entitled to temporary disability compensation as "interim" compensation because there was never a medically verified inability to work, ORS 656.262(4); 656.273(6), and that the insurer paid for claimant's medical services, see ORS 656.245(1). He was thus faced with the dilemma of unreasonable conduct worthy of a penalty and the question whether there were any "amounts then due" upon which to base a penalty. See ORS 656.262(10); Whitman v. Industrial Indemnity, 73 Or App 73 (1985); EBI Companies v. Thomas, 66 Or App 105 (1983). The Referee reasoned that, "[T]he failure to process the aggravation claim results in a delay in the evaluation of permanent disability, if any, from the aggravation." He went on to order that if the Evaluation Division, Board or a court subsequently determine that claimant is entitled to an award for permanent disability as a result of her aggravation, a penalty equal to 25% of any such award must be paid. He also ordered payment of a $500 attorney fee if there is a subsequent permanent disability award.

We conclude that it was error to award a penalty based upon future compensation. In Harold A. Lester, 37 Van Natta 745 (1985), we discussed the application of ORS 656.262(10) and its "amounts then due" language on remand from the Court of Appeals. The court had concluded that a seven month delay by the employer in obtaining a closing medical report after it had been requested by the Evaluation Division was unreasonable and had remanded the matter to us for the determination of a penalty. During the delay interval, the employer had paid temporary disability compensation to the claimant and the employer argued that, because temporary disability compensation had been paid, there were no "amounts then due" upon which to base a penalty. We stated:

> "We conclude that the reasoning behind the 'amounts then due' language of ORS 656.262(10) is to provide a means by which to make the punishment fit the crime. By quantifying the penalty based upon the amount actually withheld, the penalty usually will bear a reasonable relationship to the wrong done. Where no amounts are actually withheld, it could be reasonably argued that there was no wrong done. We believe this is the rationale behind EBI Companies v. Thomas, supra. It is, therefore, important to pay close attention to what conduct is being penalized in deciding whether amounts were 'then' due." 37 Van Natta at 747, emphasis in original.

There is nothing in Lester from which we wish to retreat. Applying the Lester analysis to this case, we look to the conduct being penalized and find that it was delay in acceptance or denial of claimant's aggravation claim. As the Referee found, and we agree with the Referee's finding, claimant never established an entitlement to temporary disability compensation on an "interim" basis or otherwise, and all medical services were paid. Because claimant's claim was not in an accepted status, she had no right to have her claim determined by the Evaluation Division. While it is true in the abstract that the delay in accepting (or denying) the aggravation claim had the effect also of delaying claim determination, no claim determination was "then due." In Lester, the claimant's claim had been submitted for closure before the delay was occasioned and the claimant's entitlement to some permanent disability was relatively certain. In addition, by the time of hearing the amount of compensation that had been withheld had been liquidated.

In this case, it is not known even now whether claimant is entitled to any compensation for permanent disability as a result of her aggravation, let alone how much. There is, therefore, no way to tailor a penalty to "make the punishment fit the crime." Although we are in complete agreement with the Referee that the insurer's conduct was unreasonable, we are constrained by the law relating to the actual awarding of penalties to find that no penalty is assessable because no amounts were then due. ORS 656.262(10); Whitman v. Industrial Indemnity, supra,; EDI Companies v. Thomas, supra; Harold A. Lester, supra.

Because no penalty can be awarded, it follows that no penalty-associated attorney fee can be awarded. Darrell W. Carr, 36 Van Natta 16 (1984).

ORDER

The Referee's order dated May 15, 1985 is affirmed in part and reversed in part. Those portions of the order that awarded a penalty and penalty-associated attorney fee are reversed. The remainder of the order is affirmed. For prevailing on the insurer's appeal on the aggravation issue, claimant's attorney is awarded a reasonable attorney fee of $400 for services on Board review, to be paid by the insurer.

JAMES R. FRANK, Claimant
Emmons, et al., Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys

WCB 83-00200
November 18, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seifert's order, as amended on reconsideration, that: (1) upheld the insurer's denial of responsibility for claimant's waterbed; and (2) affirmed the Determination Order that awarded, inter alia, temporary total disability from June 26 through July 15, 1983, temporary partial disability from July 16, 1983 through January 24, 1984, and 80° for 25% unscheduled permanent partial disability for the low back. Claimant asserts entitlement to full temporary total disability compensation for the period of June 11, 1983 through September 8, 1983, and reimbursement for the expense of his waterbed.

On the issue of extent of unscheduled disability, we affirm the order of the Referee. We also affirm the remainder of the order with the following comments. Claimant is a former refrigerator repairman whose November 1981 compensable low back injury precluded his return to that occupation. In November 1982 claimant purchased a waterbed, the use of which helped to lessen his low back symptoms.

Claimant secured part-time employment at a community college during the 1982-83 academic year. At the beginning of the spring term he accepted an offered contract providing for a full-time, one-term position paying $5,506 for the period of March 28, 1983 through June 10, 1983. Claimant elected to have the contract amount paid in equal payments over 12 months rather than having the full amount paid during the actual months of employment. As a result, claimant received monthly payments during the summer months following the expiration of his contract for hire. At the end of the contract period, claimant had no assurance that he would be rehired. No other modified work was available. Claimant was not medically stationary and had not been released to return to work by his treating physician. He ultimately did return to work at the community college for the 1983-84 academic year, which commenced on September 12, 1983.

An April 18, 1983 Determination Order awarded, inter alia, temporary total disability from June 26, 1983 through July 15, 1983 and temporary partial disability from July 16, 1983 through January 24, 1984. Claimant was apparently awarded temporary partial, rather than temporary total, disability beginning July 16, 1983 because of his receipt of wages during the summer months from his 1983 spring term community college contract. The Referee affirmed the Determination Order, holding that claimant's post-injury earnings, which he elected to receive during a period in which he was otherwise entitled to temporary total disability, must be considered in determining the amount of temporary disability compensation to be paid.

In David R. Patterson, 36 Van Natta 777 (1984), aff'd mem 73 Or App 344 (1985), the claimant was a law school professor who elected to receive a salary earned during a nine-month academic year in 12 equal payments, resulting in his receipt of wages during the summer months following the end of his contract year. The claimant also received full temporary total disability benefits during those summer months. The insurer requested authority to offset those payments from future compensation to which the claimant might be entitled, arguing that the claimant's receipt of wages and benefits simultaneously constituted a double recovery that is normally not allowed. Candee v. SAIF, 40 Or App 567 (1979). We authorized the offset, noting that such double recovery is generally avoided by reducing temporary disability benefits by the amount of wages earned during the period at issue. See OAR 436-54-222(1) (renumbered OAR 436-60-030, May 1, 1985).

The present case is similar to Patterson in that claimant seeks to recover full temporary total disability payments during a period in which he was receiving a portion of the wages he had previously earned. We agree with the Referee that claimant's benefits should reflect his receipt of post-injury earnings during the period at issue.

The remaining issue is claimant's entitlement to reimbursement for the waterbed he purchased in late 1982. Claimant asserts that the bed is a compensable medical service under ORS 656.245. The Referee relied on OAR 436-69-201(7) (renumbered OAR 436-10-040, May 1, 1985) in finding the bed not compensable. The rule provides that furniture is generally not a medical service, and that articles such as beds are not reimbursible absent a report clearly stating that the nature of the worker's injury and the process of his recovery require that the article be purchased and used. The rule further requires that the report set forth why the worker requires an item not usually considered necessary in the great majority of workers with similar impairments.

In the present case, claimant's treating doctor, Dr. Stanley, authored a report stating that claimant's waterbed is a "reasonable therapeutic device." He later stated, however, that the bed is not necessary for the process of claimant's recovery because, in Dr. Stanley's opinion, claimant has permanent disability that will not be "cured" by use of a waterbed. Rather, the waterbed is used merely to lessen claimant's symptoms.

The Referee found Dr. Stanley's reports insufficient to satisfy the requirements of the administrative rule in that they did not clearly justify the need for the waterbed. On review, claimant asserts that the administrative rule is inconsistent with ORS 656.245 and, to the extent that the rule conflicts with the statute, the rule should not control. He asserts that the statute merely requires a showing of the reasonableness and necessity of a medical service, whether it be palliative or curative, whereas the administrative rule requires proof that the medical service is necessary for both the nature of claimant's injury and the process of his recovery.

We construe claimant's argument to be that the administrative rule is invalid. We have no authority to determine the validity or invalidity of an administrative rule. That authority lies with the Oregon Court of Appeals. ORS 183.400.

While the Department's rule is not binding on us, Floyd L. Wiebe, 37 Van Natta 1295 (1985), we look to it for guidance in determining the compensability of claimant's waterbed. We find, as did the Referee, that Dr. Stanley's reports do not set forth with particularity why this claimant needs a waterbed. In fact, Dr. Stanley specifically opines that the bed is not necessary for the process of claimant's recovery. Under these facts, claimant has failed to prove the compensability of the services claimed. Cf. Paul D. Weisenberger, 37 Van Natta 1038 (1985).

ORDER

The Referee's order dated April 25, 1985, as amended on reconsideration, is affirmed.

FRANK W. HILL, Claimant
Engelgau & Woods, Claimant's Attorneys
Keith D. Skelton, Defense Attorney
Reviewed by the Board en banc.

WCB 83-04113
November 18, 1985
Order on Review

The insurer requests review of that portion of Referee Seymour's order which set aside a March 15, 1983 Determination Order that had redetermined the extent of claimant's permanent disability and reduced a permanent total disability award to an award of 50% (160°) unscheduled permanent disability. On review, the insurer contends that it has established that claimant is no longer permanently and totally disabled. We agree and reverse.

Claimant was 63 years of age at the time of hearing. He sustained a compensable low back injury in June 1967, when he fell off a water truck. In 1972 the Court of Appeals affirmed a Circuit Court decision that claimant was permanently and totally disabled under the so-called "odd lot" doctrine. Hill v. U.S. Plywood-Champion, 12 Or App 1 (1973). The court noted that two back fusions had been attempted, but neither fusion had solidified.

In June or July 1981 claimant and his wife purchased a service station. Although claimant initially intended to have his youngest son manage the business, the son decided to pursue other endeavors, leaving claimant to protect his investment. Claimant spends "[Q]uite a bit of time" at the station, but does not follow any regimented schedule. He generally assists with light repair work and estimations, but will occasionally pump gas and clean windshields when the station becomes busy. Otherwise, he leaves the work to his one part-time and three full-time employes. In claimant's opinion he could not engage in regular work activities for an eight hour day. Furthermore, his physical limitations and inability to perform the tasks efficiently would prevent him from obtaining gainful employment.

In September 1981 and January 1982 surveillance films were taken in which claimant was shown performing a variety of work activities at the service station. These activities included: (1) pumping gas; (2) washing windshields; (3) crawling beneath vehicles; (4) bending over to look into a car's engine; (5) changing a tire; (6) hopping down from the rear of a camper; and (7) walking between the station and the service islands.

In May 1982 Dr. Snodgrass, neurologist, reviewed the surveillance films and performed an independent medical examination. Dr. Snodgrass reported that claimant's recent X-rays indicated an apparently solid fusion from L-4 to the sacrum, whereas 1978 medical reports had questioned whether the fusion was solid at L4-5. The neurologist also mentioned claimant's "well-used hands with calluses and multiple scrapes and abrasions." Dr. Snodgrass noted a striking difference between claimant's mobility on the film and his performance during the examination, as well as a marked difference between claimant's description of his work activities and the activities depicted on the film. Based on claimant's examination, Dr. Snodgrass would have rated claimant's impairment in the upper range of moderately severe. However, after observing the film, Dr. Snodgrass rated claimant's impairment in the mild to lower mildly moderate range. In Dr. Snodgrass' opinion claimant was capable of medium work and could frequently lift and carry items weighing up to 25 pounds.

In February 1983 the insurer requested reconsideration of claimant's permanent total disability award. A March 1983 Determination Order found that claimant was no longer entitled to permanent total disability and awarded claimant 50% unscheduled permanent disability.

In April 1983 claimant was examined by Dr. Holbert, orthopedist. Dr. Holbert performed claimant's surgeries and had last examined him in December 1978. Claimant reported that he was "fooling around a little bit" at the service station by occasionally pumping gas and washing windshields, but never on a full-time basis. There is no indication that Dr. Holbert reviewed the surveillance films. However, the surgeon noted that claimant was "obviously being very active with heavy callousing on his hands." Dr. Holbert opined that claimant remained much as he had in recent years, concluding that claimant had a stable pseudoarthrosis at L4-5.

An investigator for the insurer observed claimant's activities at the service station for two consecutive days in both July and August 1984. On each occasion claimant was observed performing the routine duties associated with operating a service station, not unlike the activities which had been previously filmed.

Claimant testified that he only helps out at the pumps if "the boys are real jammed." Otherwise, he supervises the station's operation, primarily providing repair estimates, ordering supplies and maintaining the daily worksheets. If he overextends himself his pain increases, forcing him to lie down for hours at a time. He owns a "little Triumph" with a front seat that folds into a bed, upon which he sometimes takes afternoon naps to relieve his back pain. However, he can only sleep in approximately two hour intervals. Claimant's legs are "paralyzed once in a while," after which he experiences increased back pain. Although he does not lift items regularly, he felt he could lift approximately 20 pounds if he could position the item against his waist and did not have to bend over. He could stand or walk on hard pavement for approximately one hour, but then would "have to get off my feet for a while." While sitting, claimant must frequently change his position. He does not believe in medications.

Claimant has a seventh grade education, but has obtained his GED. Prior to purchasing the service station, claimant's work experience primarily involved logging and heavy equipment operation.

Dr. Snodgrass testified that in his opinion claimant was physically capable of performing work activities at a service station on a regular basis. Dr. Snodgrass had no opinion as to whether claimant's condition was better or worse than it had been in 1972.

The insurer has the burden of proving that claimant is employable and that there has been a material change in circumstances. This burden of proof was described in Frank Ramsey, 36 Van Natta 877 (1984) as follows:

> "[W]hat job is claimant presently capable of performing, with such capacity being indicated either by evidence of improvement

in claimant's medical condition or by circumstantial evidence of the claimant's employability." 36 Van Natta at 881.

The Referee concluded that the insurer had failed to carry its burden of proof. The Referee was not persuaded that claimant's physical condition had improved since 1972. Assuming for the sake of argument that claimant's condition had improved, the Referee found that the insurer had not shown that claimant was capable of performing gainful employment on a regular basis or that suitable work was regularly and continuously available to him. We disagree with the Referee's analysis.

We are persuaded that claimant's condition has improved. Dr. Snodgrass reported that claimant's current X-rays demonstrate an apparently solid fusion, whereas prior reports had suggested otherwise. Although Dr. Holbert concluded that claimant's condition remained the same, he also stated that claimant's pseudoarthrosis at L4-5 was stable. This statement also suggests a change in claimant's condition because reports generated at the time of claimant's 1972 permanent total disability award indicated that his fusions had not solidified.

Moreover, with the surveillance films as a visual aid, Dr. Snodgrass concluded that claimant was physically capable of performing the work activities required of a service station manager. Dr. Holbert was apparently not privy to these films. Therefore, it is a reasonable assumption that a portion of his opinion was based on claimant's representation that he "fool[ed] around a little bit" at the station, a description at variance with the activities depicted in the films. One can only surmise what Dr. Holbert's opinion would have been had he reviewed the films. Since Dr. Snodgrass' opinion was based on an observation of claimant's work activities, it is more persuasive concerning the issue of claimant's physical limiations and capabilities.

Besides the medical evidence that claimant's condition had improved, there is persuasive evidence that claimant is employable and has, in fact, been employed. The surveillance films and the investigator's testimony, as well as the opinion of Dr. Snodgrass, establish that claimant is capable of performing the work activities of a service station manager. Claimant's nearly daily operation and supervision of the service station since 1981 further supports our conclusion that he is employable.

Considering the medical evidence that claimant's physical condition has improved, together with the lay and medical evidence that claimant is capable of working, we find that the insurer has established that claimant is no longer permanently and totally disabled. Furthermore, we conclude that the Determination Order's award of 50% unscheduled permanent disability adequately compensates claimant for his compensable injury.

ORDER

The Referee's orders dated January 8, 1985 and February 21, 1985 are reversed. The Determination Order dated March 15, 1983 is reinstated.

Board Member Lewis Dissenting:

I respectfully dissent from the majority opinion and would affirm the well-reasoned order of the Referee. It is the

insurer's burden to prove that there is some kind of suitable work regularly and continuously available to claimant. I am not persuaded that the insurer has met its burden.

In Hill v. U.S. Plywood-Champion, 12 Or App 1 (1973), the Court of Appeals affirmed a decision of the Circuit Court that found this claimant permanently and totally disabled. The Circuit Court had reversed the Board's order, which had affirmed a hearings officer's order that claimant was not entitled to a permanent total award. The hearings officer had determined that claimant was capable of skippering a small fishing boat two or three days per week, and that he owned a small herd of income-producing cattle. Although it was noted that claimant hired employes to do any heavy or strenuous work done on the boat or with the cattle, the hearings officer held that claimant was capable of doing "some" work at a gainful and suitable occupation. The Board agreed.

The Circuit Court reversed, finding that claimant's disability fell within the "odd lot" doctrine discussed in 2 Larson's Workmen's Compensation Law, Sec. 57.51. The Circuit Court found:

> "Since what is being tested under the odd-lot doctrine is claimant's ability to command regular income as the result of his personal labor, it is plain that income from a business owned by the claimant, even though he contributes some work to it, should not be used to reduce disability."

Implicitly, the Circuit Court found that although claimant did, in fact, perform some light work in furtherance of his businesses, it had not been shown that he was employable on a regular basis in the competitive market. The Court of Appeals specifically agreed with the trial court's conclusions. Hill, supra, 12 Or App at 6.

In the case now before us, the evidence is that claimant is capable of performing some light work in the furtherance of his service station business. The record also reveals, however, that claimant delegates all but the lightest work to his four employes. I personally see no material distinction in the posture of this case as it is now before us and the posture of the case as it was considered by the Circuit Court and Court of Appeals several years ago. In my opinion, claimant stands now as he did then; he is capable of assisting in the operation of his business, but he is unemployable in the competitive market.

I would affirm the order of the Referee.

KENTON A. PARSONS, JR., Claimant
Bischoff & Strooband, Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-11107
November 18, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Michael Johnson's order which upheld the insurer's denial of claimant's aggravation claim for a low back condition. On review, claimant contends that his claim is compensable if analyzed under a

"material contributing cause" standard, as enunciated in Grable v. Weyerhaueser, 291 Or 387 (1981), rather than under the "last injurious exposure" rule, which the Referee applied.

The Board affirms the order of the Referee with the following comment.

Following our de novo review of the medical and lay evidence, we are persuaded that claimant's subsequent employment exposures as a commercial fisherman independently contributed to his low back disability. Consequently, under application of the "last injurious exposure" rule, responsibility shifts from the insurer on the risk at the time of claimant's original compensable injury to the insurer on the risk at the time of his subsequent employment. See Boise Cascade Corp v. Starbuck, 296 Or 238 (1984). This rule remains applicable even though the subsequent employer is out-of-state and not a party to the Oregon litigation. See Daniel P. Miville, 36 Van Natta 1501 (1984).

Claimant argues that it is mere speculation that he can derive benefits, under the federal Jones Act, 46 USC 8 (1952), resulting from his subsequent employment as a commercial fisherman. Thus, he contends that he could likely receive no compensation from any system should the Referee's order be affirmed. This argument is neither persuasive nor relevant to our analysis. What is relevant to our conclusion is that the evidence preponderates that claimant's initially compensable condition has become further disabling as a result of work activities for a subsequent employer. Consequently, application of the "last injurious exposure" rule shifts responsibility from the insurer to claimant's subsequent employer, a party not present at the hearing. As we stated in James E. Nelson, 37 Van Natta 645 (1985):

> "[I]n every responsibility case the assigning of responsibility to one employer necessarily results in a finding that one or more other employers are not responsible, and the presence, or absence, of the employers as parties to the workers' compensation litigation does not alter the fact of responsibility." 37 Van Natta at 646.

ORDER

The Referee's order dated May 17, 1985 is affirmed.

SUSAN F. VERNON, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10364
November 18, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Fink's order which set aside its denial of claimant's carpal tunnel disease as an occupational disease. SAIF also requests review of the Referee's denial of admission of Exhibit 18 to the record. The issues on review are the admissibility of an exhibit and compensability.

Exhibit 18 was an opinion report written by one of SAIF's in-house medical consultants on SAIF letterhead. It was dated

February 28, 1985. The doctor did not examine claimant, but relied on the medical records to form his opinion. The exhibit was received by SAIF after the initial index and exhibits were submitted to the Referee. Within seven days of receipt, SAIF sent a copy of the new exhibit to the Referee and to claimant with a supplemental index. Claimant received the exhibit two days before the hearing.

The administrative rules applicable to admission of exhibits obtained after the filing of the initial document submission are OAR 438-07-005(3)(b) and 438-07-005(4) and they provide:

> "(3)(b) . . . Further supplemental exhibits may be submitted, provided they are accompanied by supplemental indexes meeting the above requirements [referring to numbering in chronological order]. Further supplemental exhibits must be filed and provided to the other parties within seven (7) days of the submitting party's receipt of the exhibits.
>
> "(4) At the hearing the referee may in his or her discretion allow admission of additional medical reports or other documentary evidence not filed as required by (3) above. In exercising this discretion, the referee shall determine if good cause has been shown for the failure to file within the prescribed time limits, as well as factors of surprise or prejudice to the other parties."

SAIF complied with the technical requirements of OAR 438-07-005(3)(b), therefore, the Referee had no discretion to admit or deny admission to the exhibit except as provided for pursuant to OAR 438-07-005(4). As the Board has noted before, the new rule which became effective May 1, 1984 which replaced the "ten-day rule" inadvertently allows this sort of "surprise." Merle Barry, 37 Van Natta 1492 (WCB Case No. 84-07171, October 24, (1985). The Referee's denial is reversed and the exhibit is admitted to the record. The exhibit is already contained in the record and will be considered on review.

The Board affirms the Referee's order with the following comment. Claimant's treating doctor was an orthopedic surgeon specializing in hand surgery. We find his opinion more persuasive than the opinions obtained by SAIF because the treating doctor correctly summarized claimant's medical history, correctly identified the final diagnosis and results of claimant's 1980 problems, correctly and completely described claimant's work activities, and persuasively explained why claimant's work was probably the cause of claimant's carpal tunnel disease.

ORDER

The Referee's order dated March 20, 1985 is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the SAIF Corporation.

LEROY F. WIESE, Claimant
Welch, et al., Claimant's Attorneys
Breathouwer & Gilman, Defense Attorneys

Own Motion 85-0559M
November 18, 1985
Own Motion Determination

Pursuant to stipulation, the insurer voluntarily reopened claimant's claim for a worsened condition related to his industrial injury of March 22, 1978. Claimant's aggravation rights expired prior to the date the stipulation was approved.

The stipulation provided that the claim would remain in open status until "again closed by the Evaluation Division in accordance with ORS 656.268 or the parties are otherwise in agreement with regard to disposition. . . ." The claim was submitted to the Evaluation Division for closure, but was referred to the Board by the Evaluation Division for the reason that the claim appeared to be under the Board's own motion jurisidiction, ORS 656.278. We conclude that the claim reopening was a voluntary reopening pursuant to ORS 656.278(4). As such, it must be closed by the Board under its continuing authority to modify, change or terminate former orders, ORS 656.278(1), unless the claim was reopened during the existence of appeal rights from the final determination of the claim, Carter v. SAIF, 52 Or App 1027 (1981); Coombs v. SAIF, 39 Or App 293 (1979). This claim does not fit into the Coombs/Carter exception, and, therefore, must be closed by the Board under ORS 656.278.

We are mindful that the parties agreed that claimant's reopened claim would be closed by the Evaluation Division with a Determination Order, attendant with all of the rights that flow from the issuance of a Determination Order. However, the parties cannot by stipulation confer subject matter jurisdiction. Logsdon v. State and Dell, 234 Or 66, 71 (1963). Neither can the parties by stipulation compel an administrative agency to assume an obligation beyond that required of it by statute. See Hoffman v. City of Portland, 294 Or 150 (1982); Gordon v. City of Beaverton, 292 Or 228 (1981). Claimant argues that the provision in the stipulation for closure under ORS 656.268 was the essence of the agreement and that closing the claim under ORS 656.278 defeats the entire stipulation. We are in no position to decide that issue at this point. See Mary Lou Claypool, 34 Van Natta 943 (1983).

Claimant is hereby granted temporary total disability from April 1, 1985 through September 13, 1985, less any time worked. Deduction of overpaid temporary disability, if any, from unpaid temporary and permanent disability is approved.

IT IS SO ORDERED.

ANTHONY A. BONO, Claimant
Greco & Escobar, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-05088
November 20, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Nichols' order that found claimant's five year aggravation period began on the date of the first Determination Order. Claimant cross-requests review of that portion of the Referee's order that granted 32 degrees for 10 percent unscheduled disability whereas a Determination Order had granted no award for permanent disability. The issues on review are extent of disability and the proper date for claimant's aggravation period to begin.

The Board affirms and adopts those portions of the Referee's order concerning extent of disability.

Claimant was injured in an automobile accident on October 9, 1978 while in the course and scope of his employment. Claimant filed a claim on August 20, 1980. SAIF accepted the claim as nondisabling on November 14, 1980. On December 4, 1980 claimant's attorney wrote to SAIF stating that claimant disputed the nondisabling classification. He stated that he would immediately file a request for hearing to dispute that classification. Claimant requested a hearing on December 17, 1980.

A hearing was held before Referee Danner on January 12, 1982. The Referee held that he had no jurisdiction to consider claimant's challenge to the nondisabling classification. Claimant then requested Board review. On January 6, 1983 the Board affirmed the Referee on the issue of his jurisdiction to consider the challenge to the nondisabling classification.

> "[A] claimant must first exhaust his remedy of requesting a determination from the Evaluation Division before he may request a hearing on the issue of the proper classification of his claim." Anthony A. Bono, 35 Van Natta 1, 8 (1983) (emphasis in original).

See also Garland Combs, 37 Van Natta 756 (1985).

The case was appealed to the Court of Appeals and ultimately to the Supreme Court. See Bono v. SAIF, 66 Or App 138 (1983), rev'd and remanded, 298 Or 405 (1984). However, the jurisdiction issue was withdrawn while the case was pending before the Court of Appeals. Accordingly, the Board's decision on the issue of whether the Referee had jurisdiction to consider the challenge to the nondisabling classification is final and is the law of the case.

Claimant's doctor filed an aggravation claim on January 18, 1983. There is no indication in the record that the initial claim was ever closed either by Determination Order or by SAIF. On February 9, 1983 claimant's attorney wrote to the Evaluation Division noting that the claim had never been closed. He requested reclassification.

On March 31, 1983 SAIF filed a Form 1502 with the Evaluation Division. The form indicated that SAIF was accepting the aggravation claim as disabling. On April 5, 1983 a representative of the Evaluation Division wrote to claimant's attorney and notified him that Evaluation intended to treat the 1502 as though the claim had been reclassified as disabling from the outset. A Determination Order issued on May 18, 1983. The Determination Order indicated that claimant's aggravation rights began running on May 18, 1983.

ORS 656.262(6) provides that a notice of acceptance shall inform claimant of certain rights including "the right to object to a decision that the injury of the claimant is nondisabling by requesting a determination thereon pursuant to ORS 656.268." ORS 656.262(6)(b).

ORS 656.268(8) provides:

> "Upon receipt of a request made pursuant to ORS 656.262(6) or subsection (3) of this section, the Evaluation Division shall determine whether the claim is disabling or nondisabling."

ORS 656.262(12) provides:

> "If within one year after the injury, a worker claims a nondisabling injury has become disabling, the insurer or self-insured employer shall report the claim to the director immediately after receiving notice or knowledge of such claim. A claim that a nondisabling injury has become disabling, if made more than one year after the date of injury shall be made pursuant to ORS 656.273 as a claim for aggravation."

ORS 656.268(3) provides:

> "When the medical reports indicate to the insurer or self-insured employer that the worker's condition has become medically stationary and the self-insured employer or the employer's insurer decides that the claim is nondisabling...the claim may be closed, without the issuance of a determination order by the Evaluation Division." (Emphasis added.)

The statute then indicates that the notice of closure shall contain notice of certain rights including the right to request a Determination Order from Evaluation within one year of the notice of closure.

ORS 656.273(4) provides that a claim for aggravation must be filed within five years of the first Determination Order except:

> "If the injury was nondisabling and no determination was made, the claim for aggravation must be filed within five years after the date of injury." ORS 656.273(4)(b).

This claim was initially accepted as nondisabling. No Determination Order issued closing the initial claim. The Referee concluded that the Determination Order closing the aggravation claim was sufficient to take the claim out of ORS 656.273(4)(b), thus making the proper date for aggravation rights to begin running the date of the Determination Order closing the aggravation claim. We disagree.

Following acceptance of a claim as nondisabling, a claimant may challenge the classification within one year of the date of injury and obtain a determination from the Evaluation Division. If the claimant challenges the acceptance as nondisabling more than one year after the date of injury, the

challenge will be treated as a claim for aggravation. Finally, if the insurer elects to close a nondisabling claim pursuant to ORS 656.268(3), then the claimant may obtain a determination from the Evaluation Division on the question of whether the claim is properly classified as nondisabling. See Deborah L. Greene, 37 Van Natta 575 (1985); Garland Combs, supra.

In this case, claimant did not challenge the nondisabling classification within one year of the injury in part because the claim was not filed until more than one year after the injury. Claimant did not challenge the nondisabling classification following insurer closure because SAIF never closed this claim. Thus, the only avenue open to claimant to challenge the nondisabling classification was to have the challenge treated as a claim for aggravation pursuant to ORS 656.262(12). Claimant timely made such a claim and SAIF accepted it. It makes no sense to require that the claim be treated as a claim for aggravation and at the same time consider the Determination Order closing the aggravation claim as the date claimant's aggravation rights begin to run. Thus, we conclude that the reference in ORS 656.273(4)(b) to a determination refers to Determination Orders or insurer closures closing the claim in the first instance rather than to Determination Orders deciding the question of whether a claim is nondisabling following a classification challenge made more than one year after the date of injury; i.e. an order closing an aggravation claim.

We find that this claim was originally nondisabling and that no insurer closure or determination was issued. Accordingly, pursuant to ORS 656.273(4)(b), claimant's aggravation rights began to run on October 9, 1978, the date of claimant's injury.

The isse of claimant's entitlement to an increased award of permanent partial disability was raised by claimant and SAIF did not contend that the Referee's award should be disallowed or reduced. Because SAIF prevailed on the issue raised by it, and because claimant's compensation has not been increased, claimant's attorney is not entitled to an award or allowance of an attorney fee.

ORDER

The Referee's order dated June 4, 1984 is affirmed in part and reversed in part. That portion of the Referee's order concerning the proper date to begin claimant's aggravation period is reversed. Claimant's aggravation period began on October 9, 1978. The balance of the Referee's order is affirmed.

CELIA GARCIA, Claimant
Olson Law Firm, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-00892
November 20, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee Daron's order directing it to pay Dr. DeShaw's unpaid medical bills, but making no decision as to the reasonableness of the number of treatments provided by Dr. DeShaw which, the Referee declared, may be disallowed upon any hearing on those issues under a request for hearing filed by the Director of the Workers' Compensation Department concerning alleged violations of the Director's Rules for Medical Administration. The employer contends that Dr. DeShaw's treatments after February 15, 1983 were

not reasonable and necessary and not causally related to claimant's June 20, 1982 industrial injury. Claimant contends that all of Dr. DeShaw's treatments are compensable.

I

Claimant had previously injured her neck and right shoulder in 1979. She remained under treatment for that injury when, on June 20, 1982, she compensably injured both knees and her low back when she fell at work. On June 21, 1982 claimant consulted Dr. DeShaw, the chiropractor who had been treating her in connection with the 1979 injury. He commenced treating her for the new injuries as well. Claimant's early complaints included pain and burning in the left knee, pain in the left lower back and numbness down the left leg to the foot. The right knee sustained a laceration. Dr. DeShaw diagnosed muscle spasm, sciatic neuralgia and mild right knee sprain. Claimant was released to return to her job as a cannery inspection belt worker on June 26, 1982.

Dr. DeShaw reported on October 18, 1982 that claimant was not making "respective improvement" and that emotional overlay was apparent. The same day, with reference to the 1979 injury, he reported:

> "[Claimant] has been treated in our office since 8-31-81 for an injury to her cervical spine as related to her injury dating back to 5-23-79. After treating [claimant] for an extended period of time it is the opinion of this office that this patient's continued request for multiple treatments per week which are not scheduled and the lack of improvement after extensive treatment has been administered indicates probable emotional overlay.
>
> " . . . This office will continue to treat [claimant] on her requested basis."

Dr. DeShaw reported on November 24, 1982 that claimant had made mild to moderate improvement objectively, but subjectively she continued to complain of constant though less severe pain.

Dr. Gatterman, a chiropractic orthopedist, examined claimant for the employer on December 12, 1982. Claimant told Dr. Gatterman that the chiropractic care gave her no relief. Based largely on claimant's representation, Dr. Gatterman opined that further chiropractic care was unnecessary. She said that claimant was medically stationary without permanent low back impairment due to the June 1982 injury. She felt that claimant's marked obesity was a factor in claimant's ongoing symptoms and recommended exercise and weight loss.

Dr. Todd, an orthopedic surgeon, examined claimant on January 18, 1983. He reported that claimant stated that Dr. DeShaw's treatments had dramatically helped her back pain. He opined that claimant had crushed and possibly transected a nerve in her right knee and predicted that regeneration would take about a year.

In a February 15, 1983 letter, the employer informed Dr. DeShaw:

> "If you feel further chiropractic treatment is warranted on a curative basis for [claimant] would you please provide me with a report specifying the ongoing treatment. Please be advised should further treatment be authorized, payment will be based on four visits per month according to the medical aid rules ORS 436.69-201 (sic)."

Dr. DeShaw responded in April 1983 that he agreed with Dr. Gatterman's impression that claimant's low back condition was medically stationary, but reported that claimant continued to complain of pain in her right low back and right knee and had recently begun complaining regarding her right foot. He stated:

> "I feel that [claimant] has been plagued with a sincere problem as a result of injuries of 6-20-82. I believe this extenuating problem has stemmed from not only as Dr. Gatterman has suggested, [claimant's] weight, but also primarily from the injury in question. Miss Garcia has weighed her present weight for a period of several years and therefore, her weight is not the major contributing factor and or the cause of the problem."

The employer informed Dr. DeShaw on June 2, 1983 that it had requested the Workers' Compensation Department Medical Director to review his charges and that his charges would be held pending the Medical Director's ruling. The Medical Director referred the matter to a chiropractic peer review committee. The committee ultimately found that claimant was definitely in need of some continued palliative care, probably in excess of the guidelines found in the Workers' Compensation Department medical rules, but it was unable to determine the precise frequency of care that would be reasonable. The Director ultimately referred the matter to the Hearings Division. The Director's request for hearing is presently pending.

Dr. Spady, an orthopedic surgeon, examined claimant for the insurer and reported on August 22, 1983. He found claimant to complain excessively to rather light pressure on the low back and behind the right knee. Straight leg raising, the cross-leg pelvic stress test and the hip flexion test were positive on the right side. The hip flexion test was positive on the left. He stated that he found no evidence of nerve root compression and termed the evidence in the low back region to be primarily subjective. He was unable to find objective evidence of impairment of function in the knees. He noted that the patient had had a long period of chiropractic treatment with improvement in her symptoms, but predicted that there would not be further improvement with additional treatment. He later opined that additional chiropractic care would not benefit claimant.

A December 1983 Determination Order declared claimant medically stationary on August 22, 1983 and awarded no permanent disability compensation.

Dr. Hazel, an orthopedic surgeon, examined claimant and reported on January 13, 1984. At that time her chief complaint was recurrent right knee pain and occasional swelling. He observed that from the base of her neck to the sacrum, palpation brought on a cry and writhe of pain. He was unable to assess that one area was more tender than others. There were similar expressions of pain in connection with the examination of the right knee. He stated:

> "She obviously has a very acute and highly refined perception of pain. There is essentially no physical, nor for that matter historical substantiation that accounts for this pain. I might point out that this is not to say that this lady is malingering, but just as some people have a far more acute and highly refined sense of visual acuity or auditory acuity, there are those whose perception of noxious stimuli is likewise highly refined and they will perceive and experience more discomfort from a given stimulus than an average person.
>
> "In short, I don't believe there is any treatment that I know of that is going to help this lady. I advised her to use heat and aspirin to alleviate her axial skeletal symptoms. All too frequently the zealous treatment of symptoms results in side effects from the zealous treatment that transcend the problems that one is treating, thus, my recommendation to her was to keep her treatment pretty simple and as benign as possible. I further advised her that anyone who is having axial skeletal symptoms of pain and discomfort aggravated by activity is going to find that reduction of their own body weight will reduce to some extent their symptoms and I have urged her to keep that in mind, although it is obvious that it is going to be extremely difficult for her to alter her body weight since she was quick to point out that it has been unchanged since she was 13."

Dr. Gatterman examined claimant again on February 28, 1984. Claimant indicated that she was seeing Dr. DeShaw one to five times a week, depending on how she felt. She said that sometimes treatments would help her, and that the benefit might last a day or two. Dr. Gatterman noted multiple inconsistent complaints throughout the examination. She opined that claimant remained medically stationary without physical impairment or limitations in her work due to the June 1982 injury. She felt that continued treatment was neither reasonable nor necessary. She attributed claimant's problems to obesity and preexisting spinal abnormalities. At the hearing Dr. Gatterman explained that claimant's pattern of short term relief following chiropractic treatment suggests that repeated manipulation may have loosened her ligaments, resulting in spasms; and thereby perpetuated her problems.

Dr. Nelson, a chiropractor, performed thermography on March 19, 1984. He reported findings consistent with L5 nerve root irritation.

Dr. DeShaw last treated claimant on May 14, 1984. In the 15 months from February 15, 1983 through that date, Dr. DeShaw treated claimant 85 times, or an average of 5-2/3 treatments per month. Dr. DeShaw reported on May 23, 1984 that claimant suffered continually in her low back and knees. He found it apparent that claimant had sensory nerve root distribution dysfunction at the L5-S1 level. He stated:

> "We feel that the medical treatment that has been administered to [claimant] since the onset of her injury has been subjectively absolutely necessary and objectively reasonable and necessary in order to allow [claimant] to continue as a part of our work force. We are well aware that the care which has been administered to [claimant] has well outstepped any guidelines put out by the Workers' Compensation Department. However, we do not feel that this woman's case has been where short term care would have provided anything greater than a total permanent impairment with no ability to work. By the care which has been administered by this office to [claimant] she has indeed been able to continue and earn a livelihood while ongoing care has been administered. The care which has been administered to [claimant] for the past almost 2 years to that of her lower back and knees we believe has been as a result of the injury described above."

Dr. Freeman, also a chiropractor, took over claimant's care on May 16, 1984. He reported on January 24, 1985 that claimant continued to complain of pain in the knees and lower back, that he was seeing her about once every two weeks, and that her progress had been extremely slow. He hoped that in continuing to see her, there would be some breakthrough in her progress.

Claimant testified that she returned to work within a few days after the 1982 injury, but that her symptoms persisted. She said that Dr. DeShaw's treatments gave her some relief in her low back and knees, but that the relief lasted only a couple hours on the average.

After claimant testified that she had never had any problems with her low back before the 1982 injury, the employer confronted her with medical records indicating some low back complaints following the 1979 injury. Claimant did not dispute the records and evidenced little recollection.

II

ORS 656.245(1) provides that for every compensable

injury, the insurer or self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires. The Director of the Workers' Compensation Department has promulgated rules relating to the frequency of such treatment. At the time of the injury, OAR 436-69-201(2)(a) provided in part:

> "Frequency and extent of treatment shall not be more than the nature of the injury and the process of a recovery requires. The usual range of the utilization of medical services does not exceed 24 office visits by any and all attending physicians in the first 60 days from the first date of treatment, and four visits a month thereafter. This statement of fact does not constitute authority for an arbitrary limitation of services, but is a guideline to be used concerning requests of accountability for services being provided."

The rule was amended effective January 16, 1984 to set a guideline of two visits per month, rather than four, after the first 60 days. WCD Administrative Order 1-84. Effective May 1, 1985, the rule was renumbered OAR 436-10-040.

Claimant has the burden of proving that the condition for which she receives medical services was caused by her compensable injuries and that the treatment is reasonable and necessary. E.g., Poole v. SAIF, 69 Or App 503 (1984). Such questions necessarily turn on the unique facts of the particular case. The Department's guidelines provide no more than a general point of reference. See Treva K. Hubbard, 37 Van Natta 425 (1985).

Based on a preponderance of the evidence, we find that claimant's low back and knee conditions remained materially related to the June 1982 injury throughout the pertinent period. Claimant's obesity no doubt was substantially responsible for her ongoing condition. However, we find persuasive Dr. DeShaw's testimony that the knee and low back conditions he treated remained materially related to the June 1982 work injury. Claimant was obese long before the June 1982 injury, and her low back and knees have been consistently symptomatic only since that injury.

We find that there are persuasive reasons not to defer to the treating physician on the question of extent of treatment, however. The treatment history to February 15, 1983 provided little reason to hope that further chiropractic care would improve claimant's condition. Indeed, subsequent treatment brought about little improvement, if any. Although we give significant weight to Dr. DeShaw's opinion that his palliative care has been essential to maintaining claimant's ability to work and to the findings of the chiropractic peer review committee that claimant probably needed palliative care in excess of the Department's frequency guidelines; this is counter-balanced by claimant's own statements regarding the limited benefits she received and by the more persuasive contrary medical opinions of Drs. Gatterman, Spady and Hazel. Based on the record as a whole, we find that claimant has shown the compensability of only a portion of the treatment provided by Dr. DeShaw after February 15, 1983. We find the

disputed portion of Dr. DeShaw's treatment to be reasonable and necessary only to the approximate extent of four treatments per month. We find the compensable portion of the disputed charges to be $1,380.

ORDER

The Referee's orders dated March 7, 1985 and April 2, 1985 are affirmed in part and modified in part. That portion of the Referee's March 7, 1985 order directing the self-insured employer to pay for Dr. DeShaw's medical services, but making no decision as to the reasonableness of the number of treatments provided, is modified to order the self-insured employer to pay Dr. DeShaw $1,380 for the compensable portion of the medical services he provided to claimant after February 15, 1983, less any portion of that amount that has been paid. The Referee's orders are affirmed in all other respects.

DEBORAH L. JONES, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-10155
November 20, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Mongrain's order after remand that denied claimant's request for an award of disability in addition to the 60 percent for 90 degrees scheduled left knee award and the 5 percent for 16 degrees unscheduled low back award. Claimant contends that she is permanently and totally disabled. The issue is extent of disability.

We addressed the issues of compensability and premature claim closure in our prior Order on Review (Remanding), 36 Van Natta 377 (1984). In that order, we concluded that claimant's left knee condition, which admittedly is compensable, was medically stationary at the time the disputed Determination Orders were issued in April and June of 1982. We further concluded that claimant's psychiatric condition (depressive neurosis) and morbid obesity problem, which the evidence establishes are interrelated, preexisted the 1977 knee injury and had returned, after symptomatic worsening, to their pre-injury status. Finally, we found that the psychiatric and obesity conditions and the physical problems arising out of them, except for the left knee problem, were not compensable and also were not medically stationary at the time the disputed Determination Orders were issued. We then remanded the case to the Referee to rate the extent of claimant's disability.

After a second hearing, the Referee concluded that claimant had failed to prove that she was any more physically impaired than the disability awards granted by the Determination Orders indicated. On Board review, claimant appears to concede that her physical impairment as the sole result of the knee injury and subsequent surgery has been adequately compensated by the 60 percent scheduled disability award. Claimant has been silent about the 5 percent unscheduled low back award, and we interpret that silence as agreement that the award is appropriate. Claimant argues that she is permanently and totally disabled because of the combination of her compensable and noncompensable conditions.

The medical evidence, principally the uncontroverted opinions of claimant's treating psychiatrist, Dr. Radmore, establishes that as of the most recent hearing claimant was unable

to work at any job for which she has training, was unable, because of her psychiatric condition, to be retrained at that time and was unable, again because of her psychiatric condition, to seek work. Also, prior to the most recent hearing, claimant had undergone a gastric stapling procedure. As of the hearing claimant was two months post surgery for gastric stapling and had lost approximately 50 pounds. The weight of medical opinion is that the prognosis for continuing weight loss is good and that the weight loss will most likely result in improvement in claimant's obesity related physical problems, and probably her depression as well. It is clear that claimant's condition is likely to be improved by the passage of time, and that she is, therefore, not medically stationary as to these noncompensable conditions.

It is axiomatic that extent of permanent disability cannot be rated until all compensable conditions are medically stationary. Kociemba v. SAIF, 63 Or App 557, 560 (1983). In this case, claimant's compensable condition, the knee injury, is stationary. Claimant testified at the most recent hearing that she is receiving no treatment for her knee and that her activities cause her to walk approximately five miles per day with only some pain and stiffness. The pain and stiffness claimant experiences are to be expected as residuals of a permanently disabling injury that resulted in an award for 60 percent loss of use of the left leg. Claimant's inability to work stems partially from her knee injury, in that the residuals of that injury prevent her from performing all of the duties of a licensed practical nurse, but the majority of claimant's present inability to work, be retrained or seek work arise out of her noncompensable depression and obesity. We may not consider the potential of claimant's improvement in determining whether she is presently permanently and totally disabled. See Gettman v. SAIF, 289 Or 609, 614 (1980).

Very recently, the Court of Appeals decided Arndt v. National Appliance Co., 74 Or App 20 (1985). In Arndt, the court discussed at some length the conditions to be considered in the disability "calculus" when faced with preexisting compensable and noncompensable conditions. The claimant in Arndt had residuals from two back injuries and a compensable psychological condition, together with noncompensable gall bladder, liver and intestinal disease and a cervical spine condition that arose after the injury in question. Prior to his last back injury, the claimant was not precluded by his then existing disabilities from working. In our Order on Review we stated: "We do not think the incremental impairment caused by this [last] strain-type injury . . . is of a magnitude that would make seeking work futile." Willi Arndt, 36 Van Natta 135, 138 (1984). We concluded that the claimant was not entitled to an award of permanent total disability because he was not exempted by the futility doctrine from the requirement of ORS 656.206(3) and had not shown a reasonable effort to seek work. The court reversed, concluding:

> "It is correct that the degenerative cervical disc disease may not be considered under [ORS 656.206(3)]; as indicated, however, that condition was not disabling. The other conditions preexisted the 1979 injury and, whether compensable or not, must be considered in determining whether [claimant] is permanently and totally disabled and whether it would be futile for

> him to seek work. . . . The 'incremental impairment' caused by the 1979 injury may not have been of a magnitude that would make seeking work futile, but if claimant's total impairment after that injury was such that he could not work, he will not be required to seek work. In such a case, the worker's total impairment might be greater after the second injury than might be estimated by adding the worker's preexisting impairment to the hypothetical 'incremental impairment' caused by the second injury. This synergistic effect makes it pointless to speak in terms of 'incremental impairment' in a discussion of permanent total disability." 74 Or App at 25-26, citations omitted.

We conclude that to follow Arndt we must consider claimant's total impairment caused by all disabling conditions, whether or not compensable, that preexisted her 1977 injury and the impairment resulting from the injury itself, and determine what the effect of all these combined conditions was at the time of the hearing. We perceive this as no mean feat. This is particularly so if one reads the court's opinion in Arndt as stating a rule of law that permanent disability based upon more than one condition always results in synergism, i.e. the whole being greater than the sum of the parts. We need not grapple with that question, however.

On the evidence in this case, we find that claimant's compensable and noncompensable conditions that are a part of the permanent total disability calculus do result in synergism. The residuals from the knee injury prevent claimant from returning to full duties as a licensed practical nurse and the effects of the other conditions prevent her from doing or being trained to do anything else. While it is true that claimant was able to work as a licensed practical nurse in spite of depression and obesity prior to the knee injury, and that the depression and obesity were thus arguably not "disabling" prior to the injury, the synergistic effect of all conditions at the time of the hearing was an inability to "regularly [perform] work at a gainful and suitable occupation . . . ," and claimant is excused from seeking work under these circumstances. ORS 656.206(1)(a); Arndt v. National Appliance Co., 74 Or App 20 (1985); Livesay v. SAIF, 55 Or App 390 (1981); Butcher v. SAIF, 45 Or App 313 (1980).

The standard for determining the effective date of a retroactive permanent total disability award is "the earliest date that claimant's permanent total disability is proved to have existed." Morris v. Denny's, 53 Or App 863, 867 (1981). See also Wilke v. SAIF, 49 Or App 427, 431 (1980). Although that date is frequently found to be the date on which a claimant was declared to be medically stationary, see, e.g., William B. Johnson, 36 Van Natta 98, 104 (1984), there is no rule of law that requires such a finding, see Michael R. Harman, 37 Van Natta 418 (1985); Albert D. Richey, 36 Van Natta 1580, 1583 (1984). A finding of the appropriate effective date is based upon all of the relevant medical, social and vocational factors. Morris v. Denny's, supra.

Prior to the entry of our first order in this case, March 30, 1984, claimant's preexisting noncompensable psychiatric condition and obesity had been treated as a part of claimant's

entire claim. It was not until the entry of our order that these conditions were determined to be preexisting and thus includable in the permanent total disability "calculus." It was this determination that brought together all of the relevant medical, social and vocational factors that would permit, under the Arndt rationale, the legal conclusion that claimant is permanently and totally disabled. We, therefore, award permanent total disability as of that date.

ORDER

The Referee's order dated September 20, 1984 is modified to grant claimant an award of permanent total disability effective March 30, 1984. Claimant's attorney is awarded 25 percent of the increased compensation made payable by this order, not to exceed $3,000, to be paid out of and not in addition to compensation.

GUY P. RICHARDS, Claimant
Sanford Kowitt, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 83-08043
November 20, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Mulder's order which set aside its denial of the claim for an industrial injury to claimant's right knee. The issue on review is compensability.

The Board affirms the Referee's order with the following comment. Claimant's employment required walking and waiting on customers. Claimant suffered a new injury to his right knee in the course of his employment. The injury required medical services and caused disability. Analysis of whether claimant's injury produced a worsening of a preexisting underlying condition was inappropriate because such analysis applies only to occupational disease claims. Norris G. Langsev, 37 Van Natta 581 (1985), and cases cited therein.

ORDER

The Referee's order dated March 27, 1985 is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the self-insured employer.

STANLEY W. TALLEY, Claimant
Roberts, et al., Defense Attorneys

WCB 84-02457 & 84-07923
November 20, 1985
Order of Remand

The insurer requested Board review of Referee Shebley's order dated August 26, 1985. The insurer now presents alternative motions to the Board: (1) for a ruling that the Referee's order is an interim order; (2) to abate proceedings pending the issuance of an anticipated second order and anticipated request for review thereof; or (3) for an extension of 29 days within which to file the appellant's brief.

This case involves two claims; one for a left wrist condition and one for a low back condition. It is the low back claim that presents the difficulty and that is the focus of the insurer's motions. After a hearing on April 18, 1985 and closure of the record June 10, 1985, Referee Shebley issued an order on

July 1, 1985. That order was withdrawn on the insurer's request for reconsideration.

On August 26, 1985 an amended order was issued. In that order, the Referee set aside two Determination Orders that closed claimant's low back claim and ordered the insurer to resume processing of the claim, with temporary disability benefits reinstated as of January 4, 1984. However, the Referee's order goes on to state, "However, I will allow the carrier to offer additional evidence on this issue and will not now require it to pay claimant temporary disability benefits for any period of time prior to the date of this Order." This statement could mean that the Referee reserved the issue of claimant's entitlement to temporary disability compensation during the period January 4, 1984 through August 25, 1985. It could also mean that the Referee will allow the insurer to offer additional evidence that could bear on the Referee's decision that claimant's claim was prematurely closed. Presumably, claimant will also have the opportunity to meet any additional evidence offered by the insurer.

We do not agree with the insurer's assertion that the Referee's order is an "interim" order. The order disposes of most substantive issues apparently heard at the hearing. It is, however, incomplete on its face, in that it leaves unresolved the issue of premature closure and whether claimant is entitled to temporary disability compensation after the latter of the two Determination Orders. We may remand a case to the Referee if we find that the case "has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee . . . ." ORS 656.295(5). The remand may be either to take evidence and report findings or to enter another order. OAR 438-11-010(1).

We conclude that this case has been incompletely developed. The Referee evidently believed that the issues unresolved by the current order were of sufficient gravity that an additional hearing was warranted. We take official notice of our own agency records to note that additional proceedings in this matter were in fact held on October 29, 1985. We find that it is necessary to remand this case to the Referee for entry of an order fully disposing of all issues heard and considered.

ORDER

The Referee's amended order dated August 26, 1985 is vacated. This case is remanded to the Referee for further consideration and entry of an Opinion and Order on Remand consistent with this order.

DALE THENNES, Claimant
Francesconi & Cash, Claimant's Attorneys
David Horne, Defense Attorney

Own Motion 85-0562M
November 20, 1985
Own Motion Order Denying Motion

The insurer referred claimant's request for reopening of his claim for payment of temporary disability compensation to the Board for consideration pursuant to ORS 656.278. Claimant's aggravation rights have expired. On October 18, 1985 we issued our Own Motion Order Referring for Consolidated Hearing along with claimant's presently pending request for hearing in WCB Case No. 85-04661. Claimant has now requested an order by the Board stating that, if claimant's current aggravation is adjudged the responsibility of Liberty Northwest Insurance Corporation, the Board will order that Liberty Northwest pay temporary disability compensation in addition to benefits due claimant under ORS 656.245.

The Board denies claimant's request, for three reasons. First, there is insufficient evidence before us upon which to make the requested finding. Second, even if such evidence was before us, our own rule states that we will not enter an order on our motion while a claimant has any other administrative or judicial relief available. OAR 438-12-005(1). Third, claimant seeks the requested order as an alternative to an order designating a paying agent pursuant to ORS 656.307. We have previously held that such an order is not available to a claimant who seeks own motion relief concurrently with litigation before the Hearings Division concerning benefits as a matter of right, because no single forum has jurisdiction over all potentially liable insurers or employers. John R. Brenner, 37 Van Natta 1201 (September 12, 1985). Accordingly, claimant's motion is denied.

IT IS SO ORDERED.

BRYAN L. TIMMONS, Claimant
Hoffman, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07777
November 20, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee St. Martin's order which set aside its denial of aggravation of claimant's left knee condition. SAIF contends that claimant's knee condition worsened as a result of an industrial injury sustained during a latter employment, thus relieving it of responsibility. The latter employer is not a party to this proceeding.

Claimant injured his left knee while crawling under houses in April 1980 while employed by SAIF's insured. Dr. Rohlfing's impression on May 8, 1980 was pain in the left knee region, with a need to rule out meniscal injury. He referred claimant to Dr. Bachhuber, an orthopedic surgeon. On May 30, 1980 Dr. Bachhuber reported that claimant had no left knee complaints. His diagnosis was chondromalacia.

Claimant left the employ of SAIF's insured in September 1981. After about a year of unemployment and several months of self employment, claimant took a job with Wausau's insured in May 1983.

After the April 1980 work injury, claimant's left knee remained intermittently symptomatic, and he continued to occasionally seek medical care. An arthrogram performed on June 17, 1983 revealed meniscal tears. Dr. Bachhuber recommended surgery at claimant's convenience, but advised claimant not to wait too long. He later opined that this tearing stemmed from the April 1980 work injury.

Claimant reinjured his left knee while working for Wausau's insured on February 7, 1984. He experienced immediate left knee pain upon stepping down 20 inches onto his left foot. Swelling followed shortly thereafter. The pain and swelling tended to persist. Several days later, claimant elected to submit to surgery. Claimant continued to work through February 27, 1984. Surgery was performed on February 28, 1984.

We accept Dr. Bachhuber's opinion that the February 1984 incident caused further tearing in claimant's left knee,

contributing to claimant's left knee condition. Although Dr. Bachhuber testified that the surgery remained elective even after the February 1984 incident, he explained claimant's decision to undergo surgery as follows:

> "I explained the sequelae of not having it fixed, which would be further types of episodes and more severe pain during which he may be unable to work, which would result in further damage to the knee over the course of time. I think it was my explanation, plus his realization that he was having continued and more and more trouble with the knee, he was going to have to do something at some time. He was not and had never been anxious not to work. He felt it was important to keep working, but I think he realized that if he was going to have to do this, he might as well get it over with."

Responsibility presumptions can be asserted defensively, even when no other potentially responsible employer/insurer is a party to the proceeding. See Thomas L. Runft, 36 Van Natta 1660 (1984).

In successive injury cases, if the last incident actually and independently contributes to a claimant's disability, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributes the major part to the final condition. Industrial Indemnity v. Kearns, 70 Or App 583 (1984). This is true even though the latter contribution is slight. Id. In Kearns the court found the application of a rebuttable presumption that a claimant's last industrial injury contributed independently to the worsened condition not to be inconsistent with the Supreme Court's language in Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1984). In Daniel P. Miville, 36 Van Natta 1501 (1984), the Board defined a "material" contribution as one which causes the worker to become disabled or incur the need for medical services earlier than otherwise would have occurred in the absence of the injury.

Claimant contends that the February 7, 1984 injury did not contribute to his disability. He points out that he continued to work until the surgery was performed. He contends that since he had been advised to have surgery before the February 1984 injury, that injury did not cause the need for the surgery. He argues that there is no evidence that he sought medical services sooner as a result of the February 1984 incident.

We disagree. We find that the February 1984 work injury materially contributed to claimant's disability. The preponderance of the evidence is that the further deterioration of claimant's left knee condition caused by the February 7, 1984 work injury was at least a material factor in prompting claimant to finally submit to surgery. Accordingly, we reinstate SAIF's aggravation denial.

ORDER

The Referee's order dated May 7, 1985 is reversed. The SAIF Corporation's aggravation denial is reinstated and affirmed.

NANCY E. CUDABACK, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Noreen K. Saltveit & Assoc., Defense Attorneys
Moscato & Byerly, Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08031, 83-03359, 84-05661, 84-12695 & 85-01701
November 25, 1985
Amended Order on Review

Reviewed by Board Members McMurdo and Ferris.

We issue the following Amended Order on Review at the request of Kemper Insurance Company, which correctly brought our attention to errors in calculation in our original order regarding the amount of unscheduled permanent partial disability for which Kemper is responsible.

Kemper Insurance Company requests review of those portions of Referee Foster's order that: (1) held it to be the insurer responsible for claimant's low back condition; (2) set aside its denial of chiropractic treatments provided in excess of the guidelines suggested by the administrative rules; and (3) affirmed the Determination Order granting claimant 64 degrees for 20 percent unscheduled permanent partial disability for the low back, in addition to the 40 degrees for 12.5 percent unscheduled disability awarded by way of a prior Determination Order and a stipulated settlement between claimant and the SAIF Corporation.

Liberty Northwest Insurance Corporation requests review of that portion of the order that awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for an exacerbation of claimant's low back symptoms while she was employed by Liberty Northwest's insured.

There are three insurers and three work-related incidents in this case. Claimant's original injury occurred in October 1980 at a nursing home insured by the SAIF Corporation. Claimant incurred a low back strain, and remained somewhat symptomatic thereafter. She was declared medically stationary in August 1981 and subsequently received 16 degrees for 5 percent unscheduled disability by way of a September 1981 Determination Order. Claimant requested a hearing on the order and later received an additional 24 degrees for 7.5 percent unscheduled disability from SAIF by way of a stipulated agreement.

After several months off work, claimant was hired by General Foods, which is insured by Liberty Northwest. After working on the employer's cannery belt for four days, claimant's low back symptoms returned. She left work and returned to her chiropractor, who diagnosed a recurrent low back strain. Claimant was also examined by an orthopedist, Dr. Poulson, who diagnosed a strain superimposed on preexisting degenerative disc disease. Claimant's objective findings were nearly identical to those she exhibited before her employment with General Foods, and she testified that she had no new symptoms as a result of that employment exposure. Neither could claimant recall a specific injurious incident while at General Foods.

Claimant remained off work until May of 1983, when she became employed by the Smuckers Company. Smuckers is insured by Kemper. Claimant worked for approximately two months at Smuckers before suffering a second exacerbation. She "felt something pop"

in her low back, and the incident was followed by leg pain, which was a new symptom. Claimant's treating chiropractor and Dr. Snider, a consulting physician, stated their opinions that claimant's last work incident independently contributed to the worsening of her low back condition.

The Referee held Kemper, the insurer on the risk at the time of claimant's last injury, to be responsible. We agree and affirm that portion of the Referee's order. Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Industrial Indemnity v. Kearns, 70 Or App 583 (1984).

The Referee also awarded claimant 32 degrees for 10 percent unscheduled disability for what the Referee thought was a disability producing incident while claimant was employed by General Foods. The record does not support the Referee's award. As was noted, claimant experienced no more than a flare-up of her previous symptoms following the incident at General Foods. There is no evidence that the injury worsened her condition so as to entitle her to an award of permanent disability over that granted by prior awards. The 10 percent award will be set aside.

The Referee also set aside Kemper's denial of chiropractic treatments provided in excess of the four-visits-per-month guideline set forth in the administrative rules at the time of claimant's injury. OAR 436-69-201(2)(a) (renumbered OAR 436-10-040, May 1, 1985). ORS 656.245 mandates provision of medical services, regardless of frequency, so long as they are reasonable and necessary. Kemp v. Workers' Comp. Dept., 65 Or App 659, modified on other grounds, 67 Or App 270 (1984). An insurer may not rely on a Department rule to deny payment for services shown to be reasonable and necessary. West v. SAIF, 74 Or App 317 (1985). It remains claimant's burden, however, to prove the reasonableness and necessity of the chiropractic treatments provided. See e.g. SAIF v. Belcher, 71 Or App 502 (1984); Teresa L. Bogle, 37 Van Natta 615 (1985). After reviewing the medical evidence, we are not persuaded that claimant's treatments are necessary. The only opinion offered in support of treatment comes from the chiropractor who is providing it. While we generally defer to a treating doctor's opinion on questions of medical care, we will not do so when there are persuasive reasons not to. See Weiland v. SAIF, 64 Or App 810, 814 (1983). We recognize that in Lucine Schaffer, 33 Van Natta 511 (1981), we stated: "On questions of the need for medical treatment, the Board will always defer to the treating doctor absent some compelling reason not to do so." (Emphasis added.) We now further recognize that our use of the term "compelling" in Schaffer suggested a standard of persuasion stricter than that required in workers' compensation law. The correct standard when the medical evidence is divided is to give greater weight to the conclusions of a claimant's treating physician unless there are persuasive reasons not to do so.

In the present case, three physicians, including a consulting chiropractor, have advanced well-reasoned and persuasive opinions in which they explain why frequent chiropractic treatment is not necessary to claimant's recovery. Only claimant's chiropractor asserts that frequent treatment is needed. The medical evidence in this case weighs heavily against a finding of necessity, and we are persuaded to reject the treating doctor's opinion in favor of the remaining evidence. See

John Verhoef, 37 Van Natta 1171 (1985); Stephanie A. Grimsley-Bruni, 37 Van Natta 437 (1985). Accordingly, we find that claimant's chiropractic treatments are not necessary and, therefore, are not compensable. Kemper's denial will be reinstated.

The remaining issue is the extent of claimant's permanent partial disability. Following her last injury, a Determination Order awarded claimant 64 degrees for 20 percent unscheduled disabilty. This award was in addition to prior awards totaling 12.5 percent. At the time of the hearing, therefore, claimant's total unscheduled award stood at 104 degrees for 32.5 percent unscheduled disability. The Referee approved the Determination Order, and awarded an additional 32 degrees for 10 percent unscheduled disability, which he assessed against Liberty Northwest Insurance Company. The Referee's order, therefore, awarded claimant a total of 136 degrees for 42.5 percent unscheduled disability. We find this award to be excessive. After considering claimant's impairment, limitations, transferable skills, age, education, adaptability, work experience and labor market findings, we find that claimant's unscheduled disability does not exceed 20 percent. Claimant has received 12.5 percent unscheduled permanent partial disability by way of Determination Order and a stipulated settlement from SAIF. Kemper Insurance Company shall be responsible for 24 degrees or 7.5 percent unscheduled disability, which is the difference between what claimant has received from SAIF and the 20 percent unscheduled disability to which we find her to be entitled by way of this order.

Because claimant's attorney did not participate on Board review, no attorney fee will be awarded.

ORDER

Our previous order dated November 4, 1985 is vacated. The Referee's order dated April 24, 1984 is reversed in part, modified in part and affirmed in part. That portion of the order that set aside Kemper Insurance Company's denial of chiropractic treatment is reversed and the denial is reinstated. That portion of the order that granted claimant 32 degrees for 10 percent unscheduled permanent partial disability for an exacerbation occurring at Liberty Northwest Insurance Company's insured's is set aside. That portion of the order that affirmed the Determination Order awarding claimant 64 degrees for 20 percent unscheduled permanent partial disability in addition to the 40 degrees for 12.5 percent unscheduled disability awarded by way of a prior Determination Order and a stipulated settlement between claimant and the SAIF Corporation is modified. In lieu of all prior awards, claimant is awarded 64 degrees for 20 percent unscheduled permanent partial disability. Kemper Insurance Company shall be responsible for 24 degrees for 7.5 percent unscheduled disability, which is the difference between what claimant has received from the SAIF Corporation and the 20 percent unscheduled disability to which claimant is found to be entitled by way of this order. Claimant's attorney fee shall be altered accordingly. The remainder of the Referee's order is affirmed.

DAN L. HOUSEHOLDER, Claimant
Dennis H. Henninger, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-02511
November 25, 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 the Determination Order dated March 7, 1984 that awarded temporary total disability compensation and 13.50° for 10% scheduled permanent partial disability for injury to the foot (ankle); (2) awarded temporary disability compensation from the date of closure through the subsequent surgery; and (3) awarded a penalty and associated attorney fees for unreasonable resistance to the payment of compensation. The issues on review are premature closure, temporary disability compensation, and penalties and attorney fees.

Claimant had a history of ankle inversion sprain injuries to both ankles before he obtained employment as a feeder on the corn belt at a cannery on September 8, 1981. He sustained a sprain injury to his right ankle at work on September 11, 1981. This was the only injury suffered on the job according to the record. Dr. Stevens, orthopedic surgeon, examined claimant on September 16, 1981. He noted that claimant was overweight at 245 pounds and recommended reconstructive ankle surgery. Dr. Stevens was unsure if the industrial injury was responsible for any of the instability of claimant's ankle. He also released claimant to return to regular work.

On September 22, 1981 Dr. Stevens took claimant off work due to another injury to the right ankle. On December 23, 1981 Dr. Stevens reported that claimant was not medically stationary and scheduled reconstructive surgery for January 1982.

Claimant was examined by a panel at Orthopaedic Consultants on March 4, 1982. At the time of this examination, claimant weighed 265 pounds. The consultants obtained a complete history and agreed with Dr. Stevens' recommendation for surgery. They related claimant's condition to the industrial injury. Claimant did not return to Dr. Stevens, according to the record, and the recommended surgery was not carried out at that time.

On June 2, 1982 Dr. Manley, orthopedic surgeon, became the attending physician and reported a physical examination and recommendation for reconstructive surgery. He requested authorization of the surgery before scheduling. On June 29, 1982 Dr. Manley reported that he agreed with the report of the Orthopaedic Consultants. Dr. Manley proposed that Dr. Rusch perform the reconstructive surgery.

SAIF obtained the opinion of Dr. Coletti, orthopedic surgeon, based on the medical record. Dr. Coletti opined that SAIF should pay for that portion of claimant's condition which was due to the industrial injury, but that the reconstructive surgery was needed before the injury and SAIF should not pay for that.

In September 1982 Dr. Stevens wrote a letter to SAIF agreeing in general with Dr. Coletti's report. However, Dr. Stevens was not aware that claimant had changed his attending physician.

On October 5, 1982 SAIF denied "treatment and time loss now being sustained as being unrelated to the injury for which you

filed this claim." A hearing was held on November 18, 1982 on the issue of the denial. The hearing was continued to obtain the deposition of Dr. Coletti. Referee Williams set aside the denial by Opinion and Order dated March 11, 1983. SAIF requested Board review.

On March 16, 1983 Dr. Manley advised claimant to reduce his weight by 50 pounds before surgery and referred claimant to Dr. Rusch to schedule the surgery. On March 17, 1983 Dr. Rusch examined claimant. At that time, claimant weighed 270 pounds. Dr. Rusch diagnosed "recurrent pain and instability right ankle, cause undetermined, probably due, in large part, to ligamentous instability of the lateral aspect of the ankle. A portion of his ankle complaints are felt to be secondary to poor muscle rehabilitation and gross obesity." Dr. Rusch recommended an ankle rehabilitation program and weight reduction of "at least 50 to 70 pounds" before surgery. Dr. Rusch concluded, "It is felt that, without demonstration of his motivation and rehabilitating his ankle and a weight-reduction program, the success of a surgical procedure would be limited."

On May 24, 1983 Dr. Rusch reported that claimant was considerably improved. Claimant continued his physical therapy. On July 26, 1983 Dr. Manley reported that claimant was significantly better and that he was continuing his physical therapy. Dr. Manley also reported a recent ankle strain injury which was "clearing up nicely."

On August 2, 1983 Dr. Rusch reported that rehabilitation of claimant's ankle had progressed to the point where surgery was not recommended. Claimant had been returned to Dr. Manley's care. On August 9, 1983 Dr. Manley reported that claimant had suffered a severe sprain and claimant's ankle was in a cast for the next six weeks.

On August 30, 1983 the Workers' Compensation Board affirmed and adopted Referee Williams's order. There was no appeal of this order.

On October 12, 1983 Dr. Manley reported that he continued to believe that claimant should not have surgery. Dr. Manley also thought claimant "could return to available work in Tillamook, and [claimant] is aware of my feelings at this time."

Claimant was examined by Dr. Duff on November 2, 1983. Dr. Duff recommended peroneal tendon reconstruction of the ankle rather than the carbon fiber method previously considered. He felt that claimant could only stand for about two hours at a time considering his condition at that time, but that reconstructive surgery would leave claimant with little permanent disability. Dr. Duff felt that claimant could not return to work at the cannery without the surgery. He concluded:

> "Present treatment options seem to be limited to surgical repair. There is no indication for further physical therapy or other medical treatment. Any treatment other than surgical repair would have to be considered palliative only. Should his claim be closed without surgery, I believe he would have a moderate degree of permanent physical impairment in this leg

due to the marked instability and chronic synovitis that is present."

On November 21, 1983 SAIF submitted Dr. Duff's report to the Evaluation Division of the Workers' Compensation Department and requested a Determination Order. On November 23 SAIF requested Dr. Manley's opinion, as attending physician, whether surgery was still not recommended. By letter of November 28 which SAIF received December 6, 1984 Dr. Manley replied that he was still concerned about claimant's obesity and requested a third opinion from a doctor closer to claimant's home. On December 9, 1984 the Evaluation Division requested Dr. Manley's opinion of Dr. Duff's report. There is no further evidence in the record as to what happened to this request for a Determination Order.

Claimant was examined by Dr. Langston on January 24, 1984. Dr. Langston reported that claimant was on a weight reduction diet and that claimant weighed 250 pounds. That weight was five pounds more than claimant weighed at the time of his injury and only 20 pounds less than claimant weighed at the time of Dr. Manley's March 1983 recommendation that claimant lose 50 pounds before surgery. Dr. Langston concluded:

> "[Claimant] appears to want surgical treatment for his ankle. However, it appears that the instability is hereditary rather than traumatic. As far as I can determine at this time with these films, the mobility was equal. The symptoms are controlled very well with the use of a brace. When considering his general physical condition I would not recommend any surgical treatment at this time. I believe that this man should get back into the work field and therefore would recommend that his claim be closed for any further medical treatment. I would consider him medically stationary. I would evaluate his impairment in the ankle to be in the area of the mild category as it exists today due to this injury. He may return to his occupation as a cannery worker, or he may pursue educational training in the field of computer repair, for which he has had training in the service."

Dr. Manley examined claimant on February 8, 1984 and reported that claimant had reduced his weight by 46 pounds. Dr. Manley reported that he had received Dr. Duff's report but had not received Dr. Langston's report. Dr. Manley concluded that "the surgical repair will be very effective now that [claimant] has been able to lose weight." He requested authorization to proceed with surgical reconstruction of the ankle. SAIF received this letter on February 29, 1984.

On February 15, 1984 SAIF submitted a request for a Determination Order. Mr. Wilson, a senior claims examiner for SAIF, wrote a cover letter with Dr. Langston's report to Dr. Manley on February 16, 1984. On February 22, 1984 a representative of the employer and a representative of SAIF showed Dr. Manley a videotape of other people performing the same job

that claimant had performed at the cannery. The purpose of the videotape was to show Dr. Manley what claimant's job required. The purpose of the screening was to obtain the doctor's release for claimant to return to work if the doctor thought claimant could perform the job. The SAIF representative also gave Dr. Manley a copy of Dr. Langston's report which Dr. Manley read in the presence of the SAIF and employer representatives. Dr. Manley signed a release for claimant to return to work doing the job he had been doing at the time of injury. SAIF terminated temporary disability compensation on February 22, 1984.

On February 27, 1984 SAIF again requested Dr. Manley's opinion whether claimant was medically stationary, whether claimant needed surgery, whether the surgery was related to the industrial injury, and whether the claim should be closed and the extent of claimant's permanent impairment determined. On February 29, 1984 the Evaluation Division of the Workers' Compensation Department sent a request letter to SAIF asking it to "please provide information as discussed on the phone February 23, 1984 and February 28, 1984." SAIF received Dr. Manley's February 8 chartnote letter recommending surgery on February 29, 1984. Mr. Wilson received the February 8 chartnote letter on March 5, 1984. We do not know if this letter was ever submitted to the Evaluation Division, but Mr. Wilson did not send it to the Division. Also on March 5, 1984 Mr. Wilson received claimant's request for a hearing alleging premature closure, improper classification, improper termination of temporary disability compensation, improper failure "to provide medical benefits including surgery," and requesting penalties and attorney fees.

On March 5, 1984 someone at the Evaluation Division of the Workers' Compensation Department reviewed some aspect of the medical portion of the claim, according to initials signed at the bottom of the Evaluator's Worksheet. The claim proceeded to an evaluator on March 6, 1984. The first Determination Order for this claim was issued on March 7, 1984. Claimant was awarded temporary disability compensation and 13.5° for 10% scheduled permanent partial disability for loss of use of his right ankle. The hearing request was renewed on March 27, 1984.

On March 21, 1984 Dr. Manley replied to SAIF's February 27 letter. Dr. Manley disagreed with Dr. Langston and recommended surgery. Dr. Manley understood from claimant's representations that they would have to wait until after another hearing before the doctor could schedule the surgery, but the doctor requested that he be advised by SAIF if that understanding were incorrect. SAIF received Dr. Manley's letter on March 28, 1984. On April 9, 1984 SAIF replied to Dr. Manley's letter of March 21. The letter advised Dr. Manley that SAIF would authorize payment for the surgery and reopen the claim "after [claimant] has actually undergone the surgery you have requested in your letter." On May 2, 1984 Dr. Manley advised claimant that SAIF had guaranteed payment for the surgery and recommended to claimant that they proceed with surgery.

Claimant was scheduled for surgery on May 24, 1984. On May 15, 1984 Dr. Manley wrote a reply letter to claimant's attorney which stated in its entirety:

> "As I recall the visit from the people from [employer], I was led to believe there was no reason why this man couldn't return to

work immediately. Nothing was indicated to me about the seasonal nature of his work. At that point surgery had been refused. I felt we had no other alternative but to return this man to work with an ankle brace on. The circumstances mentioned in your letter of May 7, are basically correct."

Claimant testified that on February 22, 1984 he was still using the ankle brace full time and that he felt he could not have stood all day at the corn cob line doing the job he had performed for approximately two days before the injury.

Claimant argued before the Referee and on review that SAIF engaged in an unreasonable course of resistance to claimant's needed reconstructive surgery, and relied on the opinion of Dr. Duff that claimant should have reconstructive surgery. Claimant also argued on review that the employer representative misled Dr. Manley about authorization for surgery and the availability of claimant's regular job at the cannery. Claimant characterized Dr. Manley's letter of May 15, 1984 as indicating that SAIF had refused to authorize the surgery.

Claimant's attending physician, Dr. Manley, offered a succession of opinions whether claimant would benefit from reconstructive surgery. At first, there was enthusiasm for use of carbon fibers to replace the ankle joint ligaments. Dr. Rusch, the surgeon who would have performed that surgery, declined to operate until claimant completed weight reduction and ankle rehabilitation programs. When the ankle rehabilitation program seemed successful, Dr. Rusch withdrew the recommendation for surgery and Dr. Manley agreed. Claimant suffered some additional aggravations of his condition although the attending physician released claimant to return to work available in claimant's community and recommended against surgery. Dr. Duff suggested that surgery would restore claimant to a less disabled condition, but that claimant's permanent disability without surgery could be rated at moderate. At that time, Dr. Manley still did not recommend surgery because of concerns about claimant's obesity, but Dr. Manley did request a third opinion. SAIF allowed the third opinion, which was that of Dr. Langston. At the time of Dr. Langston's examination, Dr. Manley's latest opinion was against surgery. Dr. Langston recommended against surgery.

When the employer showed Dr. Manley a videotape of other people performing the job claimant had held at the time of his injury, the doctor wrote and signed an unequivocal release to return to that work. There was no evidence to support claimant's assertion that anyone other than claimant ever told Dr. Manley that SAIF would not pay for the ankle surgery or that the unnamed source of the refusal referred to in Dr. Manley's May 15, 1984 letter was, in fact, SAIF or the employer. At that February 22, 1984 meeting, Dr. Manley read Dr. Langston's report and said nothing to the SAIF representative nor to the employer representative about the report that claimant was worse and surgery should be performed.

Claim closure is authorized when claimant's condition is medically stationary. ORS 656.268. Claim closure is predicated upon evidence available at the time of closure. Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985); Alvarez v. GAB Business Services, Inc., 72 Or App 524 (1985). The Referee found that the Evaluation Division requests of February 23 and 28, 1984 related

to Dr. Manley's opinion of claimant's condition and whether surgery was recommended and he based that finding on the February 27 letter from Mr. Wilson to Dr. Manley. The Referee assumed that the February 8 chartnote letter received by SAIF on February 29 was never submitted to the Evaluation Division because Mr. Wilson never sent it to them. Mr. Wilson received the chartnote letter on the same date he received claimant's first hearing request, March 5. The Referee found that SAIF acted unreasonably by not calling the Evaluation Division to tell it of the contents of the February 8 chartnote letter, although there is no clear evidence whether the Evaluation Division was aware of the letter. The Referee found that if the Evaluation Division had been aware of the February 8 chartnote letter that it would not have found claimant medically stationary and issued the Determination Order on March 7, 1984.

Unlike the Referee, we are not persuaded that the Evaluation Division was unaware of the contents of Dr. Manley's February 8 chartnote letter. In the face of two telephone requests and a written request for Dr. Manley's opinion whether claimant was medically stationary and whether surgery was recommended, it does not seem probable that the Department would proceed to close the claim and rate disability without obtaining the attending physician's opinion. That Mr. Wilson did not personally notify the Department of the letter does not preclude the possibility that someone else who handles claims matters at SAIF notified the Evaluation Division that Dr. Manley's opinion had been received. In addition, there is the fact that someone reviewed some aspect of the medical file on March 5 at the Evaluation Division which led to the notation that claimant was medically stationary on February 22, 1984 according to the Evaluator's Worksheet. The fact remains that no one from the Evaluation Division of the Workers' Compensation Department was called to testify about what the Department actually had and did to close and evaluate this claim and any conclusion about the Department's processing is based on speculation.

At the time of the February 22, 1984 meeting, the opinions of Drs. Manley, Langston, and Duff were that claimant was medically stationary unless claimant were contemplating surgery. At that time, claimant was not contemplating surgery because no doctor was recommending it to claimant. The attending physician, Dr. Manley, wrote and signed a release to return to regular work based on unchallenged information about the nature of claimant's job. We are persuaded that claimant was medically stationary and that he was released to return to regular work and that issuance of the Determination Order was correct.

At the time of the February 1984 request for authorization from SAIF to schedule the reconstructive surgery, Dr. Manley had not advised claimant that the surgery was recommended. Claimant did not learn that Dr. Manley had requested and obtained a guarantee of payment for the surgery until May 2, 1984. That claimant might at some time in the future submit to a surgical reconstruction of his ankle if some surgeon offered to perform the procedure does not prevent a finding that he was medically stationary as of February 22, 1984. At that time, there was no expectation that claimant's condition would improve either by the passage of time or by medical treatment.

ORDER

The Referee's order dated June 15, 1984 is reversed in part

and affirmed in part. Those portions of the order which set aside the Determination Order dated March 7, 1984 and which awarded temporary disability compensation from February 23 through May 22, 1984 plus penalties and attorney fees are reversed. The Determination Order dated March 7, 1984 is reinstated with the modification that claimant was determined to be medically stationary on February 22, 1984. The remainder of the Referee's order is affirmed.

JAMES T. PHILLIPS, Claimant
Velure & Bruce, Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 84-05296
November 25, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Brown's order that: (1) affirmed the self-insured employer's denial of claimant's aggravation claim involving his psychological condition; and (2) failed to address claimant's request for reimbursement for prescription medication and travel expenses associated with claimant's psychiatric treatment, thereby de facto denying claimant's claim. The self-insured employer cross-requests review of those portions of the order that: (1) set aside the employer's nine denials for psychiatric services; (2) ordered the employer to pay an attorney fee of $150 on each of the overturned denials; and (3) assessed a penalty and attorney fee for the employer's alleged unreasonable denial of May 16, 1984. The issues on review are aggravation, reimbursement for medical expenses, compensability of medical services, attorney fees on the employer's denials and penalties and attorney fees on the denial of May 16, 1984.

On the issue of penalties and attorney fees for the employer's May 16, 1984 denial, we affirm the order of the Referee.

On the issue of claimant's request for reimbursement for prescription medication and travel expenses, we note that although claimant raised the issue at hearing, the Referee did not address it in his order. The failure to address the issue constituted a de facto denial of claimant's request.

After reviewing the record, we find that claimant is not entitled to reimbursement. The medical expenses claimed were incurred during a period in which our prior order finding claimant's psychological condition to be compensable was before the Court of Appeals on appeal by the self-insured employer. ORS 656.313(1) provides that filing by an employer of a request for review by the court does not stay payment of compensation to the claimant. ORS 656.313(4), however, provides that for purposes of the section, "compensation" does not include the payment of medical services. Because claimant's claim is for medical services incurred during a period of appeal, it must be denied.

With regard to claimant's aggravation claim, we reverse the Referee's order. The Referee found that claimant had incurred no more than a symptomatic worsening of his psychological condition since the last arrangement of compensation. Although apparently recognizing that a symptomatic worsening alone may represent a compensable aggravation, James W. Foushee, 36 Van Natta 901 (1984), the Referee found that claimant had received awards of permanent partial disability (totaling 30 percent) that

contemplated periodic symptomatic flare-ups, see Jimmie B. Hill, 37 Van Natta 728 (1985), and denied the claim.

We disagree with the Referee's holding for two reasons. First, the medical evidence consists primarily of a statement from claimant's treating psychiatrist that claimant's psychological condition has worsened since the last arrangement of compensation. Second, although claimant has received permanent partial disability awards totaling 30 percent, the awards were apparently for claimant's low back. There is no evidence that claimant has received prior awards for his psychological disability. We are persuaded that claimant has incurred a compensable aggravation of his psychological condition. We are also convinced, as was the Referee, that the psychiatric treatments denied by the employer were related to claimant's compensable psychiatric condition. The Referee's order in that regard shall be affirmed.

The remaining issue is claimant's attorney's fee. Claimant submitted nine claims for psychiatric services, each of which was denied separately by the self-insured employer. Each denial was overturned by the Referee, and he awarded a separate fee of $150 for each, for a total of $1,350. On review, the employer argues that a separate fee for each denial was inappropriate. Claimant's attorney argues that because the normal range of attorney fees is from $800 to $1,200 for a denial, he is entitled to nine times that amount. He requests a fee in the range of $7,200 to $10,000.

Attorney fees are to be based on a number of factors including efforts expended by claimant's attorney and the results obtained for the claimant. Kenneth E. Chouquette, 37 Van Natta 927 (1985). After reviewing the record, we find that claimant's attorney will be adequately compensated by a fee of $900 for prevailing at hearing, and $200 on Board review, on the several denied medical service claims. He shall receive an additional fee for services at hearing and on Board review for prevailing on the aggravation claim.

ORDER

The Referee's order dated May 16, 1985 is reversed in part, modified in part and affirmed in part. That portion of the order that upheld the self-insured employer's denial of claimant's aggravation claim is reversed and the claim is remanded to the self-insured employer for payment of compensation according to law. For prevailing on the aggravation claim, claimant's attorney is awarded a fee of $850 at hearing and $300 on Board review, both fees to be paid by the self-insured employer. That portion of the order that awarded claimant's attorney $1,350 for services at hearing with regard to denied medical service claims is modified, and claimant's attorney is awarded a fee of $900 for services at hearing on the denials. Claimant's attorney is awarded a fee of $200 for services before the Board on that issue. The remainder of the order is affirmed. For prevailing on the penalties and fees issue before the Board, claimant's attorney is awarded $100, to be paid by the self-insured employer.

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

WCB 82-09391
November 25, 1985
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 9, 1985. In response to claimant's request, the Board issued an Order of Abatement to allow sufficient time to consider the request and the self-insured employer's response. In the Board's Order on Review, a majority of the Board concluded that the employer was not obligated to comply with a Determination Order's award of permanent disability once it had issued its partial denial. Leokadia W. Piwowar, 37 Van Natta 21 (1985).

As a preliminary matter, the insurer has requested that former Board member Barnes be made a pro tem member for the express purposes of reconsidering this matter. Mr. Barnes was a member of the majority in the Board's Order on Review. The insurer cites no authority for its request and we have found none. See ORS 656.712. Accordingly, we deny the request.

The insurer has further requested permission to present oral argument. Claimant has made a similar offer provided that we considered it helpful in conducting our review. We normally will not entertain oral arguments. OAR 438-11-010(1). Inasmuch as this matter has been fully developed and briefed, we conclude that oral argument will not be necessary. Consequently, the requests for oral argument are denied.

Following further review of this matter, we grant claimant's motion for reconsideration. On reconsideration, we conclude that the employer's so-called partial denial was, in effect, a backup denial and, as such, prohibited by Bauman v. SAIF, 295 Or 788 (1983). Therefore, the employer should have paid permanent disability benefits until the date of the Referee's order and should be assessed penalties and attorney fees for failing to pay this compensation. Accordingly, the Referee's order is affirmed with one exception.

The salient facts are as follows. Claimant sustained two work-related low back injuries, one in August 1980 and the other in August 1981. The employer accepted both injury claims. Claimant was subsequently found medically stationary and a December 1982 Determination Order issued, awarding her 40% permanent disability. Claimant requested a hearing. Soon after, an independent medical examiner concluded that all of claimant's back impairment was attributable to the natural progression of claimant's preexisting condition, that her preexisting condition was neither worsened nor accelerated by the industrial injuries, and that her injuries had fully resolved without any resulting permanent impairment. Since claimant had requested a hearing, the employer was unable to obtain reconsideration from the Evaluation Division. See ORS 656.268(4). Consequently, the employer issued its denial, contending that claimant had suffered a temporary symptomatic flareup and had not experienced any work-related permanent impairment.

We agree with the Referee that the preponderance of the persuasive evidence establishes that claimant's permanent back impairment is attributable to claimant's noncompensable underlying condition, which was neither caused nor accelerated by her employment or by industrial injury. Therefore, claimant has

failed to prove that she sustained a permanent loss of earning capacity as a result of her compensable injuries. See ORS 656.214(5).

Moreover, we agree with the Referee's conclusion that the employer must comply with the Determination Order through the date of the Referee's order. As noted in Board member Lewis' dissenting opinion in the Board's previous order, to do otherwise would permit the employer's "whim to replace the orderly system provided for in the statute." The employer's denial is nothing more than a thinly veiled attempt to deny compensability at this late date. Such a denial is precluded by Bauman, supra., which reasoned as follows:

> "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.

Rather than issuing a denial and refusing to comply with the Determination Order, the employer should have continued to provide claimant compensation until otherwise ordered. The appropriate time to assert its contention that claimant's permanent disability was attributable to a preexisting noncompensable condition and not to claimant's compensable injuries was at the hearing concerning the extent of claimant's permanent disability. At that time the matter could be fully litigated in an open forum. In view of our conclusion today, the employer could then relieve itself of any further obligation under the Determination Order by persuasively establishing that claimant suffered no permanent loss of earning capacity due to her compensable injuries. See ORS 656.214(5). We consider this method, designed to litigate the matter by means of an "extent of disability" analysis rather than through a "compensability" analysis, to be the more efficient and appropriate procedure. The Court of Appeals would appear to favor this procedure as well. See Roller v. Weyerhaueser, 67 Or App 583 (1984).

Inasmuch as we have concluded that the denial was invalid pursuant to Bauman, it follows that it cannot be upheld. Consequently, we reverse that portion of the Referee's order that "approved" the so-called partial denial of February 7, 1983. Accordingly, claimant is entitled to a reasonable employer-paid attorney fee for overturning the employer's denial of compensability. See ORS 656.386.

ORDER

On reconsideration, the Board's Order on Review dated January 9, 1985 is set aside in its entirety and replaced by this Order on Reconsideration. The Referee's order dated July 7, 1983 is affirmed in part and reversed in part. The self-insured employer's denial dated February 7, 1983 is set aside. Claimant's attorney is awarded $1000 for services at the hearing level and on Board review concerning the overturning of this denial. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $500 for services rendered on Board review concerning the issues raised in the cross-request, to be paid by the self-insured employer.

Chairman Ferris Concurring in Part and Dissenting in Part:

On reconsideration of this matter, I agree with the majority that it was improper for the self-insured employer to unilaterally suspend payment of the permanent partial disability benefits awarded by the Determination Order. Without addressing the academic question addressed in the previous order in this case, 37 Van Natta 21, whether ORS 656.262(2) should be construed broadly enough to be said to permit an insurer or employer to unilaterally terminate permanent disability compensation after it had been ordered to pay such compensation by a valid Determination Order, I conclude that validly promulgated rules of the Workers' Compensation Department bind insurers and employers to pay such compensation until otherwise authorized by the Department, a Referee, the Board or a court. Although neither of the parties addressed the point, I believe that OAR 436-54-310(5)(a) is dispositive of the question. That rule provides that permanent partial disability benefits must be commenced within 30 days of a Determination Order that awards such benefits. See Hutchinson v. Louisiana-Pacific, 67 Or App 577, 580-81 (1984). OAR 436-54-310(6) further provides that continuing compensation shall be paid in monthly sequence as earned. While there are mechanisms to suspend payments of benefits in certain circumstances, none of those circumstances are present in this case. The Department's rules relating to the timely payment of compensation are binding upon insurers and self-insured employers until declared otherwise by an appropriate court.

We recently held in C. D. English, 37 Van Natta 572, 573 (1985), that it was unreasonable for an insurer to unilaterally suspend payment of temporary disability compensation ordered by a Determination Order, basing our decision upon OAR 436-54-310(3)(e), which requires payment of temporary disability compensation within 14 days of a Determination Order that awards such benefits. I see no meaningful distinction between the situation in English and the situation in this case. See also Allen v. Fireman's Fund Ins. Co., 71 Or App 40, 47 (1984) (unreasonable for insurer to suspend permanent disability during claim reopening while temporary disability paid).

I respectfully dissent, however, from that portion of the majority's order on reconsideration that sets aside the self-insured employer's denial. The basis of the majority's decision is that the denial is prohibited by Bauman v. SAIF, 295 Or 788 (1983). I disagree, and I would affirm the Referee's decision on this point.

As the majority correctly points out, the Bauman case prohibits an insurer or self-insured employer from accepting a claim, making payments over an extended period of time, and then changing its mind about compensability at some later date. 295 Or at 794. Even so, a claim at first accepted may later be denied for any reason within the first 60 days. Wheeler v. Boise Cascade Corp., 298 Or 452, 456 (1985). Thereafter, a denial may be sustained only upon a showing of "fraud, misrepresentation or other illegal activity." Bauman v. SAIF, supra, 295 Or at 794. This statement of the law does not, however, apply to the facts of this case, as analysis of those facts clearly shows.

In August 1980 and again in August 1981 claimant sustained minor low back injuries at work. Claims were accepted for each of these incidents. Between 1980 and 1982 claimant was

examined by numerous physicians, no two of whom were in complete agreement as to the etiology of claimant's back problem. The treating and examining physicians did, however, generally agree that claimant was medically stationary, whatever really was the cause of her condition.

On August 31, 1982 the employer sent its first partial denial, which was a denial of continuing palliative chiropractic treatments. Claimant's claim was closed by a Determination Order dated December 13, 1982 that awarded 128 degrees for 40 percent unscheduled permanent partial disability. Claimant immediately requested a hearing. 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 ankylosing spondylitis, which preexisted both of her industrial injuries; the ankylosing spondylitis was not caused, worsened (except possibly in a temporary symptomatic sense) or accelerated by the minor industrial injuries; and, claimant's industrial injuries had fully resolved without any permanent impairment "due to" the injuries. Subsequently, most of the physicians who had previously treated or examined claimant indicated their agreement with Dr. Rosenbaum's findings and conclusions. The Referee agreed, also, with Dr. Rosenbaum's conclusions, as do all three members of this Board (and one former member).

The question, then, is simply, "What did the employer accept?" I believe the evidence establishes quite clearly that the employer accepted two minor low back strains. The employer did not accept a preexisting degenerative disease -- ankylosing spondylitis. In fact, less than 30 days after the employer received its first notice that claimant's condition, for which she was seeking compensation, was anklyosing spondylitis, it denied responsibility for that condition. It did not deny responsibility for the two low back strains.

What the employer did in this case, insofar as the denial is concerned, was totally correct. It issued a post-closure partial denial of responsibility for a totally new condition, which the evidence overwhelmingly establishes had nothing whatsoever to do with the two accepted low back strains. This procedure is authorized, if not encouraged, by the court's decisions in 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).

The only connection between the low back strains and the ankylosing spondylitis is that they happen to involve the same part of claimant's body. What the majority misses is that this is not an occupational disease case. The employer was not asked to accept and did not accept a condition; the employer was asked to accept and did accept two injuries, both of which were diagnosed as strains. By setting aside the employer's denial on the basis of Bauman, the majority is, in effect, proclaiming that the employer is responsible for claimant's ankylosing spondylitis, that the ankylosing spondylitis is compensable, and, at least by implication, that claimant is entitled to permanent disability compensation for ankylosing spondylitis. I believe that the result compelled by relying on Bauman is inconsistent with the majority's finding that claimant has not proven that the accepted condition resulted in a permanent loss of earning capacity. The ankylosing spondylitis did result in a permanent loss of earning

capacity. That loss of earning capacity is either compensable or it is not. If Bauman applies, the ankylosing spondylitis is compensable, if only as a result of a legal fiction. Bauman v. SAIF, supra, does not preclude an employer or insurer from denying a condition it never accepted. The Bauman rationale simply does not apply to this case, and I respectfully dissent from the majority's holding that it does.

JERRY W. SARGENT, Claimant
Evohl F. Malagon, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 84-02567
November 25, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee T. Lavere Johnson's order which: (1) set aside its denial of claimant's low back injury claim; and (2) found that a September 15, 1984 Determination Order had prematurely closed claimant's left leg injury claim. On review, the employer contends that claimant failed to establish the compensability of his back claim.

The Board affirms the order of the Referee with the following comments.

Inasmuch as claimant has been employed by the same self-insured employer throughout the course of his prior claims, as well as the present claim, employer/insurer responsibility for his current condition is not an issue. Consequently, the "last injurious exposure" rule has no application to this situation.

The requirement that claimant must prove a worsening of his underlying condition to have a compensable claim does not apply in industrial injury cases. Boise Cascade v. Wattenbarger, 63 Or App 447 (1983); Richard W. Mays, 36 Van Natta 807 (1984). In order to establish the compensability of his injury claim, claimant must prove that his injury was a material contributing cause of his existing disability. Hutcheson v. Weyerhaeuser Co., 288 Or 51 (1979); Harris v. Albertson's, Inc., 65 Or App 254 (1983). However, an injury which produces symptoms of a preexisting underlying condition may only obligate an employer/insurer to pay for the symptomatic worsening without rendering the underlying condition itself compensable. Roy L. Bier, 35 Van Natta 1825 (1983).

Following our de novo review of the medical and lay evidence, we are persuaded that claimant's December 1983 industrial injury was a material contributing cause of his increased back symptoms, subsequent need for further medical treatment, and time missed from work. Accordingly, claimant has established the compensability of his claim. The questions as to whether claimant's preexisting back condition has worsened or whether he sustained permanent disability resulting from this compensable injury shall be addressed at the time of claim closure.

ORDER

The Referee's order dated May 14, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the self-insured employer.

WAYNE L. TRESCH, Claimant
Evohl Malagon, Claimant's Attorney
Pamela Schultz, Defense Attorney

WCB 84-06173
November 25, 1985
Order of Dismissal

The insurer has requested review of Referee's order dated October 9, 1985. The request for review was filed with the Board on November 13, 1985, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

JOHN T. VOLLAND, Claimant
Vick & Assoc., Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys
Cummins, et al., Defense Attorneys

WCB 84-07564 & 84-10066
November 25, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of those portions of Referee Quillinan's order which: (1) upheld EBI Companies' denial of claimant's aggravation claim for his low back; and (2) failed to award claimant's attorney a fee for services at hearing in securing a modification of the denial to reflect claimant's continued entitlement to medical services and in relation to a dispute regarding insurer responsibility.

The Board affirms those portions of the Referee's order upholding the aggravation denial.

EBI conceeds that claimant's attorney is entitled to a fee for his efforts at hearing in prevailing on that portion of its denial that denied responsibility for all future Workers' Compensation benefits. In setting a reasonable attorney fee for services a hearing, we consider several factors, including the apparent efforts of the attorney and the results obtained. Compare Barbara A. Wheeler, 37 Van Natta 122 (1985); with OAR 438-47-010(2). Having reviewed the record, we find that an award of $600 for these services would be reasonable.

ORDER

The Referee's order dated March 14, 1985 is affirmed in part and modified in part. The order is modified to award claimant's attorney a reasonable fee of $600 for services at hearing, to be paid by EBI Companies. The Referee's order is affirmed in all other respects.

NANCY E. CUDABACK, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Noreen K. Saltveit & Assoc., Defense Attorneys
Moscato & Byerly, Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 83-08031, 83-03359, 84-05661, 84-12695 & 85-01701
November 26, 1985
Order of Abatement

We issued our Order on Review on November 4, 1985. Shortly thereafter, we received, through our staff, a telephone inquiry relating to the language in our order that dealt with

disability. We have determinaed that the telephone inquirer made no requests or suggestions as to any specific changes in the order. Prompted by the inquiry, we reviewed our first order and found that it incompletely disposed of the case. We, therefore, on our own motion issued an Amended Order on Review on November 25, 1985 to correct the previous order.

We now conclude that we erred in issuing an amended order without having given notice to all parties to this complex case that we had received an ex parte request for clarification and without having given all parties an opportunity to respond. We emphasize that the content of the amended order was arrived at upon our own motion, and not at the specific suggestion of any party. Nonetheless, we conclude that all parties should be permitted to comment.

Our previous orders dated November 4, 1985 and November 25, 1985 are withdrawn. The Board will consider comments from all parties on the following issues: (1) what was the total of all awards of unscheduled permanent partial disability awarded to claimant through and including the date of the Referee's order, April 24, 1984; and (2) assuming claimant is entitled to a total unscheduled permanent partial disability award of 20 percent (48 degrees), what portion of that award is the responsibility of Kemper Insurance Company. Comments will be considered by the Board if received within 20 days from the date of this order.

IT IS SO ORDERED.

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

WCB 83-07720
November 29, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee Menashe's order that directed it to pay compensation previously ordered paid by Referee Mulder. Claimant cross-requests review of that portion of the Referee's order that denied her request for a penalty for unreasonable resistance to the payment of compensation. The issues are: (1) whether the employer is required to pay compensation ordered paid by a Referee; and (2) penalties.

Claimant originally requested a hearing on issues of compensability and extent of disability in WCB Case No. 82-09391. That case was heard by Referee Mulder. He issued an order in which he approved the employer's denial of claimant's ankylosing spondylitis condition. The employer had denied that condition after the issuance of a Determination Order granting claimant an award of 128 degrees for 40 percent unscheduled permanent partial disability on account of her low back. After issuing its denial, the employer suspended payment of the permanent disability benefits ordered by the Determination Order. Although Referee Mulder determined that claimant was not entitled to the 40 percent award because her disability was not due to a compensable condition, he nevertheless ordered the employer to pay the compensation awarded by the Determination Order that became due from the date of the denial until the date of the hearing and also assessed a 25 percent penalty on the amounts not paid. Claimant and the employer both requested Board review.

The issues raised by Referee Mulder's order are not relevant to our resolution of this case. Those issues were complex questions of law and fact, ultimately resolved by a divided Board. See Leokadia W. Piwowar, 37 Van Natta 21, order abated, 37 Van Natta 297, Order on Reconsideration, 37 Van Natta 1591 (WCB Case No. 82-09391, January 9, 1985, January 17, 1985, November 25, 1985). The only relevant inquiry in this case is whether the employer was required to pay the compensation ordered paid by Referee Mulder and, if so, whether a penalty should have been assessed for failure to do so.

ORS 656.313 provides in relevant 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."

OAR 436-54-310(5) (renumbered 436-60-150, May 1, 1985) provides in relevant part:

> "Timely payment of permanent disability benefit has been made when paid no later than the 30th day after:
>
> ". . . . .
>
> "(b) date of any litigation order which orders permanent disability."

The obligation to pay compensation arises immediately from a Referee's order directing such payment, and failure to pay pursuant to such an order is unreasonable delay in the payment of compensation. Hutchinson v. Louisiana-Pacific, 67 Or App 577, 580-81, rev den, 297 Or 340 (1984). Whether the Referee is correct is a question to be resolved by the Board or the courts. The clear mandate of ORS 656.313(1) and OAR 436-54-310(5)(b) required payment of the compensation ordered paid by Referee Mulder within 30 days of his order. Payment was not made. Referee Menashe was correct in ordering the employer to comply with Referee Mulder's order by paying the permanent disability compensation withheld. He should, however, also have assessed a penalty and associated attorney fee. Hutchinson v. Louisiana-Pacific, supra.

The employer's only argument in favor of its decision to not pay pursuant to Referee Mulder's order was that it viewed the sums it was directed to pay as being in the nature of a penalty. We do not find this argument persuasive. Referee Mulder ordered a penalty in addition to the compensation he ordered paid. We conclude that the Referee's decision to order payment was based upon his conclusion that the employer was obligated to continue paying the benefits awarded by the Determination Order until

relieved of that obligation by a Referee, the Board or a court. Whether or not that decision was correct (and the Board has unanimously agreed that it was), the employer was obligated to pay.

ORDER

The Referee's order dated October 4, 1983 is modified. Claimant is awarded an additional amount equal to 25 percent of the compensation ordered paid by the Referee as a penalty for unreasonable resistance to the payment of compensation. Claimant's attorney is awarded $300 as a reasonable attorney fee for having obtained a penalty and $450 for services on Board review as a reasonable attorney fee in connection with the employer's appeal, both sums to be paid by the self-insured employer in addition to compensation. The remainder of the Referee's order is affirmed.

MARK E. ROBERTS, Claimant
Robert J. Barsocchini, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-11389
November 29, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Tuhy's order which upheld the insurer's denial of the claim for injury to claimant's deltoid muscle in his right shoulder. The issue on review is compensability.

Claimant was injured in a non-work related motor vehicle accident in June 1982. He suffered injuries to the rhomboid muscles, which are related to the shoulder, and back and dorsal scapular nerve entrapment. His doctor performed surgery in March 1983. Claimant obtained employment as a welder in December 1983, even though he was continuing to recover from the motor vehicle accident and surgery. A subsequent surgery was performed in May 1984 to alleviate symptoms of subacromial bursitis related to the motor vehicle accident. Claimant continued with physical therapy and was released to work six hours per day as his strength and mobility increased in August 1984.

One day during the third week of August 1984 claimant was carrying a steel plate with three other men. Claimant felt a tearing sensation in the deltoid muscle of his right shoulder. He thought at the time that it was a minor strain and would heal spontaneously. The physical therapist noted the complaint and modified the therapy slightly to accommodate claimant's discomfort. Claimant worked at lighter duty work for a day or two, then missed work the Friday of that week. He did not work on the weekend. The following week claimant bumped the shoulder on a temperature probe inside a tank. He reported the injury and sought medical attention. The attending physician aspirated serosanguineous fluid five times from a plum-sized knot that formed on claimant's shoulder. The doctor also confirmed that claimant had torn deltoid muscle fibers. The doctor opined that claimant was temporarily disabled due to the injury at work since the effects of the motor vehicle accident were no longer disabling.

The Referee found that claimant had to prove that his condition had worsened as a result of the work incident. Claimant's brief used the analysis of Weller v. Union Carbide, 35 Or App 355 (1978), aff'd 288 Or 27 (1979), as the framework of his theory of compensability. The insurer and claimant relied on Larson v. Brooks-Scanlon, 54 Or App 861 (1981), rev. den. 292 Or 581 (1982), as dispositive.

Claimant suffered an injury to his shoulder at work. A Weller analysis does not apply to the determination of compensability in injury cases. Boise Cascade v. Wattenberger, 63 Or App 447 (1983). The authorities relied upon by the Referee and the parties are inapplicable in this industrial injury case.

Claimant suffered an injury to the deltoid muscle of his right shoulder in the course of his employment. It was unrelated, by his doctor's statement, to claimant's motor vehicle accident injury and disability. The context of the doctor's final report related claimant's industrial injury as a secondary injury because it was less serious and because it happened second, not because it was a result in some way of the motor vehicle accident. We find that claimant carried his burden of proof that he suffered an injury in the course of his employment and that the injury required medical services and caused disability. Therefore, we reverse the Referee's order and remand the claim to the insurer for processing.

ORDER

The Referee's order dated May 16, 1985 is reversed. The denial of the insurer is set aside and the claim is remanded to the insurer for processing. Claimant's attorney is awarded $1,200 for services at hearing and $350 for services on Board review, to be paid by the insurer.

DANIEL L. JORDAN, Claimant
Noreen K. Saltveit, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-10203
August 30, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Pferdner's order which: (1) upheld a November 4, 1983 Determination Order as a proper closure of this May 27, 1981 injury claim; (2) affirmed the Determination Order award of 32° (10%) unscheduled disability for injury to claimant's neck; (3) upheld the SAIF Corporation's de facto denial of an alleged aggravation claim; and (4) declined to award interim compensation and/or impose a penalty/attorney's fee for failure to process the alleged aggravation claim. The issues are whether the aforementioned Determination Order prematurely closed this claim; in the alternative, whether claimant's injury-related condition has compensably worsened since claim closure; in the alternative, whether claimant is entitled to an increased unscheduled disability award; whether SAIF was obligated to pay interim compensation in response to the alleged aggravation claim; and whether penalties/attorney fees are appropriate.

We agree with the Referee's determination that the evidence fails to establish this claim was prematurely closed. Therefore, we affirm that portion of his order upholding the Determination Order as a proper closure of the claim.

The record, when viewed as a whole, ORS 656.273(7), fails to establish a worsening of claimant's injury-related condition. Therefore, we affirm that portion of the order which upheld SAIF's de facto aggravation claim denial.

On the issue of unscheduled disability, we find that, although claimant may have sustained some minimal injury to his

low back as a result of his 1981 fall, there is insufficient evidence to persuade us that claimant suffers any permanent impairment of his low back due, in material part, to his compensable industrial injury. Considering the evidence of permanent neck impairment, and claimant's age, education, training, skills and work experience, we find that the 32° (10%) unscheduled disability adequately and appropriately compensates him for the loss of earning capacity attributable to this neck injury.

Although we find that claimant has failed to establish a compensable aggravation claim, we find that Dr. Thompson's October 30, 1984 letter to SAIF, which was received November 5, 1984, constitutes a valid aggravation claim, including medical verification of an inability to work as a result of a worsened condition allegedly related to claimant's original industrial injury. See Hewes v. SAIF, 36 Or App 91 (1978); Deloris J. Spores, WCB Case No. 84-03275, 37 Van Natta 1169 (decided this date); Gerald I. Halle, 37 Van Natta 515 (1985); Douglas Dooley, 35 Van Natta 125, 127 (1983). Thus, SAIF was obligated to pay interim compenstion within 14 days of receipt of Dr. Thompson's letter. ORS 656.273(6). No interim compensation was paid, nor was the claim denied. On or about December 11, 1984 claimant filed a supplemental request for hearing challenging SAIF's de facto denial of his aggravation claim. On or about January 23, 1985 SAIF filed its amended response, asserting that its denial should be affirmed.

The Referee failed to distinguish between proving a compensable aggravation on the one hand, and filing a claim for aggravation sufficient to trigger SAIF's claims processing obligations, on the other hand. See generally Gerald I. Halle, supra, Douglas Dooley, supra, and cases cited therein.

Claimant is entitled to interim compensation from November 5, 1984, the date of notice of claimant's medically verified inability to work as a result of an allegedly worsened injury-related condition, until the date that SAIF filed its response to claimant's request for hearing, January 23, 1985. Martha A. Baustian, 35 Van Natta 1287, 1288 (1983). The fact that claimant requested a hearing challenging a de facto denial did not discharge SAIF's obligation to pay interim compensation, although it would excuse SAIF's failure to formally deny the aggravation claim. See Joyce A. Morgan, 36 Van Natta 114, aff'd mem. 70 Or App 616 (1984). SAIF's unexplained failure to pay interim compensation at any time prior to its January 23, 1985 response to claimant's request for hearing was unreasonable. See Jones v. Emanuel Hospital, 280 Or 147 (1977). Under the circumstances (no denial and no response to the claim for approximately 11 weeks), we find the maximum penalty appropriate, together with an associated attorney's fee. See Zelda M. Bahler, 33 Van Natta 478, 479, 481 (1981), rev'd in part on other grounds 60 Or App 90 (1982).

ORDER

The Referee's order dated February 15, 1985 is reversed in part. That portion of the order which declined to award interim compensation and impose a penalty/attorney's fee for failure to pay interim compensation is reversed. Claimant is awarded interim compensation from November 5, 1984 through and including January 22, 1985. The SAIF Corporation shall pay claimant, as and

for a penalty, an amount equal to 25% of the interim compensation awarded herein; in addition, the SAIF Corporation shall pay to claimant's attorney an associated fee of $400. The remainder of the Referee's order is affirmed.

ROYCE J. BURIAN, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-08250
December 3, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Quillinan's order which increased claimant's award of scheduled permanent disability for loss of use of his left hand from 10 percent (15 degrees), as awarded by an August 31, 1982 Determination Order and a prior Determination Order, to 30 percent (45 degrees). On review, SAIF contends the award was excessive. We agree and modify claimant's permanent disability award.

Claimant sustained a severe mangling and crushing injury to his left hand in May 1981. His ring finger was amputated at the metacarpophalangeal joint.

Claimant was initially found medically stationary in September 1981 by his treating physician, Dr. Jewell. The doctor reported that claimant's hand had "healed nicely." Dr. Jewell further noted that claimant's left hand demonstrated decreased function, easy fatigability, abnormally low dexterity and a less than normal grasp.

Claimant was also examined by Ms. Emmes, occupational therapist. Ms. Emmes reported that claimant's left hand grasp remained less than 10 percent of normal and that his palmar and lateral pinch strengths were 55 percent and 65 percent of normal respectively. The therapist noted that the left hand tired after 10 minutes of continued use with "an overall discomfort and occasional tingling." Ms. Emmes further reported that claimant exhibited a hypersensitivity surrounding the amputation site which radiated near the proximal interphalangeal joint of the middle finger, the web between the ring and middle fingers, and proceeded palmar to the palmar crease.

A Determination Order issued on December 3, 1981. Based on amputation, sensory change and weakness, claimant was awarded 10 percent scheduled permanent disability for loss of use of the left hand.

In February 1982 Dr. Jewell surgically removed a post-traumatic neuroma from claimant's left ring finger. On April 29, 1982 Dr. Jewell found claimant medically stationary. Dr. Jewell opined that based on Ms. Emmes' final examination of that date, claimant demonstrated moderate impairment at the amputation site in terms of decreased sensation. It was Dr. Jewell's opinion that claimant suffered no increase in his disability as a result of the neuroma formation. Ms. Emmes' report concerning that April 1982 examination is not in the record.

A second Determination Order issued August 31, 1982. Claimant was awarded no additional permanent disability.

Claimant experiences "phantom pain" at the site of the amputated left ring finger. Upon exertion, an area surrounding

the knuckles of his middle and ring finger becomes stiff and numb. The left hand also tires easily and lacks dexterity. Cold temperatures are bothersome, particularly around the amputation site. Prior to the injury his left hand was the stronger hand, primarily due to a previous right hand injury. However, following the left hand injury, he stated that he did not have the strength in his left hand that he once had. His grip strength had further diminished "a little bit" since his February 1982 surgery. In claimant's opinion he had lost "about 30 percent" in left hand grip strength.

The Referee increased claimant's award of permanent disability to 30 percent for loss of use of the left hand. In arriving at her determination, the Referee considered claimant's amputation, sensory loss, weakness, loss of pinch strength and reduced grip strength.

When decreased grip strength results from amputation or decreased joint range(s) of motion, and not from neurological origins, atrophy, or tissue loss (other than amputation), an additional allowance for loss of grip strength is not to be included in determining the extent of permanent disability. OAR 436-65-530(2)(c), (2)(d), and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), and (5)(b), May 1, 1985). Additional hand impairment in the form of loss of grip strength is not considered where the evidence fails to establish that the claimant has a greater loss of grip strength than would be a natural consequence of the impairment in his injured fingers. Charles H. Taylor, 35 Van Natta 168 (1983); Charles R. Jackson, 37 Van Natta 1609 (decided this date); Steven D. Silva, 37 Van Natta 1621 (decided this date).

If reduced grip strength from amputation or loss of range of motion was considered in finger injuries, nearly every finger injury would result in an award of forearm disability. This is due to the fact that most finger amputations or losses of range of motion are accompanied by a degree of diminished grip strength. A forearm disability award automatically results because a loss of grip strength is rated as a partial loss of the forearm. OAR 436-65-530(5)(a) (renumbered OAR 436-30-220(5)(a), May 1, 1985). The limitations of OAR 436-65-530(2)(c), (2)(d), and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), and (5)(b), May 1, 1985) are apparently designed to foreclose this illogical result. Furthermore, the administrative rules, taken as a whole, suggest that a commensurate reduction in grip strength has already been considered in formulating a scheduled disability award for loss of use or function of the fingers, when based on amputation or loss of range of motion.

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's reduced grip strength is attributable to neurological causes, atrophy, or tissue loss (other than amputation). Therefore, loss of grip strength should not be considered in evaluating the extent of claimant's disability.

Dr. Jewell opined that claimant demonstrated moderate impairment at the amputation site in terms of decreased sensation. However, the doctor not only did not attribute claimant's previously reported reduced grip strength to neurological origins, he failed to mention grip strength entirely. Moreover, Dr. Jewell concluded that claimant's

disability rating was unchanged. At the time of Dr. Jewell's report, claimant had been awarded 10 percent permanent disability.

Apparently Dr. Jewell based his opinion on a final examination performed by Ms. Emmes in April 1982. Unfortunately, a report on this examination does not appear in the record. Therefore, the most recent report from Ms. Emmes is dated September 1981, well before claimant's February 1982 neuroma surgery and the April 1982 final examination. Ms. Emme noted in her September 1981 report that claimant experienced hypersensitivity surrounding the amputation site and also demonstrated a significantly reduced grip strength. However, she failed to relate claimant's loss of grip strength to this hypersensitivity.

Claimant testified that he had lost about 30 percent grip strength in the left hand and that, following exertion, he experienced stiffness and numbness near the knuckles of his middle and ring fingers. However, claimant's testimony did not indicate that he considered his problems permanent. More important, he did not relate his reduced grip strength to atrophy, tissue loss or neurological origins.

When claimant's testimony is considered in conjunction with the reports of the treating physician and the occupational therapist, we are unable to conclude that claimant's reduced grip strength is attributable to anything other than the natural consequence of the impairment of his injured fingers.

Since we conclude that loss of grip strength should not be considered, it is necessary to redetermine the extent of claimant's permanent disability. In conducting our redetermination, we are mindful that the extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980). Furthermore, we use the Department's rules for rating of disability as guidelines. See Fraijo v. Fred N. Bay News Co., 59 Or App 260 269 (1982). However, in cases involving scheduled, as opposed to unscheduled, disability, we find the rules highly persuasive, both because they follow the specificity of the statutes relating to scheduled disability, ORS 656.214(2)-(4), and because they are based upon commonly accepted medical principles.

The medical and lay evidence establishes that claimant has suffered impairment to not only his left ring finger, but to the surrounding area of the amputation site, including some numbness in a portion of the middle finger. In arriving at our determination we have considered the physical findings and claimant's testimony, particularly those portions concerning his sensory loss, hypersensitivity, susceptibility to cold, weakness, and disabling pain. We have computed the "combined" impairment value for both the ring and middle finger and converted these values to an impairment value for the hand. OAR 436-65-510; OAR 436-65-530(1); OAR 436-65-515(3)(4) (renumbered OAR 436-30-170, 436-30-220(1), 436-30-180(3)(4), May 1, 1985). These computations result in a total award of 15 percent hand disability, which we find is adequate compensation for claimant's compensable injury.

ORDER

The Referee's order dated March 14, 1983 is modified.

In lieu of the Referee's award, and in addition to the 10 percent (15 degrees) scheduled disability awarded by the August 31, 1982 Determination Order and a prior Determination Order, claimant is awarded 5 percent (7.5 degrees) scheduled disability for a total award to date of 15 percent (22.5 degrees) scheduled permanent disability for loss of use of the left hand. Claimant's attorney's fee shall be adjusted accordingly.

VICTORIO R. CASTILLEJA, Claimant
Michael B. Dye, Claimant's Attorney
Rankin, et al., Defense Attorneys
Daniel DeNorch, Defense Attorney

WCB 84-00697 & 84-05900
December 3, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer, Cascade Steel Corporation (Cascade) requests review of Referee Danner's order, as affirmed on reconsideration, that set aside its denial of claimant's new injury claim and affirmed Liberty Northwest Insurance Corporation's denial of claimant's aggravation claim for the low back. The issue on review is responsibility.

We affirm the Referee's order with the following comment. In finding Cascade, the last employer on the risk, to be the responsible employer, the Referee cited Boise Cascade Corp.v. Starbuck, 296 Or 238 (1984), for the proposition that the trier of fact may allocate responsibility to the last employer if he finds that the later employment "might have" caused the disability. On review, Cascade argues that the Referee applied an improper "potential causation" standard, and that in order for the last employer to be held responsible it must be shown that the last employment actually contributed to claimant's disability.

In Boise Cascade v. Starbuck, supra, the Court held:

> "In a procedural context, if a worker presents substantial evidence of successive work-related injuries causing disability, a prima facie case for recovery from the last employer is made out. Either or any employer against whom a claim is made can still present evidence to prove that the cause of the worker's disability is another employment . . . In such a case, the trier of fact decides the case on the basis of the evidence presented. If the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause, the finding is for the worker against the last employer whose employment may have caused disability." 296 Or at 244-45. (Emphasis added.)

In the present case, the Referee's order suggests that he was in fact convinced that the last employment was the more likely cause of claimant's disability. In such a situation, the Referee could have simply allocated responsibility to the second employer without relying on the "might have" language of Starbuck.

After reviewing the record, however, we find that as a de novo trier of fact we are not convinced that either of claimant's employments was the more likely cause of his current disability. Under these circumstances, Starbuck requires that we allocate responsibility to the last employer whose employment "may" have caused claimant's disability. The evidence is that the conditions of claimant's second employment with Cascade may have caused claimant's disability. Cascade is responsible.

Because claimant's attorney did not participate on Board review, no attorney fee shall be awarded. See OAR 438-47-090(1).

ORDER

The Referee's orders dated January 25, 1985 and March 28, 1985 are affirmed.

IRENE M. GONZALES, Claimant
Michael B. Dye, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-12022
December 3, 1985
Order Denying Motion to Consolidate

The employer requested and claimant cross-requested review of Referee Foster's order. Subsequent to Referee Foster's order, claimant requested and received a hearing in WCB Case No. 85-09023. We accept claimant's representation that the issue in the latter case, heard by Referee Quillinan, was whether the employer had adequately complied with a portion of Referee Foster's order. We further accept claimant's representation that Referee Quillinan ruled against claimant and that claimant has requested Board review of that decision. Claimant has now moved the Board for an order consolidating this case with WCB Case No. 85-09023 for purposes of Board review. In the alternative, claimant moves the Board for an order striking those portions of the employer's brief that refer to Referee Quillinan's order.

Viewing claimant's representations in the light most favorable to claimant, we conclude that consolidation of the two cases is not appropriate. The question of compliance with a Referee's order to pay compensation is not dependent upon the correctness of the order. See Hutchinson v. Lousiana-Pacific, 67 Or App 577, 580-81 (1984). We are asked in this case to review the correctness of Referee Foster's order. Our decision in this case will not determine the outcome of the subsequent case, no matter what that decision is.

Regarding claimant's motion to strike that portion of the employer's brief that discusses Referee Quillinan's order, we agree with the employer's statement in response to the motion that the Board has the authority to take notice of its own administrative acts. However, to the extent that the discussion claimant moves to strike may constitute reference to matters that are beyond the record and the Board's ability to take administrative notice, if any, it will not be considered.

Claimant's motions are denied.

IT IS SO ORDERED.

FRANK H. HOSTLER, Claimant
David C. Force, Claimant's Attorney
Starr & Vinson, Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-06328
December 3, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee Podnar's order which awarded 70 percent (105 degrees) scheduled permanent disability for loss of use or function of claimant's right hand, whereas a Determination Order had awarded 20 percent (30 degrees). On review, SAIF contends that the Referee's award is excessive. We agree and modify the Referee's order.

Claimant's right hand was pulled into a hay wire drum. He sustained a crushing injury and incomplete amputation of his middle and ring fingers. The amputations were surgically completed by disarticulation of the middle finger at the distal interphalangeal (DIP) joint, and of the ring finger at the proximal interphalangeal (PIP) joint.

Claimant has a preexisting nonfunctional DIP joint of the little finger on the right hand. This impaired finger had been useful in holding and balancing objects held in that hand. However, since the ring finger's partial amputation, claimant no longer is able to use the little finger in any fashion, thereby contributing to the overall impairment of claimant's right hand.

Nerve conduction studies suggested carpal tunnel syndrome, prompting a right carpal tunnel decompression. Following claimant's recovery, his attending physician indicated that no additional impairment had resulted from the surgery.

Claimant also sustained a minimal sensory loss of the ring finger and a minimal to moderate sensory loss of the middle finger. He described an aching, as well as a numbing, sensation in the palm of his hand. His pain increases whenever he attempts to tightly grasp objects. He has little remaining use of his right hand, other than what he is able to accomplish by using his thumb and forefinger. Since his recovery, claimant has attempted to return to the logging industry on three separate occasions. However, due to his grasping and pulling limitations, each effort has been short-lived and unsuccessful.

The Referee noted a dermatological condition and described it as "a certain scaly condition on [claimant's] right palm." Claimant applies a prescribed medication for treatment of this condition, which did not preexist the injury. The Referee made the following observations concerning claimant and his hands:

> "* * * [I]t should be noted that claimant is a rather stocky individual of perhaps less-than-average height. His hands are a reflection of his general build: short, stocky and perhaps a bit on the thick side with a rather blocky-type motion. These are not the hands of a dentist or seamstress. A loss here is a complete taking. There is not the flexibility or range of motion to begin with which could accommodate or make up for what has been lost."

In evaluating the extent of claimant's right hand disability, we are mindful that the extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980). Furthermore, we use the Department's rules for rating of disability as guidelines. See, Fraijo v. Fred N. Bay News Co., 59 Or App 260, 269 (1982). However, in cases involving scheduled, as opposed to unscheduled, disability, we find the rules highly persuasive, both because they follow the specificity of the statutes relating to scheduled disability, ORS 656.214(2)-(4), and because they are based upon commonly accepted medical principles. Charles R. Jackson, 37 Van Natta 1609 (decided this date). Whenever a "loss of use" is not adequately covered by the Department's rules, that extra-rule factor should be specifically identified in the Referee's or Board's order. Clyde V. Brummel, 34 Van Natta 1183 (1982).

Our de novo review of the record has revealed no extra-rule factors, nor were any mentioned by the Referee. Claimant's amputation, consequential sensitivity, sensory loss, numbness, pain, reduced grip strength, and skin condition are all taken into consideration by the guidelines for rating the extent of scheduled permanent disability for parts of the upper extremity. OAR 436-65-500 to 436-65-532. (renumbered OAR 436-30-120 to 436-30-230, May 1, 1985).

A complicating factor in awarding claimant appropriate compensation is his preexisting little finger impairment. It is quite apparent that the finger is no longer of any use in the overall function of the right hand. Thus, claimant has sustained a loss of use or function of his little finger and is entitled to some award based upon that loss. Douglas E. Thomas, 36 Van Natta 8 (1984).

Considering the medical evidence together with claimant's testimony describing how the finger once functioned, we find that claimant had approximately 55 percent function of that finger prior to his industrial injury, which he has now lost. This impairment converts to 3 percent of a hand. OAR 436-65-515(5) (renumbered OAR 436-30-180(5), May 1, 1985).

The partial amputation of claimant's middle finger represents a 50 percent loss of the finger, while the partial amputation of the ring finger represents a 75 percent loss of that finger. OAR 436-65-502(2)(a) and (b) (renumbered OAR 436-30-140(2)(a) and (b), May 1, 1985). These values convert to 10 percent and 7 percent of a hand respectively. OAR 436-65-515(5) (renumbered OAR 436-30-180(5), May 1, 1985). Claimant experiences minimal loss of sensation in his ring finger and minimal to moderate sensory loss in his middle finger. We find it appropriate to allow an additional 20 percent for loss of sensation of the two fingers. OAR 436-65-530(1) (renumbered OAR 436-30-220(1), May 1, 1985).

We are further persuaded that claimant experiences disabling pain which interferes with work activities. We find that this interference is of a moderate degree and warrants an additional value of 10 percent. OAR 436-65-530(3) (renumbered OAR 436-30-220(3), May 1, 1985). Claimant's decreased grip strength

does not appear to be attributable to either neurological causes, atrophy, or tissue loss (other than amputation). Inasmuch as this reduction in strength apparently results from the amputation of his fingers, an additional allowance for loss of grip strength is not included. OAR 436-65-530(2)(c), (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), (5)(b), May 1, 1985); Charles R. Jackson, 37 Van Natta 1609 (decided this date). Claimant's dermatological condition warrants no more than a 5 percent allowance. OAR 436-65-530(7) (renumbered OAR 436-30-220(7), May 1, 1985).

Following our de novo review of the medical and lay evidence, and considering the above-mentioned guidelines, we conclude that an award of 45 percent scheduled permanent disability adequately compensates claimant for the loss of use or function of his right hand resulting from his compensable injury.

ORDER

The Referee's order dated November 21, 1984 is modified. In lieu of the scheduled disability awarded by the Referee, and in addition to the 20 percent (30 degrees) scheduled disability awarded by the Determination Order, claimant is awarded 25 percent (37.5 degrees) scheduled disability, for a total award to date of 45 percent (67.5 degrees) scheduled disability for loss of use or function of the right hand. Claimant's attorney's fee shall be adjusted accordingly.

CHARLES R. JACKSON, Claimant
Doblie & Assoc., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 82-04320
December 3, 1985
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated August 12, 1983. On August 30, 1983 the Board issued its Order of Abatement. Following further review, we grant the insurer's request. On reconsideration, we modify our prior order.

Claimant sustained a June 1981 crushing injury to his right index and middle fingers. The index finger was extensively lacerated and the tip was fractured. The middle finger was also lacerated. Surgery was performed on the index finger.

Following an April 1982 closing examination Dr. Jewett, claimant's treating orthopedist, reported that claimant experienced an approximately 33 percent loss of right hand grip strength, 75 percent loss of right index finger pinch strength and a 50 degree loss of range of motion at the distal phalanx of the right index finger. Dr. Jewett concluded that claimant had permanent deformity and disability in terms of ongoing tenderness and loss of range of motion at the distal phalanx joint.

On May 6, 1982 a Determination Order issued. Claimant was awarded 40 percent scheduled permanent disability for loss of use of his right index finger.

In November 1982 claimant was examined by Dr. Skelley of the Callahan Center. Claimant's complaints included constant numbness at the tip of the right index finger, sharp pain on pressure in the right index finger, cold sensations in the right hand, and periods of aching from the fingertips of the right hand to the elbow of the right arm. Dr. Skelley noted that there was

no evidence of atrophy or weakness in the muscles of claimant's upper extremities and that both of claimant's hands appeared "somewhat cooler" than normal. Testing revealed moderate slowness in the arterial effusion of the ulnar and radial arteries of both hands.

Dr. Skelley stated that he could understand the numbness of claimant's fingers and possibly the sharp pain claimant experienced on pressure of the index finger. Dr. Skelley was unable to determine why claimant had pain from his finger to his forearm. The doctor noted an approximately 80 percent diminished grip strength in the right hand. However, Dr. Skelley reported that on closer inspection and questioning, claimant had stated that his diminished strength was due to "the pressure and pain in his finger on gripping the dynameter."

Claimant credibly testified that he experiences a loss of motion, constant pain, susceptibility to the cold and a loss of sensation in the tip of his right index finger. These complaints also applied to his middle finger, but to a slightly lesser degree. Claimant further testified that since the injury the dexterity and strength of his right hand had been significantly reduced.

Based on claimant's permanently reduced range of motion, loss of grip strength, loss of sensation and disabling pain, the Referee awarded claimant 50 percent scheduled right hand disability. The insurer requested Board review, contending that loss of grip strength should not be considered in determining claimant's award of permanent disability.

In our prior order on review, we concluded that a loss of grip strength should be considered. However, we modified claimant's award to 35 percent permanent disability. Since we considered loss of grip strength in our determination, claimant's disability award evolved into forearm disability. See OAR 436-65-530(5)(a) (renumbered OAR 436-30-220(5)(a), May 1, 1985).

When decreased grip strength results from amputation or decreased joint range(s) of motion, and not from neurological origins, atrophy, or tissue loss (other than amputation), an additional allowance for loss of grip strength is not to be included when determining the extent of permanent disability. OAR 436-65-530(2)(c), (2)(d), and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), and (5)(b), May 1, 1985). Additional hand impairment in the form of loss of grip strength is not considered where the evidence fails to establish that the claimant has a greater loss of grip strength than would be a natural consequence of the impairment in his injured fingers. Charles H. Taylor, 35 Van Natta 168 (1983); Steven D. Silva, 37 Van Natta 1621 (decided this date); Royce J. Burian, 37 Van Natta 1602 (decided this date).

On further review of this record, we are persuaded that claimant's reduced grip strength is neither attributable to neurological causes, atrophy, nor tissue loss. Consequently, we find that loss of grip strength should not be considered in evaluating the extent of claimant's permanent disability.

The preponderance of the evidence suggests that claimant's grip strength is limited because of his pain, which appears to be the natural consequence of the impairment in his injured fingers. Although claimant described a loss of feeling in

both his index finger and the tip of his middle finger, he did not relate these complaints to his reduced grip strength. Instead, claimant testified that he experienced pain when he applied pressure to his right hand, such as when he gripped a hammer or a screwdriver. Dr. Skelley's report similarly attributes claimant's reduced grip strength to the pain and pressure experienced in the index finger while gripping the dynamometer. Moreover, Dr. Skelley advised that there was no evidence of any muscular atrophy or weakness in the upper extremities. Finally, Dr. Jewett foresaw permanent disability, but related this disability to ongoing tenderness and loss of range of motion.

If reduced grip strength from amputation or loss of range of motion was considered in finger injuries, nearly every finger injury would result in an award of forearm disability. This is due to the fact that most finger amputations or losses of range of motion are accompanied by a degree of diminished grip strength. A forearm disability award automatically results because a loss of grip strength is rated as a partial loss of the forearm. OAR 436-65-530(5)(a) (renumbered OAR 436-30-220(5)(a), May 1, 1985). The limitations of OAR 436-65-530(2)(c), (2)(d), and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), and (5)(b), May 1, 1985) are apparently designed to foreclose this illogical result. Furthermore, the administrative rules, taken as a whole, suggest that a commensurate reduction in grip strength has already been considered in formulating a scheduled disability award for loss of use or function of the fingers, when based on amputation or loss of range of motion.

Had claimant's loss of grip strength been considered, he would have likely received an award of approximately 35 percent forearm disability. The illogic of including loss of grip strength under these circumstances becomes apparent when one considers that had claimant's index and middle finger injury resulted in total amputation of both fingers, (without accompanying atrophy, tissue loss or neurological impairment into the hand, forearm or arm), the most claimant could have hoped to receive would have been 42 percent hand disability. See OAR 436-65-515(2) and (3) (renumbered OAR 436-30-180(2) and (3), May 1, 1985). It cannot seriously be contended that claimant's injury, which resulted in a 50 degree loss of range of motion at the distal phalanx of the index finger and some numbness in the index and middle finger, should remotely approximate the extent of disability for the total loss of use of both digits.

Since we conclude that loss of grip strength should not be considered, it is necessary to redetermine the extent of disability. In conducting our redetermination, we are mindful that the extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980). Furthermore, we use the Department's rules for rating of disability as guidelines. See Fraijo v. Fred N. Bay News Co., 59 Or App 260 269 (1982). However, in cases involving scheduled, as opposed to unscheduled, disability, we find the rules highly persuasive, both because they follow the specificity of the statutes relating to scheduled disability, ORS 656.214(2)-(4), and because they are based upon commonly accepted medical principles.

The medical and lay evidence establishes that claimant has suffered a 50 degree loss of range of motion at the distal phalanx of his right index finger. We note parenthetically that our prior order erroneously minimized this loss by concluding claimant suffered a 50 percent loss of range of motion. Claimant also experiences minimal numbness in both his index and middle fingers. Applying OAR 436-65-510(1)(a) and OAR 436-65-530(1) (renumbered OAR 436-30-170(1)(a) and OAR 436-30-220(1), May 1, 1985), we find that claimant has a total impairment value of 37 percent for the index finger and 7.5 percent for the middle finger.

A proportionate loss of the hand may be allowed where disability extends to more than one digit, in lieu of ratings on the individual digits. ORS 656.214(4). We have chosen to do so. This results in an approximate total of 10 percent right hand disability, which we conclude is an appropriate award.

Since this decision is consistent with our previous holding in Hiroshi Hitomi, 33 Van Natta 609 (1981), it is not overruled.

ORDER

On reconsideration, the Board modifies its Order on Review dated August 12, 1983. Claimant is awarded a total award of 10 percent (15 degrees) scheduled permanent disability for loss of use of his right hand. This award is in lieu of all prior awards. Claimant's attorney's fee shall be adjusted accordingly.

BARBARA A. LAWRENCE, Claimant
McNutt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-02604
December 3, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Leahy's order which awarded 80 percent (153.6 degrees) scheduled permanent disability for loss of use of the left arm, whereas a February 13, 1985 Determination Order had awarded 20 percent (38.4 degrees). On review, SAIF contends that the award should be reduced. We agree and modify the Referee's order.

Claimant was 49 years of age at the time of hearing. In June 1983, while working as a fileter for a fish packing plant, claimant slipped and fell on her left arm. Her condition was diagnosed as a severe fracture of the distal humerus.

Dr. Bert, orthopedist, has performed three surgeries on claimant's left arm. In June 1983 he performed an open reduction, inserting a "T" plate, with three threaded and two smooth pins. The bone failed to heal, requiring further surgery in January 1984. The plate and threaded pins were removed and replaced by a compression plate with five "Synthes" screws. The smooth pins, described as "completely buried in bone," were left in place. Dr. Bert also grafted bone from claimant's left iliac crest to her humerus, both anteriorly and medially. The bone still would not heal, necessitating a third surgery in September 1984. The plate and screws were removed and replaced by a "Y-type" plate, with eight "Synthes" screws. Dr. Bert again removed bone from claimant's iliac crest, this time grafting it anteriorly, laterally, and medially to the fracture site.

In January 1985 Dr. Bert reported that claimant's left humerus had finally healed and a union had developed. Claimant was denying any pain, but was "still quite weak, of course, in the triceps muscle around the humerus." She lacked 25 degrees of full extension, but had full pronation and supination. Noting that there was no obvious motor sensory impairment, the orthopedist stated that claimant's main problem was clinical depression. Dr. Bert opined that claimant was capable of light activity with no lifting over 10 to 15 pounds with the left arm. Otherwise she would be capable of doing all usual and customary work.

A Determination Order issued February 13, 1985. Claimant received 20 percent left arm permanent disability, based on loss of range of motion, surgery, and weakness.

On March 1, 1985 claimant returned to Dr. Bert, who noted that she had "really good motion of her elbow." She could flex to 120 degrees and lacked 30 degrees of full extension, with full pronation and supination. Dr. Bert concluded that claimant had minimal to moderate impairment, based upon "some residual of pain and loss of extension."

Claimant, who is right handed, has an approximately five inch scar running diagonally across the back of her left arm on both sides of the elbow. At the hearing she demonstrated the arm's range of motion. As long as the arm is supported, she can control its movements. However, when standing or raising the arm without support, she can not maintain control. For example, although she can grip dishes, she does not hold or wash them without bracing her wrist against the sink. In addition she does not lift dishes in and out of the cupboard with her left arm. Claimant further testified that her strength is diminished, noting that she can not open a new jar of peanut butter or turn a steering wheel.

Claimant experiences pain whenever the arm hangs to her side or after she engages in physical activity. The arm also feels stiff and "tingly." She could probably lift 10 pounds straight from the floor, but cannot lift above her waist. Her little finger and index finger are "a little numb," but she has "fairly good use of them." Her arm "aches terrible" if it is exposed to the cold. Consequently, she always wears long sleeves. While sleeping, claimant lays the arm across her chest for support. Since the injury the arm's maneuverability and dexterity have been reduced, resulting in a curtailing of claimant's household and recreational activities. In order to alleviate her pain, claimant either lies down, takes aspirin or resorts to a pain pill.

The Referee found claimant's testimony believable and her demonstration informative. Taking into consideration claimant's diminished range of motion, surgery, implants, weakness, motor loss, numbness, reduced grip strength, and sensory change, the Referee awarded 80 percent left arm permanent disability.

When permanent partial disability results from an injury, the criteria for the rating of disability is the permanent loss of use or function of the injured member due to the industrial injury. ORS 656.214(2). OAR 436-65-525 and 530

(renumbered OAR 436-30-210 and 220, May 1, 1985) set forth guidelines to assist in the determination of the extent of permanent disability caused by an arm injury. However, these rules are not binding on us. SAIF v. Baer, 61 Or App 335 (1983). Further, the extent of loss of use does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980).

Following our de novo review of the medical and lay evidence, which includes claimant's believable testimony and demonstrations, we are persuaded that she is entitled to an award of scheduled permanent disability greater than that awarded by the Determination Order. However, we find the Referee's award to be excessive. After completing our review and considering the above-mentioned guidelines, we conclude that an award of 50 percent scheduled permanent disability adequately compensates claimant for her compensable injury.

ORDER

The Referee's order dated May 21, 1985 is modified. In lieu of the Referee's award and in addition to the 20 percent (38.4 degrees) scheduled permanent disability awarded by the February 13, 1985 Determination Order, claimant is awarded 30 percent (57.6 degrees), for a total award to date of 50 percent (96 degrees) scheduled permanent disability for loss of use or function of the left arm. Claimant's attorney's fee shall be adjusted accordingly.

LeROY E. LEEP, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-13197
December 3, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of those portions of Referee Quillinan's order that: (1) set aside its denial of claimant's low back aggravation claim; (2) set aside its denial of claimant's request for additional surgery to his low back; and (3) awarded penalties totalling 30 percent of the temporary disability compensation awarded by her order. The issues are aggravation, medical services and penalties.

We adopt the Referee's findings of fact, which we summarize. Claimant was age 51 at the time of the hearing. He sustained a low back injury in 1961 which resulted in a laminectomy. In 1975 he sustained a nondisabling low back strain. In 1977 he reported another injury, which was initially accepted by another insurer as an aggravation of the 1975 injury. The other insurer later denied the claim and claim was made against SAIF, which also denied. SAIF ultimately was ordered held responsible for claimant's 1977 injury. Leroy Leep, 27 Van Natta 451 (1979). Claimant's claim was closed by a Determination Order dated March 11, 1980 that granted an award of 20 percent (64 degrees) unscheduled permanent partial disability for injury to the low back. That award was increased by stipulation dated October 1, 1980 to 30 percent (96 degrees).

Claimant's claim was reopened for aggravation in May 1981. In December 1981 claimant underwent a lumbar fusion from L4 to S1. In January 1983 claimant was again declared medically stationary and a second Determination Order dated April 4, 1983

closed the claim with an award of an additional 10 percent (32 degrees) unscheduled permanent partial disability, bringing claimant's total award to 40 percent (128 degrees). By stipulation dated September 26, 1983 claimant received an additional 10 percent (32 degrees) unscheduled permanent partial disability. The 1983 stipulation is the last award or arrangement of compensation.

In July 1983 claimant's treating physician released claimant to light to light moderate work, noting good lumbar ranges of motion with no apparent motor or sensory impairment. An independent examination conducted in February 1984 reported a successful lumbar fusion with some residual limitation in ranges of motion, subjective pain complaints and no evidence of lower extremity neuropathy. Claimant did not seek medical treatment between September 1983 and June 1984.

On June 6, 1984 claimant sought treatment from Dr. Nash, a neurosurgeon. Dr. Nash's examination disclosed marked lumbosacral muscle spasm, loss of the lordotic curve, a decreased left ankle reflex and positive straight leg raising indicative of lumbosacral neuropathy. His interpretation of a subsequent lumbar CT scan and myelogram was that claimant had objectively confirmed lateral nerve root entrapment at L4-5 and L5-S1. On November 15, 1984 Dr. Nash requested authority to proceed with a surgical restructuring of the fusion and foraminotomies at L4-5 and L5-S1. Dr. Nash did not anticipate that this surgery would return claimant to work, but he opined that the surgery would reduce claimant's pain. SAIF received Dr. Nash's statement that claimant was unable to work on account of his condition on January 3, 1985 and began payment of temporary disability compensation as "interim" compensation on January 15, 1985. While there was some minor delay and confusion in continuing "interim" compensation payments prior to the denial, the Referee found that they were not unreasonable under the circumstances. We agree. We also agree with the Referee's finding that claimant was not entitled to temporary disability compensation as "interim" compensation prior to January 3, 1985.

SAIF denied both the aggravation claim and the requested surgery on April 30, 1985. The only basis in the record for the SAIF denials is the February 12, 1985 report of a panel of the Orthopaedic Consultants. The panel concluded that, in spite of claimant's increased subjective complaints, there had been no material change in claimant's underlying condition since the last arrangement of compensation, September 1983. It was also their conclusion, after review of the CT scan and myelogram performed by Dr. Nash, that further surgery was not indicated, although they did acknowledge loss of filling of the L5 sheaths bilaterally. The panel based this conclusion in part on claimant's history that he had felt worse after the last two of his three previous surgeries. The Consultants opined that claimant was capable of sedentary work, and perhaps light work after additional "sheltering."

Considering claimant's substantial disability award (50 percent), we could not find on the basis of claimant's subjective complaints alone that he had proven an aggravation. See Charlotte Clemmer, 36 Van Natta 753 (1984), aff'd, Clemmer v. Boise Cascade Corp., 75 Or App 404 (1985); Richard A. Scharback, 37 Van Natta 598 (1985); Billy Joe Jones, 36 Van Natta 1230 (1984) aff'd mem, 76 Or App 402 (1985); James W. Foushee, 36 Van Natta 901 (1984). Indeed barely over a year ago we concluded that

this claimant had failed to prove an aggravation based solely upon his own testimony. Leroy E. Leep, 36 Van Natta 1345 (1984). We agree with the Referee, however, that claimant has tipped the scale in his favor on the aggravation question. Comparing the pre-September 1983 medical reports with those of Dr. Nash and the Orthopaedic Consultants, we find that claimant exhibited in and after June 1984 objective signs that were not present in and prior to September 1983. Neither were those signs present in February 1984, when Referee Danner upheld SAIF's denial of claimant's previous aggravation claim. However, coupling Dr. Nash's findings, which were in part confirmed by the Orthopaedic Consultants, with claimant's believeable testimony of increased pain, see Garbutt v. SAIF, 297 Or 148 (1984), we conclude that claimant has established a worsening of his condition related to the 1977 injury and subsequent surgeries. ORS 656.273(1).

We also agree with the Referee's conclusion as to the requested surgery. There is a difference of opinion between claimant's treating physician and the Orthopaedic Consultants panel as to the nature and degree of claimant's objective findings and need for additional surgery based thereon. However, the Orthopaedic Consultants do not suggest that claimant's present condition is not related to his compensable injury. See Poole v. SAIF, 69 Or App 502 (1984). The disagreement appears to be based upon a difference of opinion as to what, if any, relief claimant will realize. Where requested treatment is reasonably related to a compensable condition, a claimant is entitled to choose whether to undergo the treatment. See Milbradt v. SAIF, 62 Or App 530 (1983); Wetzel v. Goodwin Brothers, 50 Or App 101 (1981).

On the issue of penalties, we modify the Referee's order. ORS 656.262(10) provides:

> "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

We conclude that the Referee's assessment of penalties totalling 30 percent of all temporary disability compensation made payable by her order is in excess of that permitted by statute.

ORS 656.262(10) allows the assessment of a penalty not to exceed 25 percent of the "amounts then due." See Whitman v. Industrial Indemnity Co., 73 Or App 73 (1985); EBI Companies v. Thomas, 66 Or App 105 (1983). We have held that when determining what amounts are "then due," we look directly to the conduct being penalized. Harold A. Lester, 37 Van Natta 745 (1985). In this case, the conduct being penalized is delay in acceptance or denial of a claim. The Referee found, and we also find, that claimant was not entitled to compensation until January 3, 1985. See ORS 656.273(6). See also Haret v. SAIF, 72 Or App 668 (1985) (discussion of medical chart notes as aggravation claim). We further find that claimant's entitlement to compensation ended with SAIF's denial. ORS 656.262(2). We also note that no serious contention is made that the denial itself was unreasonable, only that it was late.

Applying the above criteria to this case, we find that there were "amounts then due" only between January 3, 1985 and April 30, 1985. The fact that the compensation was paid is not relevant to the question whether it may be the basis upon which to quantify a penalty. Harold A. Lester, supra. We conclude that SAIF should pay additional compensation of 15 percent of the temporary disability compensation due between January 3, 1985 and April 30, 1985 as a penalty for unreasonably delaying acceptance or denial of claimant's aggravation claim and 10 percent of the same compensation as a penalty for unreasonably delaying acceptance or denial of claimant's request for medical services in the form of surgery. The Referee also assessed a 5 percent penalty for delay in payment of claimed expenses. We find that there is insufficient evidence as to when SAIF received notice of the claim of expenses and are unable to state that SAIF's conduct was unreasonable. We need not address the question whether different "amounts then due" may be the bases for separate penalties resulting in a total in excess of 25 percent.

ORDER

The Referee's order dated June 5, 1985 is modified to award claimant additional compensation in a sum equal to 25 percent of the temporary total disability compensation due claimant between January 3, 1985 and April 30, 1985 as a penalty, apportioned 15 percent for unreasonable delay in acceptance or denial of claimant's aggravation claim and 10 percent for unreasonable delay in acceptance or denial of claimant's claim for medical services, in lieu of all other penalties ordered. As modified, the Referee's order is affirmed. Claimant's attorney is awarded $500 as a reasonable attorney fee for services on Board review, to be paid by the SAIF Corporation.

GABRIEL C. MENDEZ, Claimant
Ginsburg, et al., Claimant's Attorneys
Annala, et al., Defense Attorneys

WCB 84-01889
December 3, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Peterson's order that set aside the Determination Order closing claimant's low back injury claim. The issue is premature claim closure. Claimant asserts on Board review that if the Board finds the claim was not prematurely closed, he has suffered an aggravation. Alternatively, claimant argues that he is entitled to an award of permanent partial disability.

Claimant is a 46 year old Mexican male who does not speak, read or write English. On April 21, 1981 claimant sustained an industrial injury to his cervical spine while employed by a different employer which ultimately resulted in a laminectomy and foraminotomy of C6-7. Although the Determination Order closing that claim is not a part of the record, the evidence is that the claim more probably than not was closed shortly after claimant was examined by the Orthopaedic Consultants in March 1982. There is evidence that establishes that claimant received an award of 96 degrees for 30 percent unscheduled permanent partial disability for injury to his neck.

Although there is some evidence tending to establish that claimant's back condition either arose out of the same incident as the neck injury or otherwise was present prior to closure of the neck injury claim, claimant's present back condition was accepted by the self-insured employer as the result of an October 21, 1982 disabling industrial injury for which claim was made by a Form 801 completed on October 28, 1982. See Bauman v. SAIF, 295 Or 788 (1983). Claimant was initially treated by Dr. Buhl, a general surgeon, who referred him to Dr. Schwartz, an orthopedic surgeon. Dr. Schwartz' first impression was that of a herniated lumbosacral disc. On December 23, 1982 claimant was examined by Dr. T. J. Rosenbaum at the employer's request. Dr. Rosenbaum diagnosed a chronic lumbosacral strain with a possible herniated L5-S1 disc and concluded that claimant was not medically stationary.

Claimant's ongoing treatment alternated between Dr. Buhl and Dr. Schwartz. In February 1983 claimant underwent a lumbar myelogram, which showed no significant abnormalities. Dr. Buhl released claimant to light duty work on March 7, 1983. On March 8, 1983 claimant returned to Dr. Buhl and stated that he had tried working but was unable to continue because of pain. Dr. Buhl concluded claimant had had a recurrence of his chronic lumbar strain and authorized one week off work. Throughout the spring and summer of 1983 claimant was treated conservatively by Dr. Schwartz, who reported that claimant's symptoms remained about the same. He noted that diagnostic studies were all negative for disc involvement, but that claimant's subjective complaints were compatible with a herniated lumbosacral disc. He reported no positive findings on physical examination.

On August 17, 1983 claimant reported to Dr. Buhl. Claimant was unable to stand unaided on his right leg, had absent knee jerk reflexes bilaterally and exhibited a positive straight leg raising on the right. Dr. Buhl was unable to determine what caused claimant's symptoms. On August 29, 1983 Dr. Buhl authorized claimant to leave work again and prescribed additional physical therapy for right leg pain.

Claimant was examined by the Orthopaedic Consultants on September 21, 1983. The panel diagnosed a lumbosacral strain by history, with severe functional overlay manifested by refusals and inconsistencies. The panel was unable to find any orthopedic or neurological pathology to explain claimant's subjective complaints. The consultants opined that claimant could return to his regular work without limitations and had no loss of function of his lumbar spine. On October 5, 1983 claimant reported to Dr. Buhl that he had experienced increased pain after the Orthopaedic Consultants' examination. Dr. Buhl expressed a continuing concern that claimant was suffering from some type of compression neuropathy, possibly a herniated disc.

On October 26, 1983 the employer's claims processing agent sent Dr. Buhl a copy of the Orthopaedic Consultants September 21, 1983 report. The cover letter requested that Dr. Buhl advise whether or not he agreed with the report and further stated that if no disagreement was expressed within 14 days, the claim would be submitted for closure. A chartnote of Dr. Buhl's dated October 27, 1983 related that claimant saw the doctor and

reported that he felt worse. Dr. Buhl wrote that claimant suffered from low back pain of uncertain etiology and that claimant's medication was to be adjusted. In a January 11, 1984 chartnote, Dr. Buhl again noted that claimant was unable to work because of pain after a three-hour attempt, that he was unable to stand unaided on his right leg, that definite spasm of the right side of the low back was evident and that claimant reported pain radiating into his testicles. Dr. Buhl again adjusted claimant's medications and opined that claimant needed a job modification. The employer's processing agent wrote Dr. Buhl on January 13, 1984 to request a narrative report addressing the questions whether claimant was medically stationary and whether he could return to work. It is apparent from the letter that the claims examiner was aware of the January 11 chartnote. There is no evidence that Dr. Buhl ever responded to the letter.

On January 25, 1984 Dr. Schwartz again examined claimant. He reported that claimant had attempted to work but had stopped because of pain after two hours. Straight leg raising was positive on the right and claimant's knee jerk reflexes were absent bilaterally. Measurement of claimant's lower extremities showed right calf and quadriceps atrophy. Dr. Schwartz reported some evidence of decreased motor strength of the right great toe extensors and right ankle dorsiflexors, although he noted that measurement of motor functions was difficult because of functional overlay. He concluded that although there was no hard evidence of neurological involvement, there was some suggestion of a problem with claimant's L5 nerve root. Dr. Schwartz requested a CT scan and authorized time loss. A lumbar CT scan was performed January 30, 1984 and was negative.

On January 31, 1984 a Determination Order closed claimant's claim. The Determination Order granted no permanent disability award and determined claimant's medically stationary date to be November 8, 1983. There is no medical report dated November 8, 1983; however, that date is 14 days from the date the employer's processing agent mailed Dr. Buhl a copy of the Orthopaedic Consultants' September 21, 1983 report.

On February 10, 1984 the employer's processing agent issued a denial of an aggravation claim apparently based upon Dr. Schwartz's January 25, 1984 chartnote. On February 15, 1984 Dr. Schwartz saw claimant again. His chartnote states that he was aware claimant's claim had been closed and of the medically stationary date determined by the Evaluation Division. Dr. Schwartz stated:

> "[Claimant] continues to complain of a lot of problems with his back and his right leg. I am sure they are quite real to him but I have not been able to substantiate any objective findings and must, therefore, conclude that there is a certain amount of functional overlay or else organic disease that just eludes detection."

Dr. Schwartz released claimant to work sorting fruit as of February 16, 1984. Claimant requested a hearing on February 21, 1984.

After de novo review of the record as a whole, we conclude that claimant's claim was not prematurely closed. An

employer or insurer has a duty to promptly submit a claim for closure when the evidence shows that a claimant's condition has become medically stationary. ORS 656.268(2); Georgia Pacific v. Awmiller, 64 Or App 56 (1983). Claim closure decisions must be evaluated based upon the evidence available at the time of closure, not upon subsequent events. Sullivan v. Argonaut Ins. Co., 73 Or App 694, 697 (1985). The evidence available to the Evaluation Division in this case consisted of reports from Drs. Buhl and Schwartz to the effect that they were unable to determine any objective bases for claimant's pain complaints and a report of the Orthopaedic Consultants that claimant could return to his regular work without limitation and had no impairment. As early as August 1983 Dr. Buhl wrote that all he had to offer claimant was his "greatest sympathy." The preponderance of the evidence establishes that claimant's condition was more or less the same in January 1984 as it had been for the previous several months. The fact that claimant's subjective complaints continued, or even waxed and waned, does not mean that he was not medically stationary. See Brad T. Gribble, 37 Van Natta 92, 99 (1985). Moreover, the employer's processing agent twice asked Dr. Buhl for his comments on the Orthopaedic Consultants' report and never received a response. We conclude that the evidence established as of the date of the Determination Order that claimant was medically stationary at least as of November 8, 1983.

At hearing claimant sought alternative relief in the event the Referee did not find that the claim had been prematurely closed. These alternatives were, first, that claimant's condition became worse after the Determination Order was issued, entitling him to benefits for aggravation. If claimant is found not to be entitled to aggravation benefits, he argues that he is entitled to an award for unscheduled permanent partial disability. The Referee did not directly address either of these issues, finding that his decision on the premature closure issue was dispositive. We conclude that the record is sufficiently developed to enable us to decide these issues. See ORS 656.295(5).

No physician who has examined claimant has found any objective pathology that would explain claimant's subjective complaints. We can, therefore, point to no evidence in the record that would indicate a worsening of claimant's condition on a pathological basis. In fact, the evidence preponderates that claimant has no pathological condition. However, the evidence does persuade us that claimant has a permanent chronic low back pain syndrome that is disabling. A worsening of symptoms only can be sufficient to establish an aggravation. Richard A. Scharback, 37 Van Natta 598 (1985); Billy Joe Jones, 36 Van Natta 1230 (1984) aff'd mem, 76 Or App 402 (November 14, 1985). In this case, however, we find that the evidence does not establish a worsening of symptoms. We are persuaded by a preponderance of the evidence that claimant's symptoms have remained relatively constant since before the Determination Order was issued. We conclude that claimant has not shown an aggravation.

The Referee dealt with the February 10, 1984 denial only to the extent that he found it to be of no effect. He based his reasoning upon the fact that the evidence as a whole indicates that the denial was issued to deny an "aggravation claim" made prior to the first determination of claimant's claim. We agree with the Referee that the February 10, 1984 denial is of no effect. Because the denial purported to reject a claim for

aggravation allegedly made before claimant's claim was first closed, it is irrelevant because there had been no "last award or arrangement of compensation" from which to measure any worsening.

We do agree with claimant that he is entitled to an award of permanent partial disability for his low back. As stated above, the evidence establishes that claimant has a permanent chronic low back pain syndrome that is disabling. Dr. Wilson, a neurologist who performed an independent medical examination, opined that claimant's impairment is in the mild range. Both Drs. Buhl and Schwartz agree that claimant's condition is permanent and disables him from performing certain kinds of work involving heavy lifting. Considering claimant's physical impairment and the relevant social and vocational factors that combine to measure loss of earning capacity, ORS 656.214(5), we conclude that claimant would be appropriately compensated by an award of 64 degrees for 20 percent unscheduled permanent partial disability for injury to his low back.

The employer has requested authority to recover an overpayment of temporary total disability in the sum of $1,890. Claimant does not contest the fact or the amount of overpayment. Offset of the overpayment out of the compensation awarded by this order is allowed in a sum not to exceed $1,890. No offset is allowed for any temporary disability benefits paid pursuant to the Referee's order in this case. ORS 656.313(2).

ORDER

The Referee's order dated May 13, 1985 is reversed in part and affirmed in part. That portion of the Referee's order that set aside the self-insured employer's February 10, 1984 denial is affirmed. The remainder of the order is reversed. The Determination Order dated January 31, 1984 is modified to grant claimant an award of 64 degrees for 20 percent unscheduled permanent partial disability for injury to his low back. Claimant's attorney is allowed 25 percent of the increased compensation awarded by this order, not to exceed $2,000, as a reasonable attorney fee. The employer is authorized to offset overpaid temporary total disability compensation against the increased compensation awarded by this order, not to exceed $1,890.

STEVEN D. SILVA, Claimant
Aspell & Della-Rose, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-01279
December 3, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee Neal's order which increased claimant's award of scheduled permanent disability for loss of use of his right hand from 20 percent (30 degrees), as awarded by a December 3, 1981 Determination Order, to 40 percent (60 degrees). On review, SAIF contends the Referee should not have considered claimant's reduced grip strength in determining the extent of claimant's permanent disability. We agree and modify claimant's permanent disability award.

Claimant sustained an April 1980 compensable injury to the third, fourth, and fifth finger of his right hand. His little finger was amputated through the middle phalanx. The middle phalanges of his middle and ring finger were fractured. Claimant has undergone three surgeries, primarily designed to correct

mallet deformities in his middle and ring fingers. The middle finger is fused at the distal phalanx joint in a functional position.

In November 1981 claimant's treating surgeon, Dr. Nathan, performed a closing examination. Claimant's complaints included pain in the ring finger and the inability to make a full fist. Dr. Nathan noted that the examination of the involved right hand revealed active use. The doctor reported there was a normal thenar and hypothenar eminence, as well as normal thumb flexion, adduction, opposition and extension. There is no indication that a grip strength test was performed.

Dr. Nathan provided a thorough recitation of the range of motion findings for the joints of each finger of the right hand. The doctor also noted the corresponding "combined" impairment value for each particular digit and its equivalent hand impairment value. Dr. Nathan concluded that the impairment values for the three fingers totalled 15.25 percent right hand impairment.

On December 3, 1981 a Determination Order issued. Based on amputation, range of motion, sensory change and weakness, claimant was awarded 20 percent scheduled permanent disability for loss of use of the right hand.

Claimant credibly testified that in cold weather his fingers became stiff and painful. He also experienced "a lot of loss of feeling in the backs" of the middle and ring fingers, from the knuckle to the end of each finger. However, claimant experienced no loss of sensation at the tips of his middle and ring fingers. Claimant stated that he found it difficult to grip small objects and that his right hand was "a lot less in strength" than his left hand. A tendon in his middle finger becomes swollen, painful and inflamed and must be repaired periodically. Claimant experienced no problems using his thumb or the heel of his right hand and indicated that his problems did not extend beyond the metacarpal joints of his fingers.

The Referee increased claimant's award of permanent disability to 40 percent for loss of use of the right hand. In arriving at her determination, the Referee considered claimant's testimony and Dr. Nathan's impairment ratings.

When decreased grip strength results from amputation or decreased joint range(s) of motion, and not from neurological origins, atrophy, or tissue loss (other than amputation), an additional allowance for loss of grip strength is not to be included in determining the extent of permanent disability. OAR 436-65-530(2)(c), (2)(d) and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d) and (5)(b), May 1, 1985). Additional hand impairment in the form of loss of grip strength is not considered where the evidence fails to establish that the claimant has a greater loss of grip strength than would be a natural consequence of the impairment in his injured fingers. Charles H. Taylor, 35 Van Natta 168 (1983); Charles R. Jackson, 37 Van Natta 1609 (decided this date); Royce J. Burian, 37 Van Natta 1602 (decided this date).

If reduced grip strength from amputation or loss of range of motion was considered in finger injuries, nearly every finger injury would result in an award of forearm disability.

This is due to the fact that most finger amputations or losses of range of motion are accompanied by a degree of diminished grip strength. A forearm disability award automatically results because a loss of grip strength is rated as a partial loss of the forearm. OAR 436-65-530(5)(a) (renumbered 436-30-220(5)(a), May 1, 1985). The limitations of OAR 436-65-530(2)(c), (2)(d), and (5)(b) (renumbered OAR 436-30-220(2)(c), (2)(d), and (5)(b), May 1, 1985) are apparently designed to foreclose this illogical result. Furthermore, the administrative rules, taken as a whole, suggest that a commensurate reduction in grip strength has already been considered in formulating a scheduled disability award for loss of use or function of the fingers, when based on amputation or loss of range of motion.

The medical and lay evidence fails to persuade us that claimant's reduced grip strength is attributable to neurological causes, atrophy, or tissue loss (other than amputation). Consequently, loss of grip strength should not be considered in evaluating the extent of claimant's permanent disability.

Reduced right hand grip strength was mentioned by Dr. Nathan during claimant's rehabilitation, but this reference was made approximately one year prior to claimant's closing examination. Moreover, Dr. Nathan did not attribute this reduction to any particular origin. At his closing examination, claimant complained of an inability to make a fist with his right hand. However, once again Dr. Nathan failed to relate this apparent reduction in grip strength to neurological origins, atrophy, or tissue loss (other than amputation). Instead, Dr. Nathan attributed claimant's permanent impairment to the loss of motion ranges in the three fingers. Under these circumstances, claimant's testimony that his right hand is "a lot less in strength" is insufficient to establish that his reduced grip strength is anything other than the natural consequence of the amputation and loss of range of motion in his injured fingers.

Since loss of grip strength should not be considered, we find that claimant's permanent disability award should be modified. In conducting our redetermination of the extent of claimant's permanent disability, we are mindful that the extent of loss does not necessarily correlate to the extent of mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980). Furthermore, we use the Department's rules for rating of disability as guidelines. See Fraijo v. Fred N. Bay News Co., 59 Or App 260 269 (1982). However, in cases involving scheduled, as opposed to unscheduled, disability, we find the rules highly persuasive, both because they follow the specificity of the statutes relating to scheduled disability, ORS 656.214(2)-(4), and because they are based upon commonly accepted medical principles.

In arriving at our determination, we have considered Dr. Nathan's findings and claimant's credible testimony, particularly those portions concerning his sensory loss, sensitivity to cold, weakness and disabling pain. We have computed the "combined" impairment value for each finger and converted these values to an impairment value for the hand. OAR 436-65-510; OAR 436-65-530(1); OAR 436-65-515(3)(4)(5) (renumbered OAR 436-30-170, 436-30-220(1), and 436-30-180(3)(4)(5), May 1, 1985). These computations result in a total award of 20 percent hand disability, which we find is adequate compensation for claimant's compensable injury.

ORDER

The Referee's order dated July 28, 1982 is modified. Claimant shall receive no additional scheduled permanent disability for loss of use of the right hand over the 20 percent (30 degrees) scheduled disability he was awarded by the December 3, 1981 Determination Order. Claimant's attorney's fees shall be adjusted accordingly.

GEORGE B. WASSON, Claimant
W. Daniel Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-02877
December 3, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of those portions of Referee Seymour's order that found claimant's claim had not been prematurely closed and awarded claimant 112 degrees for 35 percent unscheduled permanent partial disability for chronic stress-induced headaches and depression. The SAIF Corporation contends that claimant's claim was not prematurely closed and that claimant's disability award should be reduced. The issues are premature closure and extent of disability.

Claimant began experiencing chronic headaches and depression in June 1973 on account of the stress associated with his employment as a student counselor at the University of Oregon. In the course of treatment for this disorder claimant became dependent on Valium and codeine. Claimant filed a workers' compensation claim for his condition in July 1980. His claim was found compensable by Opinion and Order dated November 22, 1982 and this order was affirmed by the Board on June 28, 1983.

Claimant was declared medically stationary in late 1983 by a psychiatrist, Dr. Henderson. Dr. Henderson reported that the frequency of claimant's headaches had decreased by approximately 25 percent and that claimant had overcome his dependence on Valium and codeine. Dr. Henderson also reported that claimant was opposed to trying antidepressant medications for philosophical and personal reasons and indicated that claimant's depression had improved as much as it was going to without such medications. Dr. Henderson rated claimant's residual psychiatric impairment as mild and recommended ongoing psychiatric treatment. Claimant's claim was closed by Determination Order dated March 1, 1984 with an award of 32 degrees for 10 percent unscheduled permanent partial disability.

Several months after claim closure, claimant began treating with Dr. Scott, a psychologist. Dr. Scott believed that claimant was not medically stationary and that his psychological condition could be improved through psychotherapy. Apparently upon Dr. Scott's recommendation, claimant reduced his work schedule to half time beginning in September 1984. In a letter to claimant's attorney dated November 19, 1984, Dr. Scott (under the signature of another psychologist) explained that this work schedule was desirable in order to "maximize the effects of treatment and minimize recovery time." Dr. Scott indicated that claimant would be returned to full time work after the prescribed course of psychotherapy had been completed.

In a deposition taken March 28, 1985, Dr. Scott stated

that despite claimant's half-time work schedule and several months of psychotherapy, claimant's condition had failed to improve. Dr. Scott still believed, however, that claimant would respond and estimated that claimant would become medically stationary in another two years. Dr. Scott also reiterated his belief that claimant eventually would return to full-time employment.

On the issue of premature closure, we find Dr. Henderson's opinion more persuasive than that of Dr. Scott. We, therefore, affirm that portion of the Referee's order relating to this issue.

With regard to the issue of the extent of claimant's disability, the Referee increased claimant's award for unscheduled permanent partial disability from the 10 percent (32 degrees) awarded by Determination Order to 35 percent (112 degrees). The principal reason for this increase appears to be the Referee's conclusion that claimant is unable to handle his present job on a full-time basis. This conclusion is echoed on Board review by claimant's argument to the effect that because he is limited to half-time work at half his regular salary, he has sustained at least a 50 percent loss of earning capacity.

Earning capacity is the ability to obtain and hold gainful employment in the broad range of general occupations taking into consideration such factors as age, education, training, skills and work experience. ORS 656.214(5). It is not synonomous with wages earned in any particular position. Ford v. SAIF, 7 Or App 549, 552-53 (1972). Evidence of a worker's earnings is but one factor which, depending upon the circumstances of the individual case, may or may not be relevant to a determination of loss of earning capacity. Jacobs v. Louisiana-Pacific, 59 Or App 1, 3 (1982); Rundell v SAIF, 12 Or App 258, 264 (1973).

Under the circumstances of the present case, we conclude that claimant's half-time work schedule is irrelevant to assessing the extent of his disability. The reduction in claimant's work schedule was recommended by Dr. Scott as a temporary measure to facilitate psychological treatment. It was never intended to be a permanent restriction on claimant's work activity. None of claimant's other physicians placed any such permanent restrictions on claimant's work activity. We fail to find support in the record for the Referee's conclusion that claimant is permanently limited to half-time work in his present occupation.

On our de novo review of the record, considering claimant's psychological impairment together with the pertinent social and vocational factors, see ORS 656.214 (5), we find that claimant is appropriately compensated for his loss of earning capacity by an award of 32 degrees for 10 percent unscheduled permanent partial disability. We, therefore, set aside the Referee's award of 35 percent (112 degrees) and reinstate the Determination Order award of 10 percent (32 degrees) unscheduled permanent partial disability.

ORDER

The Referee's order dated May 29, 1985 is affirmed in part and reversed in part. That portion of the order which found that claimant's claim was not prematurely closed is affirmed.

That portion of the order which increased claimant's award for unscheduled permanent partial disability to 35 percent (112 degrees) is reversed and the award of 10 percent (32 degrees) by Determination Order dated March 1, 1984 is reinstated. Claimant's attorney's fee shall be adjusted accordingly.

DAVID L. GRENBEMER, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 85-0244M
December 4, 1985
Own Motion Determination Rescinded

The Board issued an Own Motion Determination on October 4, 1985 which closed claimant's claim. It has now been brought to the Board's attention that this claim was reopened within one year of the last Determination Order which was issued on September 21, 1984 thereby entitling claimant to closure by the Evaluation Division of the Workers' Compensation Department pursuant to ORS 656.268. Coombs v. SAIF, 39 Or App 293 (1979), and Carter v. SAIF, 52 Or App 1027 (1981). The Board hereby rescinds its October 4, 1985 Own Motion Determination and directs that SAIF Corporation submit the above entitled claim to the Evaluation Division for the issuance of a Determination Order pursuant to ORS 656.268.

IT IS SO ORDERED.

WILLIAM P. MALONEY, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06752
December 4, 1985
Amended Order of Dismissal

We issued our Order of Dismissal on November 20, 1985 based upon the SAIF Corporation's withdrawal of its request for Board review of Referee Baker's order. Our previous order fails to note that the employer independently requested Board review and that the employer's independent request was not withdrawn.

Our Order of Dismissal dated November 20, 1985 is hereby withdrawn. In lieu thereof,

IT IS HEREBY ORDERED that the request for Board review filed by the SAIF Corporation is dismissed; and

IT IS FURTHER ORDERED that this case be docketed for Board review upon the request for review filed by the employer, Skookum Reforestation.

JOHN M. BOWMAN, Claimant
Kenneth D. Peterson, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-03004
December 6, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Menashe's order which awarded claimant 112 degrees for 35 percent unscheduled permanent partial disability for injury to claimant's neck and low back in lieu of the Determination Order dated March 7, 1984 which awarded no unscheduled permanent partial disability. Claimant cross-requests review on the issue of the extent of his disability and also argues that the Referee erred in refusing to admit Exhibit 15. The issues are the admissibility of an exhibit and the extent of disability.

We agree with claimant that the Referee erred in

refusing to admit Exhibit 15. Claimant complied with the technical requirements of OAR 438-07-005(3)(b) and the Referee had no discretion to deny admission of the exhibit. Susan F. Vernon, 37 Van Natta 1562 (WCB Case No. 84-10364, November 18, 1985); Merle Barry, 37 Van Natta 1492 (1985). Exhibit 15 is part of the record and will be considered on review.

With regard to the issue of the extent of claimant's disability, on our de novo review of the record, considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214(5), we find that claimant is adequately compensated by an award of 112 degrees for 35 percent unscheduled permanent partial disability. Therefore, the Board affirms the order of the Referee.

ORDER

The Referee's order dated July 10, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

PHYLLIS M. KEUSCHER, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00399
December 6, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Howell's order which: (1) found that her claim was not prematurely closed; (2) upheld the SAIF Corporation's denial of her aggravation claim for a cervical condition; (3) awarded 25 percent (80 degrees) unscheduled permanent disability for a left shoulder, neck, back, and headache condition, whereas a March 23, 1984 Determination Order had awarded no unscheduled disability; and (4) awarded 5 percent (9.6 degrees) scheduled permanent disability for loss of use of the left arm, whereas the aforementioned Determination Order had awarded no scheduled disability. On review, the issues are premature closure, aggravation, and extent of permanent disability, unscheduled and scheduled.

The Board affirms the order of the Referee with the following comment concerning the premature closure issue.

Following our de novo review of the record, we are persuaded that claimant's condition was medically stationary at the time of claim closure. In reaching this conclusion we reviewed evidence available at the time of claim closure and not evidence subsequently developed. Maarefi v. SAIF, 69 Or App 527, 531 (1984). Moreover, we did not exercise hindsight. Alvarez v. GAB Business Services, 72 Or App 524, 527 (1985); Sullivan v. Argonaut Ins. Co., 73 Or App 694, 697 (1985).

ORDER

The Referee's order dated March 20, 1985 is affirmed.

MELVIN F. LOWE, Claimant
Gatti, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 84-00455
December 6, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Daron's order which: (1) found that it had failed to properly process claimant's low back injury claim; (2) awarded temporary total disability; and (3) assessed penalties and accompanying attorney fees for unreasonable processing. Claimant cross-requests review, contending that he is entitled to an additional attorney fee.

The Board affirms that portion of the Referee's order pertaining to the unreasonable processing issue with the following comments.

The insurer contends that claimant neither alleged nor presented evidence suggesting that it failed to notify claimant whether his injury claim was accepted/denied or classified as disabling/nondisabling. Consequently, it is the insurer's contention that the Referee raised and decided a new issue, one for which no evidence was offered. We disagree.

Following our de novo review of the record, we are satisfied that the issue presented at the hearing concerned the processing of claimant's injury claim from its inception up to the present. Furthermore, we are persuaded that the insurer failed to notify claimant of the claim's acceptance/denial and classification, as well as claimant's appeal rights.

The insurer further argues that it was under no obligation to formally close this so-called nondisabling claim. There is support for this argument. See Deborah L. Greene, 37 Van Natta 575 (1985); Ralph J. Bencoach, 36 Van Natta 681, 688 (1984). However, the insurer's argument presupposes that claimant received notice of his claim's initial acceptance as nondisabling, with accompanying appeal rights. As mentioned above, this supposition is inaccurate. Moreover, were we to follow the insurer's analysis, claimant would not only be denied the opportunity of having his disability evaluated, but we would also be supporting a process in which claimant has been kept uninformed regarding the status of his claim and his commensurate rights of appeal.

We reverse that portion of the Referee's order which awarded a penalty based upon future compensation.

Subsequent to the Referee's order, the Board issued its opinion in Ozetta L. Domitrovich, 37 Van Natta 1553 (November 18, 1985). In Domitrovich, the Referee had assessed a penalty for failing to process an aggravation claim. However, since the Referee further found that the claimant was not entitled to temporary disability and all medical services were paid, the penalty was based on any permanent disability that might be subsequently awarded. To determine what conduct was being penalized in deciding whether amounts were "then due" as required by ORS 656.262(10), we applied the analysis discussed in Harold A. Lester, 37 Van Natta 745 (1985). While it was true in the abstract that the delay in processing the aggravation claim also had the effect of delaying claim determination, we reasoned that

no claim determination was "then due." Accordingly, although we agreed with the Referee that the insurer's conduct was unreasonable, we concluded that it was error to award a penalty based on future compensation.

In the present case, the Referee assessed a penalty based not only on unpaid temporary total disability benefits, but also on any permanent disability which claimant might be awarded by a forthcoming Determination Order. Although we agree with the Referee that the insurer's conduct was unreasonable, as in Domitrovich, a penalty based on future compensation is not an amount "then due." Accordingly, that portion of the Referee's order which assessed a penalty based upon any permanent disability which claimant is awarded by a subsequent Determination Order is reversed. That portion of the penalty based upon unpaid temporary disability benefits is affirmed. The accompanying $300 attorney fee for services rendered on the penalty issue is also affirmed.

Finally, we affirm that portion of the Referee's order which declined to award claimant a reasonable attorney's fee based on any permanent disability awarded by the forthcoming Determination Order. When the Determination Order issues, and should it award permanent disability, claimant may request a summary proceeding pursuant to OAR 438-47-015. At that time. a Referee may determine whether the attorney was instrumental in obtaining compensation for a claimant without a hearing and whether a reasonable attorney fee is warranted.

ORDER

The Referee's orders dated March 28, 1985 and May 21, 1985 are affirmed in part and reversed in part. That portion which assessed a penalty based upon a future permanent disability award is reversed. The remaining portions are affirmed. Claimant's attorney is awarded $450 for services on Board review, to be paid by the insurer.

JOSE RAMIREZ, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 83-00881
December 6, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Myers' order which affirmed the Determination Order dated December 24, 1984 which awarded 32 degrees for 10 percent unscheduled permanent partial disability for injury to claimant's head and neck. In its brief on review, the SAIF Corporation requests review of that portion of the order which ordered SAIF to pay a penalty of 25 percent of the medical bills which were paid late without reason and awarded associated attorney fees of $500. The issues on review are extent of unscheduled permanent partial disability and penalties and attorney fees.

The Board affirms and adopts the order of the Referee. Claimant's attorney is awarded no fee on review because the only issue on which he prevailed was the issue of penalties and attorney fees. No attorney fees are awarded for prevailing on technical issues alone. Korter v. EBI Companies, 46 Or App 43 (1980); Laurence E. Saxton, 36 Van Natta 769 (1985).

ORDER

The Referee's order dated April 2, 1985 is affirmed.

TONY H. SMITH, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 85-0242M
December 10, 1985
Own Motion Order on Reconsideration

The Board issued an Own Motion Order on June 5, 1985 whereby it declined to reopen claimant's claim as it found claimant had failed to prove an objective worsening of his compensable condition. Claimant has submitted to the Board a new report from Dr. Hoffman and asks the Board to reconsider its earlier order. SAIF Corporation continues to oppose reopening this claim.

The Board remains unpersuaded that claimant's compensable condition has objectively worsened so as to justify a reopening of his claim pursuant to ORS 656.278. However, even if claimant were able to show a worsening of his condition, the Board would not reopen his claim for the payment of temporary total disability compensation. The evidence indicates that claimant has not been gainfully employed for a significant period of time. Pursuant to Cutright v. Weyerhaeuser Company, 299 Or 290 (1985), the Board declines to allow temporary disability benefits. The request for own motion relief is again denied.

IT IS SO ORDERED.

DARREL A. CHASTAIN, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys
Darrell Bewley, Ass't. Attorney General

WCB 81-03963 & 81-03962
December 11, 1985
Order Denying Petition for Attorney Fees

We issued our Order on Remand from the Court of Appeals, Chastain v. SAIF, 72 Or App 422, rev den, 299 Or 251 (1985), on September 16, 1985. On November 27, 1985 claimant mailed a petition for attorney fees, in which he requests that the Board reinstate the attorney fee awarded by the Referee in his original order, with the modification that the fee be paid by the SAIF Corporation rather than by Fremont Indemnity/United Grocers Insurance.

Pursuant to ORS 656.295(8), our order became final 30 days after it was issued. Because claimant's petition was filed more than 30 days after issuance of our order, we lack jurisdiction to consider it. The petition is, therefore, denied.

IT IS SO ORDERED.

ROBERT C. HARTMAN, Claimant
MacDonald, et al., Claimant's Attorneys
Daniel J. DeNorch, Defense Attorney

WCB 85-01164
December 11, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Fink's order that upheld the insurer's denial of claimant's industrial injury claim involving the right knee. The issue is compensability.

Claimant is a former mechanic who alleges that he sustained an injury to his right knee while repairing the motor of a truck refrigeration unit. Claimant testified that the work required him to rest his knees on the door frame of the refrigeration unit for approximately 10 to 15 minutes. The frame is made of 1/8th inch wide sheet metal, making the surface upon which claimant claims to have injured his knee extremely narrow.

Claimant immediately informed his supervisor of the alleged injury. When he ultimately sought medical attention, he was diagnosed as having suffered a torn medial meniscus, which the treating orthopedist causally related to claimant's work incident based on claimant's history.

The Referee found claimant credible based on demeanor. He upheld the denial of the claim, however, because he was not convinced that the incident could have occurred as described. The Referee apparently did not believe it possible for claimant to have rested his knee on a narrow sheet metal surface for the ten to fifteen minute period to which claimant testified.

While we may agree with the Referee that from a layman's view it is difficult to understand the mechanics of claimant's injury, we note that claimant's testimony regarding the events pertinent to the claim is uncontroverted and, in fact, is supported by the scant medical evidence. Accordingly, we find that claimant has established the compensability of his claim.

ORDER

The Referee's order dated July 16, 1985 is reversed and the claim is remanded to the insurer for acceptance, processing and payment of compensation according to law. Claimant's attorney is awarded $1,200 for services at hearing and $500 for services on Board review, both fees to be paid by the insurer.

MUNZO MASHADDA, Claimant
Coons & McKeown, Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 82-01374
December 11, 1985
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Mashadda v. Western Employers Insurance, 75 Or App 93 (1985). The court has ordered that claimant's industrial injury claim be accepted. Therefore, the insurer's denial dated February 3, 1982 is set aside and this matter is remanded to the insurer for claim acceptance and processing according to law.

IT IS SO ORDERED.

CHRIS POH, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-02699
December 11, 1985
Order on Review

Reviewed by the Board en banc.

The insurer requests review of Referee Foster's order which awarded 288 degrees for 90 percent unscheduled permanent partial disability in lieu of the previous awards by Determination Orders and a Referee's order which totalled 112 degrees for 35 percent unscheduled permanent partial disability for injury to claimant's low back. Claimant cross-requests review of the Referee's finding that claimant did not prove that he was permanently and totally disabled. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

Claimant injured his low back while working as a welder in 1976. A partial hemilaminectomy and disc removal was performed at L5-S1 in January 1977. The initial vocational rehabilitation effort focused on machine shop training although four areas of suitable occupation were considered. After a symptomatic exacerbation of claimant's condition due to elk hunting, the attending physician examined claimant and opined that he had a good result from his surgery and had "mild symptomatology in his left leg which should not interfere with most kinds of jobs, but I would not recommend that he go into any sort of heavy manual labor where he has to do heavy lifting or constant bending and stooping."

Claimant's rehabilitation program was interrupted by hospitalization for a flareup of symptoms in the first week of June 1978. On discharge, the attending physician reported that claimant was walking with a back support and had little pain. On followup examination, the attending physician referred claimant to the Callahan Center. The claim was closed by Determination Order dated October 6, 1978 with an award of compensation for temporary disability and 48 degrees for 15 percent unscheduled permanent partial disability.

Claimant was admitted to the Callahan Center in October 1978 for three weeks. Claimant participated in physical therapy, but made no progress physically. He returned to his attending physician in December 1978. Claimant's physician opined that claimant was moderately disabled.

In March 1979 claimant was referred to a second vocational rehabilitation organization. A comprehensive vocational assessment report concluded that although claimant had social and financial factors that should be motivating, he was very passive and lethargic about rehabilitation. At this time claimant moved from the Dayton area to the Grand Ronde area and terminated telephone service, which made contact with the counselor and prospective employers more difficult. Claimant went to two job interviews, but refused or postponed three others. Claimant obtained a job offer as a construction welder, but the vocational rehabilitation counselor discovered that claimant had understated his limitations and the job offer was rescinded. Further job opportunities were lost when claimant did not follow up on interviews. Claimant interrupted the job search program for at least two months while he made a fruitless attempt to move to the McMinnville area with the help of a federal subsidy program.

Claimant was awarded an additional 48 degrees for 15 percent unscheduled permanent partial disability by a Referee's order dated June 25, 1979. The Referee considered evidence of claimant's motivation to return to work and found:

> "Summarizing, claimant is extremely poorly motivated. He has used excuses for not going to job interviews of not wanting to try because of his criminal background, having to baby-sit while his wife works, not being provided with proper clothes, and not having transportation. Additionally, since claimant has no phone, prodigious efforts have been expended by the counselor in merely keeping contact with claimant."

There was no request for Board review of the Referee's order, so it became final by operation of law.

In February 1980 claimant suffered a worsening of low back neurological symptoms which eventually resulted in surgery in October 1981 to free the nerve root at L5-S1 from scar tissue and to explore the adjacent nerve root at L4-5 on the right. The aggravation claim was closed by Determination Order dated May 5, 1982 which awarded 16 degrees for 5 percent unscheduled permanent partial disability in addition to the 96 degrees for 30 percent permanent disability previously awarded. Claimant was again referred to the second vocational rehabilitation organization for assistance.

The vocational rehabilitation counselors tried two programs for claimant before they decided on a community college program to train him as an auto parts salesman. Claimant began the school program in January 1983. Claimant continued to live at Grande Ronde which was approximately 30 miles from the school. In March 1983 claimant moved to Amity, which was approximately 26 miles from the school, and obtained replacement tires for one of his cars with the help of a subsidy from the Field Services Division of the Workers' Compensation Department (FSD) as part of his training program. The program was interrupted in July 1983 for a combination of medical and transportation problems. Claimant resumed his training program in September 1983 and tried to extend the program one extra term because of the interruption. FSD concluded that claimant had sufficient skills to obtain employment and denied the extension request.

In October 1983 claimant was to begin developing a cooperative training site with his schooling. He stated he was willing to work in Salem, McMinnville, or Newberg, but was primarily interested in one particular auto parts store in McMinnville. By December 5, 1983 claimant still had not made the initial contact for a cooperative training program with any parts store. In mid-December claimant suffered some back pain while standing and waiting for a practical examination in auto parts identification and he told the vocational counselor that he planned to see his physician on December 22. The counselor subsequently learned that claimant did not consult his physician about the back pain in mid-December.

Claimant had a recurrence of his low back and leg pain in February 1984. His attending physician opined that the prognosis was good and made no recommendation of additional limitations. He commented that claimant was now trained as an auto parts salesperson.

On February 22, 1984 FSD warned claimant that his failure to send monthly progress reports for December 1983 and January 1984 would end his assistance for return to work. In March claimant requested more new clothing through FSD in order to search for work.

An April 21, 1984 FSD filenote summarized the final two months of vocational assistance:

> "File reviewed. Worker has received training program, employment counseling, job search skills and proper clothing to conduct work search. He failed to follow through on employer contact in November (Davidson's Auto Parts) to arrange work experience. He did not contact Mr. P's Auto Parts as instructed by [counselor] and failed to respond to job leads with Transmission Parts Company and Schucks Auto Supply. Thus, his file will be closed due to maximum services as described above, plus fact that most recent D[etermination] O[rder] was issued 12/20/83 and eligibility expired 4/20/84. Also, [claimant] failed to fully participate in return to work plan."

The FSD reviewer failed to mention one other job lead that claimant did not follow up with Allied Auto Supply in Salem.

On March 26, 1984 the orthopedic surgeon who performed the second surgery, Dr. Paluska, wrote to the insurer:

> "I have received your letter of inquiry dated March 14, 1984. After concluding my examination of [claimant's] back on February 21st, and also bearing in mind that he did not return for his scheduled appointment on March 16, 1984, I can only assume his back had improved, and his back disability with which he presented to me on February 21st, was temporary.
>
> "Therefore, I conclude that his disability award of 33% is acceptable."

On April 30, 1984 vocational rehabilitation assistance was terminated by letter from FSD.

On August 28, 1984 Dr. Paluska wrote to claimant's attorney and reported, "He tried to return to work as an auto parts salesman but part of his work required the lifting of batteries and cases of oil and he could not do that without aggravating his back." He opined that claimant should be restricted to sedentary labor and concluded:

> "I would rate [claimant's] permanent impairment, as the result of his industrial injury as moderately severe, that is 60-80%. In addition, it should be re-emphasized that he should not engage in any type of

> job or vocational rehabilitation program that would entail a job requiring excessive bending, stooping, standing or lifting."

Claimant consulted a third rehabilitation counselor who found claimant had the following skills:

> "A knowledge of the tools, machines, materials, and methods used in the welding profession.
> The ability to read simple scale drawings and/or blueprints to visualize objects.
> Using 'shop math' to calculate object dimensions, and material amounts needed.
> Coordinating his eyes, hand, and fingers, to use handtools and the welding equipment in constructing objects.
> Adhering to specifications and standards.
> Using basic math skills to total cost, make change, and compute percentages.
> Fill out sales forms.
> Knowing basic records-keeping systems, such as those used in auto parts systems."

The counselor contacted Mr. P's Auto Parts and concluded that the job at that one auto parts store was beyond claimant's stated capabilities due to the requirements to stand all day and occasionally carry objects weighing 25 to 50 pounds. The counselor identified four areas of employment: small parts assembly, hand packaging, mail clerk, and route clerk. The counselor concluded with a six-point program of assistance including more training, more job search counseling, better transportation or relocation, and wage subsidies.

In a December 17, 1984 letter from claimant's attorney, Dr. Paluska responded by checking a box that the job description of the particular job at Mr. P's Auto Parts exceeded claimant's limitations. On January 10, 1985 Dr. Paluska responded to a letter from the insurer's attorney with the information that his opinion of claimant's inability to work as an auto parts salesman was based solely on the job description provided for the one employer, that he had examined claimant three times and claimant had failed to appear for two appointments, and that he did not use the AMA Guides to the Evaluation of Permanent Impairment to arrive at the impairment rating of 60-80 percent.

Claimant's past job experiences included mobile home manufacturing, green chain pulling, operating a bark chipper, and farming. He has a tenth grade education plus a GED. He was 35 years old at the time of the hearing. He has a preexisting industrial injury which disables him from overhead reaching and lifting. The Referee found that claimant was severely impaired but that it was lack of motivation that prevented reemployment rather than lack of skills or training or lack of physical ability.

In order to meet the burden of proving that he is permanently and totally disabled, claimant must establish that he is unable to perform any work at a gainful and suitable occupation. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Preexisting disability is considered as well as impairment resulting from the compensable industrial injury. ORS

656.206(1)(a); Arndt v. National Appliance Co., 74 Or App 20 (1985); John D. Kreutzer, 36 Van Natta 284, aff'd mem. 71 Or App 355 (1984).

Although claimant is substantially disabled, he is not totally incapacitated. Because he is capable of performing some work, he can succeed in the claim for permanent and total disability only if he can prove 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 and totally disabled due to a combination of impairment related to the industrial injury and social and vocational factors. See Livesay v. SAIF, 55 Or App 390 (1981).

Claimant's motivation is also a key factor, and the burden is on claimant 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). Laymon v. SAIF, 65 Or App 146 (1983). Claimant can be excused from the requirement of ORS 656.206(3) if there is a finding that it would be futile for him to seek work based on impairment or a combination of impairment with social and vocational factors. Butcher v. SAIF, 45 Or App 313 (1980); George M. Turner, 37 Van Natta 531 (1985).

We find that claimant has not proven that he is totally incapacitated from working at a gainful and suitable occupation. The most that his treating doctor will say is that claimant is moderately severely disabled and that claimant is limited from performing some kinds of work. The doctor recommends that claimant not be placed in a job beyond his capacity, but does not report that the occupation of auto parts salesman is beyond claimant's capacity.

We also find that claimant has not proven that his disability makes it futile for him to attempt to seek work at a gainful and suitable occupation. One prospective employer's job may have been beyond claimant's physical capacity. However, the occupation was chosen through cooperative development of claimant's skills and desires. Moreover, claimant did not follow up the leads to other employers in the same line of business whose work requirements may not exceed claimant's physical limitations. The vocational evidence proves that only one job with one employer within the industry classification was actually beyond claimant's capacities and that the occupation, as defined, is within claimant's capacities. Claimant failed to seek work beyond the one opportunity even though his counselors identified many opportunities. His pattern of recalcitrance and reluctance persuades us that he has not proven that he "is willing to seek regular gainful employment and that [he] has made reasonable efforts to obtain such employment." Therefore, we find that he has not proven that he is permanently and totally disabled. Cf. Robert W. Northey, 37 Van Natta 78, aff'd mem. 75 Or App 579 (1985) (60 percent; claimant made no effort to seek and find work in spite of adequate skills); J. T. Tims, 36 Van Natta 340 (1984), aff'd mem. 72 Or App 780 (1985) (65 percent; hod carrier reduced to light capacity, trained as mechanic and auto parts salesman but was uncooperative with return to work efforts).

On the issue of extent of unscheduled permanent partial disability, claimant must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. "Earning capacity" is

defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971).

We rely on medical assessment and claimant's testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985). Howerton v. SAIF, 70 Or App 99 (1984).

As the court has stated:

> "A determination of the degree of partial incapacity or loss of earning power cannot be made with mathematical precision. A fact finder can do no better than to intelligently identify a range and arbitrarily choose a number within that range which seems to be consistent with that assigned to other similar injuries. There is a necessarily subjective element of experience-based intuition and exact consistency is not attainable." Owen v. SAIF, 33 Or App 385, 388 (1978).

See also, Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

We find that the Referee's award of 288 degrees for 90 percent unscheduled permanent partial disability is adequate to compensate claimant for the effects of his industrial injury. Although claimant did not prevail on his claim that compensation should be increased, the issue arose because of the insurer's request for review and reduction of the Referee's award. Claimant's compensation was not reduced and, therefore, claimant's attorney is entitled to an attorney fee. ORS 656.382(2).

ORDER

The Referee's order dated April 4, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the insurer.

Board Member Lewis Dissenting:

I respectfully dissent and would find claimant to be permanently and totally disabled.

Claimant has had two major surgeries on his low back and continues to have pain as a result of his industrial injury. Claimant is also partially disabled and cannot reach overhead as a result of a prior unrelated injury. Claimant's attending physician has limited claimant's physical activity to brief periods of standing, little or no bending or stooping or overhead reaching, and no lifting above 20 pounds. Claimant's training and work experience have been in fields requiring heavy lifting: welding, mobile home manufacturing, green chain pulling, farm work. Claimant attempted to cooperate with vocational rehabilitation counselors who attempted to place claimant in jobs

that were beyond his physical capacity. When a vocational counselor found a subsidized employment opportunity with a sympathetic employer, the job turned out to require lifting of products weighing more than 50 pounds and standing on concrete floors for eight hours a day. When claimant completed his auto parts training program, the final exam which required one hour of standing on concrete caused claimant's back symptomatology to increase so badly that claimant was forced to lie down for two days. Claimant has no transferable skills into the sedentary job classification.

The Referee found claimant was quite severely impaired based partly on his observation of claimant attempting to sit through the hearing, but the Referee found claimant was not motivated according to the reports of some of the vocational counselors. The Referee also speculated that claimant could return to some type of work within his capabilities if he were more motivated.

I would find that claimant has proven that he is permanently and totally disabled because he is precluded from regularly performing work at all gainful and suitable occupations for which he has the ability and training or experience to perform as of the time of the hearing. ORS 656.206. See Gettman v. SAIF, 289 Or 609 (1980). I would find that claimant is excused from seeking work because I am persuaded that even if he could find a gainful and suitable job, he could not keep it, based on his medical restrictions, Mr. McNaught's vocational assessment report and claimant's experience at school. Cf. Phillips v. Liberty Mutual, 67 Or App 692 (1984) (permanently and totally disabled; claimant's refusal to attempt to perform a specially tailored job that was beyond his physical capacity was not unreasonable and the evidence proved it would be futile for claimant to try to seek work); Ronald Meacham, 36 Van Natta 386 (1984), aff'd mem., 73 Or App 98 (1985) (permanent total disability, claimant attempted three jobs but was unable to perform and must lie down often to relieve symptoms, he did not cooperate fully with vocational rehabilitation counselors, and he needed additional training to become employable).

On the issue of claimant's motivation, I am persuaded that claimant showed that he was motivated to seek and obtain employment. He enjoyed his training program and earned high grades. The training program was interrupted at one point because of a worsening of claimant's condition, but he returned to it as soon as he could. He had transportation problems which he worked diligently to overcome. The vocational counselors noted that claimant's living accommodations were shabby and that claimant desired to move to better quarters. I am not persuaded that it was unreasonable that claimant failed to maintain a home telephone when he was trying to support a family of four on temporary total disability compensation benefits and vocational rehabilitation compensation benefits. I am persuaded by the record that the vocational rehabilitation efforts in this case were misdirected and doomed to failure because of claimant's limitations and I am also persuaded that claimant's responses were reasonable.

Accordingly, I respectfully dissent from the majority opinion.

THOMAS G. SMITH, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-10654
December 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee St. Martin's order which increased claimant's unscheduled permanent disability award for a low back injury from 5 percent (16 degrees) to 25 percent (80 degrees). On review, the employer contends that the award should be reduced. We agree and modify the Referee's order.

At the time of hearing claimant was a 46 year old machinist for an electrical power company. Claimant originally injured his low back in January 1978, when he slipped and fell while working for the same employer. This injury resulted in an August 1978 laminotomy at L5-S1 on the left and a decompression of the nerve root which was performed by Dr. Langston, orthopedist. Thereafter, claimant returned to his machinist duties. A January 1979 Determination Order's permanent disability award of 10 percent was apparently increased to 30 percent by a July 1979 Referee's order. However, a November 1979 Determination Order subsequently awarded 15 percent permanent disability which was in lieu of all previous awards.

In May 1982 claimant filed a claim for back pain brought on by long hours of work as a machinist. His then-treating chiropractor, Dr. Plewes, diagnosed "[M]oderate sprain of the lumbar spine resulting in imbrication of the posterior articular processes of L-4 and L-5 with resultant right sciatic radiculititis; accompanied by muscle spasms of paravertebral muscles."

In August 1982 Dr. Langston performed an independent medical examination. Claimant attributed his recurrence of back pain and radiating right leg pain to his eight hour work days, seven days a week. However, claimant reported that Dr. Plewe's daily treatments for two weeks had completely relieved his pain, allowing him to return to work without discomfort. Dr. Langston diagnosed musculoligamentous strain by history. Noting that claimant had completely recovered without any evidence or complaint in his low back and right lower extremity, Dr. Langston opined that claimant had suffered no permanent impairment and could return to work without limitation.

In October 1982 the employer accepted the claim and submitted it for closure. A November 1982 Determination Order awarded claimant no permanent disability. However, an April 1983 stipulation awarded him 5 percent permanent disability.

In April 1983 claimant's low back and right leg pain increased, prompting the reopening of his claim. In June 1983 Dr. Plewes estimated that claimant would be able to return to work by July. Observing that it was common to see remissions and exacerbations in cases such as this, Dr. Plewes predicted that claimant could anticipate future recurrences of pain especially during times of physical stress and fatigue.

In July 1983 Dr. Gripekoven, orthopedist, performed an independent medical examination. Claimant reported that his

severe pain in May 1983 had developed following a three month period of ten hour workdays, six days a week, as well as an eight foot jarring fall at work. Weekly chiropractic adjustments had improved his condition and enabled him to return to work, albeit subject to a light duty restriction. His low back pain had resolved, but he still experienced pain into his right leg. Noting that claimant demonstrated some sensory loss and depression of his right Achilles reflex, Dr. Gripekoven opined that claimant showed evidence of a right side S1 nerve root irritation. However, Dr. Gripekoven concluded that claimant did not sustain any increased impairment as a result of his latest episode and could continue with his employment, subject to a further period of job sheltering. In September 1983 Dr. Plewes concurred with Dr. Gripekoven's report.

In October 1983 claimant came under the care of Dr. Checkal, chiropractor. Dr. Checkal reported that claimant's sciatic nerve was inflamed and that X-rays indicated the presence of a swollen lumbosacral disc. Although Dr. Checkal concluded that claimant was medically stationary, the chiropractor also recommended that claimant be released from work. Dr. Checkal prescribed conservative treatment, consisting of chiropractic adjustments, ultra sound and infra-red heat treatments.

In January 1984 claimant was reexamined by Dr. Gripekoven. Claimant reported that he had been off work for the past three months, but was markedly improved and anticipated returning to his usual employment in February. He experienced no back pain and some occasional right leg pain. Dr. Gripekoven opined that claimant should be able to return to his usual employment without limitations and had suffered no permanent impairment.

In February 1984 Dr. Checkal released claimant for modified work, subject to a 30 pound weight restriction and a recommendation that he avoid excessive bending, twisting and lifting activities. Dr. Checkal further suggested that claimant work no more than 24 hours per week for a two week period. Thereafter, claimant returned to his regular duties and was subsequently considered medically stationary by Dr. Checkal in June 1984. Although claimant was symptom-free, Dr. Checkal was not entirely convinced that claimant would not eventually experience further low back problems. Dr. Checkal opined that claimant did not have over 35 percent impairment.

A July 1984 Determination Order did not award permanent disability in excess of the 5 percent claimant had earlier received.

In January 1985 claimant was again examined by Dr. Gripekoven. Claimant reported that twice weekly chiropractic treatments assisted him in accommodating his condition. His back condition had remained relatively constant, but his leg pain varied between his left and right leg. If he limited his work days to eight hours, he was able to tolerate his problems, but the longer work days and overtime precipitated greater discomfort. Noting a marked bilateral paravertebral spasm, a list to the right side and forward, and a 50 percent or less of normal range of lumbar motion, the orthopedist diagnosed chronic lumbar sprain with radicular pain. Dr. Gripekoven recommended continued conservative treatment, but offered no further opinion concerning the extent of claimant's permanent impairment.

Claimant is a high school graduate. For the past 19 years he has worked for the employer as a machinist. He returned to full time duties in April 1984. At the time of the hearing he was working ten hour days as a "winder's helper," assisting in the overhauling of hydroelectric generators. Claimant could tolerate the overtime hours because he was "not working on cement and it's not lifting anything." Once that project concluded, claimant would return to the "shop" where he works eight hour days, but his work activities are more physically draining in that they are performed on cement floors and involve more "pulling and tugging." Although claimant's seniority makes him eligible for a "lead man" position, he feels that he cannot carry a full load in that his employer generally expected that position to work 12 hour days, seven days a week when necessary. As a result of his back and right leg pain, claimant has curtailed, if not eliminated, several of his hobbies, household chores, and recreational activities.

Inasmuch as claimant was off work on two different occasions since his 1982 injury and had given up much of his personal life activities, the Referee concluded that claimant's physical impairment was far greater than it had been prior to the 1982 injury. Noting that claimant was apparently utilizing all of his available energies on the job, the Referee awarded an additional 20 percent permanent disability. We agree that claimant's previous 5 percent permanent disability award should be increased. However, we consider the Referee's award to be excessive.

ORS 656.222 requires that an award of compensation for a subsequent disability shall be made with regard to the combined effect of claimant's injuries and his past receipt of money for such disabilities. The statute requires consideration of the prior related injuries and the prior disability award, but it does not require a mechanical offset. Thomason v. SAIF, 73 Or App 319, 322-23 (1985); Green v. SIAC, 197 Or 160 (1952). Claimant contends that he suffered two distinct injuries affecting two separate body parts in that he experienced primarily left leg symptoms following his 1978 injury and right leg symptoms following his 1982 injury. We do not find this contention persuasive. The preponderance of the evidence establishes that both injuries pertained to the same general area of his body, his low back. Accordingly, claimant's prior injury and award will be considered.

In rating the extent of claimant's permanent disability, we consider claimant's physical impairment, including his testimony concerning disabling pain, and all of the relevant social and vocational factors set forth in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985). We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned statute and guidelines, we conclude that a total award of 15 percent unscheduled permanent disability adequately compensates claimant for his 1982 back injury.

ORDER

The Referee's order dated March 8, 1985 is modified. In lieu of the Referee's award, claimant is awarded an additional unscheduled permanent disability award of 10 percent (32 degrees), which gives him a total award to date of 15 percent (48 degrees) resulting from his 1982 low back injury. Claimant's attorney's fee shall be adjusted accordingly.

JERRY USSERY, Claimant
Philip H. Garrow, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 82-10940
December 11, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Howell's order which upheld the self-insured employer's denial of claimant's industrial injury claim for his low back condition and denied claimant's request for a penalty and attorney fee for the self-insured employer's allegedly unreasonable denial. Claimant also requests a penalty and attorney fee for the employer's unreasonable failure to pay interim compensation.

We find that at hearing, claimant did not request a penalty and attorney fee for the employer's failure to pay interim compensation. He raises the issue for the first time on review. Because the issue was not raised below, we decline to consider it. See Robert R. Delugach, 37 Van Natta 63, 65 (1985).

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated May 14, 1985 is affirmed.

JEANNE Y. SPILLANE, Claimant
Olson Law Firm, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-10036
December 12, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Holtan's order which upheld the self-insured employer's partial denial of her request for elective low back surgery. The employer cross-requests review, contending that the Referee incorrectly set aside its partial denial of claimant's request for child care and mileage expenses.

We affirm and adopt that portion of the Referee's order which found that claimant's request for surgery was not compensable. However, we reverse that portion of the order which found that claimant's child care and mileage expenses were compensable.

Claimant was 51 years of age at the time of hearing. In June 1979 she sustained a compensable low back injury while lifting a heavy roll of wire. Following an extensive period of conservative treatment, surgery was performed in October 1983.

In November 1983 Dr. Smith, claimant's treating orthopedist, reported as follows:

> "[T]his letter is to certify that [claimant] was in need of home care assistance from the dates of October 24 through November 3 during her convalescence from back surgery. Ms. Yvonne Page was enlisted to help [claimant] with her home care during this time."

The employer apparently paid for claimant's home care assistance for this period.

In May 1984 claimant was referred to the Callahan Center. Claimant, a resident of Klamath Falls, was concerned for the welfare of her 15 year old son while she attended the center. Consequently, she arranged with an acquaintance, Brenda Harris, to provide 24 hour per day care for her son. No specific figure was agreed upon, but it was understood that Ms. Harris would receive "around" $25 per day, plus mileage. Claimant did not discuss this matter with the employer because her previous child care expenses had been paid without objection.

Claimant's son resided with Ms. Harris for 36 days. During this time, Ms. Harris also provided meals, laundry services, and transportation to and from the school bus stop. Contending that the expenses were neither authorized nor medically related to claimant's compensable injury, the employer denied claimant's request for payment.

The Referee found the expenses compensable. He reasoned that the evidence was uncontroverted that claimant's son would have been unattended while claimant attended the Callahan Center. Furthermore, he noted that the employer had previously paid for claimant's child care expenses. The Referee relied on Peggie Roberts, 15 Van Natta 76 (1975), which had found child care expenses compensable where the claimant was precluded from caring for her six children during her convalescence from surgery and the care had been authorized or approved by the claimant's physician.

Roberts has recently been discussed in Jeanne M. Lorenzen, 37 Van Natta 1086 (1985), a decision issued subsequent to the Referee's order. In Lorenzen, we framed the issue as whether child care services were provided as a medical or other related service under ORS 656.245(1). Reasoning that there was no evidence to indicate that any physician or practitioner of the healing arts ever authorized, discussed, or considered claimant's child care needs during her hospitalization or recovery, we concluded that the child care expenses were noncompensable.

The present case falls somewhere between Roberts and Lorenzen. Following our de novo review of the record, we find that it falls closer to Lorenzen.

Claimant had received her physician's approval for "home care assistance." However, the approval pertained to an entirely different set of circumstances. The approval does not mention child care, but instead uses the general term of "home care assistance." Although claimant apparently considered child supervision within this general phrase, the phrase could also pertain to services particularly designed to enhance claimant's post-surgery recovery by relieving her from such physical activities as household maintenance and personal hygiene.

Moreover, claimant's physician specifically approved of the services rendered by a person other than the individual who subsequently provided the 36 days of child care. Finally, not only did the approval expressly involve a 10-day period some seven months prior to the time in question, but it also concerned claimant's convalescence at home following surgery rather than the 36 days she was away from her home attending the Callahan Center.

As we stated in Lorenzen, it cannot be denied that claimant owed a high legal and moral duty to provide responsible supervision for her unattended minor child. Furthermore, we can conceive of situations where the injured worker's knowledge that minor children are being cared for during the worker's convalescence and rehabilitation can have a positive impact on the worker's eventual recovery. However, on this record, we conclude that claimant has failed to establish that the child care expenses she obtained during her stay at the Callahan Center were compensable as medical or other related services under ORS 656.245(1).

ORDER

The Referee's order dated May 3, 1985 is affirmed in part and reversed in part. The self-insured employer's August 2, 1984 partial denial of claimant's request for child care expenses and mileage reimbursement is reinstated and upheld. Claimant's attorney fee award is reversed. The remainder of the Referee's order is affirmed.

RODNEY A. ALDERSON, Claimant
Christopher D. Moore, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11194
December 17, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Daron's order which: (1) upheld the SAIF Corporation's denial of claimant's request for out-of-state chiropractic care; and (2) denied claimant's request for penalties and attorney fees for SAIF's allegedly unreasonable denial.

The seminal issue in this proceeding is whether by expressly authorizing the worker to choose an attending physician within the state, ORS 656.245(3) impliedly empowers insurers not only to disapprove of specific out-of-state physicians, but also to deny payment for treatment by all out-of-state practitioners of a particular mode of treatment. In Reynaga v. Northwest Farm Bureau, 300 Or 255 (November 26, 1985), the Oregon Supreme Court held that it does not. Accordingly, we reverse that portion of the Referee's order which upheld SAIF's refusal to pay for future out-of-state medical services without prior authorization and unless administered by a board certified orthopedic or neurosurgeon.

Claimant also contends that SAIF's refusal was unreasonable and, hence, that a penalty and attorney fee should be awarded. Before Reynaga, the lead case on the power of insurers to deny payment for treatment by out-of-state practictioners was Rivers v. SAIF, 45 Or App 1105 (1980). As the Referee's order well illustrates, Rivers did not provide clear direction and could be read as supporting SAIF's position in the present case.

Considering the uncertainty that existed before Reynaga, we do not find that SAIF's actions were unreasonable. We decline to award a penalty and associated attorney fee.

ORDER

The Referee's order dated May 21, 1985 is affirmed in part and reversed in part. That portion of the Referee's order which upheld the SAIF Corporation's refusal to pay for future out-of-state medical services without prior authorization and unless administered by a board certified orthopedic or neurosurgeon is reversed. These restrictions are set aside. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $500 for services at hearing and $500 for services on Board review, to be paid by the SAIF Corporation.

IRENE M. GONZALEZ, Claimant
Michael B. Dye, Claimant
Cummins, et al., Defense Attorneys

WCB 84-12022
December 17, 1985
Order Denying Motions to Strike

Both parties have moved the Board for orders striking portions of the other party's briefs. Fundamentally, each party asserts that the other has attempted to insert evidence or issues not considered by the Referee into the record on review.

ORS 656.295(5) provides that Board review shall be based upon the record created at the hearing "and such oral or written argument as [the Board] may receive." The Board may not consider evidence not a part of the record at the hearing. Muffett v. SAIF, 58 Or App 684, 687 (1982). If the proferred evidence would complete an otherwise incomplete record, we are authorized to remand the case to the Referee. ORS 656.295(5); see Parmer v. Plaid Pantry #54, 76 Or App 405 (CA A33092, November 20, 1985). Proferred evidence will be considered only in connection with a decision whether the case warrants remand. Bailey v. SAIF, 296 Or 41, 45 (1983). To the extent that the matters objected to are argument, they are not evidence, and will be considered by the Board if relevant to the issues to be decided. We will make these decisions in connection with our review of the case in the normal course of business.

All pending motions to strike are denied. We note that briefing is closed. This case shall be docketed for review in the normal course of business.

IT IS SO ORDERED.

RONALD D. GRIFFIN, Claimant
Coons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09698
December 17, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Daron's order that awarded claimant 6.75 degrees for 5 percent scheduled permanent partial disability for the left foot and 6.75 degrees for 5 percent scheduled disability for the right foot, in lieu of the Determination Order that made no permanent partial disability award. Claimant also seeks an attorney fee for services at the hearing and on Board review for what he asserts to be a defense against the SAIF Corporation's alleged retroactive denial of the compensability of claimant's right foot condition. The issues on review are extent of scheduled disability and attorney fees.

On the issue of extent we affirm the order of the Referee. We also find that claimant's attorney is not entitled to an attorney fee. Claimant asserts that after accepting claimant's right foot condition, SAIF attempted to deny responsibility for it both at hearing and on Board review. With certain exceptions, such retroactive denials are not permissible. Bauman v. SAIF, 295 Or 781 (1983).

After reviewing the record, we find that SAIF has not attempted to retroactively deny the compensability of claimant's right foot condition; it has merely argued that if claimant has permanent disability to the right foot, it is not due to his compensable injury. See ORS 656.214(2). On review, SAIF does not argue for a reduction in the Referee's award of scheduled disability; it merely asks that the award not be increased. We find that SAIF's argument is made in the context of the extent of claimant's right foot disability, not the compensability of the condition in the first instance. An attorney fee is, therefore, not warranted.

ORDER

The Referee's order dated June 21, 1985 is affirmed.

WILLIAM R. GWYNN, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11354
December 17, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seifert's order that upheld the SAIF Corporation's denial of claimant's aggravation claim for the lower back. The issue on review is compensability.

We affirm the order of the Referee with the following comment. Claimant's claim involves an Oregon injury with an alleged aggravation arising from work activity performed in California. Apparently because of claimant's work activity in two states, the Referee discussed Daniel P. Miville, 36 Van Natta 1501 (1984), rev'd, Miville v. SAIF, 76 Or App 603 (December 4, 1985), in which we applied the last injurious exposure rule to a claim arising from an Oregon injury followed by a period of out of state employment that we found independently contributed to the claimant's disability. The Referee in this case discussed but apparently did not rely on Miville in reaching his decision. Rather, he found that claimant suffered a temporary exacerbation of symptoms only while in California and that his aggravation claim was not compensable.

We wish to make clear that we do not reach the issue discussed in Miville, for we find that claimant suffered neither a new injury nor a compensable aggravation while in California. The evidence persuades us that following the last arrangement of compensation, claimant experienced a mere exacerbation of symptoms without a worsening of his underlying condition. While a symptomatic worsening alone can represent a compensable claim under the proper facts, James W. Foushee, 36 Van Natta 901 (1984), it is generally not sufficient if the claimant has received an award of permanent partial disability that takes into account future symptomatic flare-ups. See Jimmie B. Hill, 37 Van Natta 728 (1985). In the present case, claimant has received an award of 64 degrees for 20 percent unscheduled permanent partial disability for the low back. We find that this award contemplated future symptomatic exacerbations.

ORDER

The Referee's order dated June 4, 1985 is affirmed.

DANIEL J. SABOL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11114
December 17, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seymour's order that upheld the SAIF Corporation's denial of the low back injury claim. The issue on review is compensability.

Claimant worked at a wholesale bakery as a laborer. More than half of his job was stripping racks, which was to take empty steel and plastic trays out of portable racks and stack the trays on pallets. This work required nearly continuous bending and twisting while lifting and carrying weights up to 30 pounds.

While stripping racks in February 1984 claimant suffered an injury to his low back which resulted in pain which radiated down his left leg like an electric shock. Dr. Patricelli diagnosed "transient mild sensory nerve compression" and released claimant to return to work. The claim was accepted as a non-disabling injury and was not closed. Claimant had no left sided symptoms after approximately one month.

On July 30, 1984 claimant felt pain and tingling in his right leg while stripping racks. The pain and tingling built up over the course of the day until claimant felt it should be reported to his supervisor. Claimant went on vacation for a week after the injury during which he continued to feel the pain in his right leg. He returned to work at light duty because of an unrelated shoulder injury and expected the right leg pain to resolve as the left leg pain had resolved.

On August 29, 1984 claimant signed a claim form and on August 31 he left work and sought treatment at an emergency room. The emergency room doctor diagnosed back pain of undetermined causation, although the hospital form indicated that the complaints were related to a January 1984 low back injury at work. The doctor did not obtain the history of injury in July 1984.

On September 4, 1984 claimant was examined by Dr. Crist who diagnosed right leg pain with unclear etiology. Dr. Crist noted that claimant had a similar occurrence involving the left side which had resolved within one month without residual problems. On September 11, 1984 claimant was examined by Dr. Tilchin, chiropractor, who diagnosed lumbar strain/sprain and scoliosis. On September 22, 1984 Dr. Crist examined claimant and noted that he doubted the chiropractic treatment would help or hurt claimant. Claimant discontinued the chiropractic treatment.

On October 16, 1984 the SAIF Corporation denied compensability of a left hip and leg pain condition due to nerve compression related to an injury date of July 30, 1984. On November 5, 1984 SAIF received Dr. Crist's letter pointing out that claimant's July 1984 injury involved right-sided symptoms and requesting clarification of the denial. SAIF replied on December 11, 1984 with another denial which specified right-sided symptoms.

On November 7, 1984 Dr. Butters, orthopedic surgeon, examined claimant's right knee and leg. He reported no objective findings. He concluded, "I don't see much indication for further workup of the leg problem at this time. As you know, posterolateral knee pain is a difficult area to diagnose. I feel that he should remain on the light duty job as is planned. . . ."

On February 5, 1985 claimant was examined by Dr. Robertson who reported claimant's history of intermittent right leg pain since July 1984 related to pushing racks of dough with a twisting motion and that Dr. Butters had advised claimant that the problem was probably a pinched nerve. Dr. Robertson reported that the physical examination was normal and diagnosed quiescent mild sciatica. He recommended a back exercise program.

On March 29, 1985 Dr. Crist reported his opinion that claimant's right sided symptoms were not related to the left sided symptoms suffered in February 1984. Dr. Crist also reported that claimant had said there was no specific injury in July 1984 and that he had had no significant problems with the leg since that time.

Claimant testified that he lifted weights in an unsupervised and unstructured program three days a week and ran two to ten miles per week. Claimant stopped running approximately January 1985 and stopped lifting weights when Dr. Robertson diagnosed a back problem. By the end of July 1984 claimant had had no back or leg problem since the February 1984 injury resolved.

Claimant suffered a sudden increase in pain which required medical services while performing twisting and lifting labor at work. The injury is manifest as a pain that goes through cycles of waxing and waning involving the right leg. The Referee made no credibility finding.

The Supreme Court set out the standards by which a prima facie case of causation in an injury claim may be made without expert medical testimony in Uris v. Compensation Department, 247 Or 420 (1967). An injury need not be precipitated by a sudden single event at work. Harris v. Albertson's Inc., 65 Or App 254 (1983); Valtinson v. SAIF, 56 Or App 184 (1982). Dr. Butters related claimant's pain to claimant's job even if he could not diagnose a specific condition at the time he examined claimant. Dr. Crist related claimant's experience after July 1984 to claimant's experience in February 1984. Claimant has consistently reported the same history and course of symptoms since the date when the pain suddenly began. We find that claimant has carried his burden of proof that he suffered an injury at work which required medical services and resulted in disability. We, therefore, reverse the Referee's order.

ORDER

The Referee's order dated May 29, 1985 is reversed. SAIF's denials are set aside and the claim is remanded to SAIF for processing. Claimant's attorney is awarded $1,000 for services at hearing and $750 for services on Board review, to be paid by the SAIF Corporation.

HAROLD J. SIMONIS, Claimant
Jim Vick & Assoc., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-04687
December 17, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Leahy's order that dismissed the request for a hearing on the issue of payment of chiropractor bills. The issue was presented to the Referee on stipulated documents without testimony. The issue on review is payment of chiropractor bills as medical services when those bills were incurred before approval of a stipulated order awarding additional unscheduled permanent partial disabilty.

Claimant injured his low back in the course of his employment in May 1982. The claim was accepted. Claimant obtained chiropractic treatment for his injury. In November 1982 the SAIF Corporation requested substantiation of the need for treatment. The chiropractor replied to SAIF with a justification for treatment. The claim was closed by Determination Order dated February 15, 1983 which awarded 32 degrees for 10 percent unscheduled permanent partial disability. Claimant requested a hearing on issues of temporary and permanent disability. A Referee signed a stipulated order awarding an additional 64 degrees for 20 percent permanent disability on June 3, 1983 and which purported to settle all issues raised or raisable at the time of the order. SAIF never sent a denial or a partial denial of the chiropractor's services to claimant. Subsequent to the approval of the stipulation, claimant learned for the first time that SAIF had not paid the chiropractor's bills from August 27, 1982 through January 11, 1983; from March 11, 1983 through April 4, 1983; and for August 8, 1983, which total $703.

SAIF argues on review that it need not have notified claimant that it was denying payment of the chiropractor's bills until after February 1983. SAIF relies on Billy J. Eubanks, 35 Van Natta 131 (1983), to show that it was in compliance with applicable rules at the time. In Billy J. Eubanks the Board reviewed the applicable statutes and administrative rules and decided that the insurer must notify a claimant that it has denied payment for medical services and provide a claimant with a notice of hearing rights. SAIF also relies on the doctrine of res judicata to bar the claim raised after the stipulation.

Claimant relies on Hettie M. Eagle, 33 Van Natta 671 (1981), which has a similar factual background, and Eubanks. In Hettie M. Eagle, the claimant contested closure and extent of disability determinations at a time while she was continuing to receive psychological treatment. Claimant was unaware that SAIF was not paying the psychologist at the time of the first hearing and there had been no formal denial of the treatment. The Board found that SAIF could not rely on res judicata to prevent claimant from litigating the issue of payment of the medical bills in the absence of notice to claimant and without having denied the bills at the time of the first hearing.

To resolve the issues in this case, we first find that Billy J. Eubanks was the exposition of statutes and administrative rules in effect at the time and was not the promulgation of a new rule of law, therefore, its application was not restricted to the future. See U. S. National Bank v. Wagoner, 70 Or App 266 (1984), rev. den., 298 Or 773 (1985). We next find that claimant was not

barred by res judicata from litigating the issue of compensability of the chiropractor's bills because there had been no formal denial of the bills at the time of the stipulation. Syphers v. K-W Logging, Inc., 51 Or App 769 (1981); Hettie M. Eagle, supra; Samuel R. Weimorts, 32 Van Natta 198 (1981).

According to Eubanks and the applicable administrative rules, SAIF had to pay or deny the bills. When SAIF questioned the bills based on frequency of treatment, the chiropractor responded with a justification for treatment. No rebuttal evidence was offered. Therefore, we find that SAIF was responsible for payment of the chiropractor's bills as justified continuation of the care of claimant's accepted injury.

ORDER

The Referee's order dated May 7, 1985 is reversed. The claim is remanded to SAIF for payment of the chiropractor's bills which total $703. Claimant's attorney is awarded $500 for services through hearing and $500 for services on Board review, to be paid by the SAIF Corporation.

DONALD F. SPEARS, Claimant
Callahan, et al., Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 84-07840
December 17, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee Lipton's order which found the insurer's refusal to pay an award for unscheduled permanent partial disability in a lump sum was not unreasonable and, therefore, denied claimant's request for penalties and attorney fees. The issue on review is penalties and attorney fees.

Claimant was injured in the course of his employment. His claim was closed by Determination Order dated October 17, 1983 which awarded 64 degrees for 20 percent unscheduled permanent partial disability. Claimant requested a hearing and Referee Fink awarded 112 degrees for 35 percent unscheduled permanent partial disability in lieu of the Determination Order. The Determination Order was the first award of compensation for permanent disability relating to this claim.

The insurer, relying on ORS 656.230(2), paid claimant periodic installments until the full amount of the award had been paid. Claimant demanded a single lump sum payment, but did not invoke the provisions of ORS 656.230(1). The insurer does not concede that Referee Fink's order was an award of additional compensation, based on the actual wording of the order, but rather argues that the order was a modification of the original Determination Order award.

ORS 656.230 provides:

"(1) Where a worker has been awarded compensation for permanent partial disability, and the award has become final by operation of law or waiver of the right to appeal its adequacy, the director may,

in the director's discretion, upon the worker's application order all or any part of the remaining unpaid award to be paid to the worker in a lump sum. Any remaining balance shall be paid pursuant to ORS 656.216.

"(2) In all cases where the award for permanent partial disability does not exceed 64 degrees, the insurer or the self-insured employer shall pay all of the award to the worker in a lump sum."

Claimant argued that Referee Fink awarded 48 degrees in addition to the award by Determination Order. He argued that it was an artificial elevation of form over substance to consider the additional compensation ordered by Referee Fink as anything but an award of additional compensation. The insurer argued that Referee Fink deliberately chose his words and ordered compensation of 112 degrees in lieu of the Determination Order award of 64 degrees and, therefore, the insurer reasonably relied on the words of the statute which provide that an award of compensation in excess of 64 degrees shall be paid in periodic installments.

The issue is confined to the situation when only one Determination Order has been issued, that order awarded 64 degrees or less compensation for unscheduled permanent partial disability, and the Referee increased the award by 64 degrees or less in an order which specified that the Referee's award was in lieu of the Determination Order award, but which made the total award for permanent disability greater than 64 degrees. Payment of compensation when the award of compensation is greater than 64 degrees is controlled by ORS 656.216(1).

ORS 656.216(1) provides:

"Compensation for permanent partial disability may be paid monthly at 4.35 times the rate per week as provided for compensation for temporary total disabilty at the time the determination is made. In no case shall such payments be less than $108.75 per month."

The statutes speak of "the award." When the Referee awarded compensation "in lieu of" an award by Determination Order, there was only one award, and that was the award made by the Referee. Prior payments made pursuant to the Determination Order were advance payments made on the award for permanent disability pending a final determination. A claimant's total award can be reduced even though the claimant would not have to refund the amount of the award paid pending litigation. ORS 656.313. We find that the insurer was not only reasonable, but also correct in making the periodic payments contemplated by ORS 656.216 rather than one lump sum payment absent a request by claimant and an order by the director of the Workers' Compensation Department for a lump sum distribution of the award pursuant to ORS 656.230(1).

ORDER

The Referee's order dated April 17, 1985 is affirmed.

HERBERT T. STRUNK, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13388
December 17, 1985
Order of Remand

Claimant has requested review of Referee Howell's order dated October 1, 1985. In accordance with our usual procedures, the request for review was acknowledged and a transcript of the hearing proceedings was ordered. We were informed by the hearing reporter that a transcript of the hearing could not be provided because the recording equipment used at the hearing had not been properly activated and the tape was blank. This situation arose through no fault of the parties or the Referee.

We referred this matter to Presiding Referee Daughtry to contact counsel and ascertain their respective positions as to how we should proceed. Referee Daughtry advises us that the parties are in agreement that Referee Howell's order should be vacated and the matter should be remanded to the Hearings Division, but are unable to agree as to the breadth of proceedings on remand.

We agree with the parties that this matter must be remanded. ORS 656.295(5). See Bailey v. SAIF, 296 Or 41 (1983); Muffett v. SAIF, 58 Or App 684 (1982). We have further concluded that substantial justice will best be achieved by remanding this case to the Presiding Referee for an expedited rehearing before a Referee other than Referee Howell. The documentary evidence on rehearing shall be identical to that received by Referee Howell. Only those witnesses who testified at the hearing before Referee Howell shall be permitted to testify at the rehearing. The testimony of such witnesses, however, shall not be subject to any limitation other than the usual requirements for the admissability of evidence.

ORDER

Referee Howell's order dated October 1, 1985 is vacated. This matter is remanded to the Presiding Referee for further proceedings consistent with this order.

SHARON A. BARKASEY, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-00303
December 19, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee Lipton's order that found claimant entitled to an award of permanent total disability. The sole issue on review is whether claimant has proved entitlement to that award.

Claimant compensably injured her neck and right shoulder in November 1975 while cutting chickens. The initial diagnosis was right trapezius pain with discomfort radiating into the right subscapular area. A May 1976 cervical myelogram, performed by Dr. McGee, revealed a right C5-6 extradural defect. Dr. McGee became claimant's treating physician.

As a result of the myelographic findings, claimant underwent right posterior cervical foraminotomies at C5-6 and 6-7 in June 1976. The surgery initially improved claimant's symptoms, although she continued to suffer hypesthesia. Other symptoms returned soon after the surgery, however, and when they failed to dissipate by mid-1977, Dr. McGee suggested the possibility of further surgical intervention.

Claimant was then examined by a panel of Orthopaedic Consultants in November 1977. The panel opined that additional surgery was not needed. They further indicated that claimant was medically stationary with an impairment in the range of mild to mildly moderate. It was the panel's opinion that claimant could return to light duty work.

Claimant entered an authorized training program in electronics assembly, which she successfully completed in July 1978. She noted increased pain and other symptoms with this training activity, however. At the completion of her program, claimant was awarded 5 percent unscheduled disability for the neck and right shoulder by way of an August 9, 1978 Determination Order.

Following the determination, claimant's shoulder complaints increased, although electromyographic studies proved normal. Claimant experienced some relief with physical therapy, but her symptoms continued to wax and wane throughout the remainder of 1978 and into 1979. Although retrained in electronics assembly, claimant was unable to secure employment due to the depressed high technology market in her geographical area. As a result, she entered a beautician training program. Claimant again experienced increased symptoms during training, and Dr. McGee recommended that the training be reduced to part-time. Claimant eventually completed the second program in October 1980. Following the completion of training, Dr. McGee opined that claimant was capable of part-time employment as a beautician. A second Determination Order granted claimant an additional 35 percent unscheduled disability for the neck and shoulder, as well as 10 percent scheduled disability for the right arm.

In March of 1981 Dr. McGee reiterated his opinion that claimant could work part-time. Claimant, however, felt that she was incapable of work and she declined further vocational assistance. Her file was closed in April 1981. In the meantime, claimant appealed the earlier Determination Order and by an Opinion and Order dated March 23, 1982, she was awarded an additional 35 percent unscheduled disability, bringing her total unscheduled award to 75 percent.

Claimant's complaints continued throughout 1982. She was examined once again by Orthopaedic Consultants in November of that year and the panel found her functional problems to be overshadowing the organic ones. Pain Center treatment was suggested and claimant's treating physician concurred. The Center's initial assessment of claimant indicated that she would probably benefit from therapy, but it was uncertain whether she would follow through on the suggestions provided. The Center's discharge analysis was that although claimant appeared to have a "good attitude," it was "difficult to determine whether she was really sincere about actual return to work . . . She seems . . . inclined to see herself as a retired individual. She does indicate that it is necessary for her to return to work." The Pain Center personnel felt that claimant was capable of light to sedentary work.

Although Dr. McGee noted some improvement in claimant's symptoms and a decrease in her medications following treatment at the Pain Center, he stated in July 1983 that claimant should not be encouraged to seek work outside the home. He apparently felt that claimant's history of increased symptoms with work activity would repeat itself if claimant attempted competitve employment.

He did suggest that claimant was capable of light duty chores at home, however.

Because claimant's complaints continued, claimant was examined by Dr. Quan, a psychiatrist, in an attempt to determine whether she suffered from a psychiatric disability that would preclude her from being employed. None was found. Dr. Quan noted, however: "It does not appear that she has significant motivation to resume employment . . . [y]et it does seem apparent that she is able to do many things in her personal life without significant difficulty."

Claimant was again examined by Orthopaedic Consultants in December of 1983. After the physical examination revealed no new findings, the physician dictating the report noted:

> "In my opinion, the patient is capable of returning to some type of light duty work not requiring lifting more than 10 pounds, such as light clerical work, or sales work . . . The potential for this patient ever returning to work depends upon a change in her psychological attitude toward her impairment. It is obvious, in my opinion, that at the present time, she is not motivated to return to work. She has definitely made up her mind to never seek employment in the future."

Dr. McGee was asked whether he concurred in the panel's analysis, and he replied: "No additions - any work activity would have to minimize stress to neck, arm and shoulders."

In a reply to claimant's attorney regarding claimant's employability, Dr. Seres of the Northwest Pain Center stated:

> "From a medical standpoint . . . both Dr. Miller and I agree that although there are significant problems, there are some things that this woman could do as far as work is concerned. It would appear rather clear at this point, however, that [claimant] does not see herself as employable and is not interested in pursuing this approach."

In July 1984 Mr. McNaught, a vocational consultant, reported that claimant had no vocational goals, had not looked for work and had no skill to look for work. He also opined that although claimant "certainly [has] vocational strengths," she was unemployable and it would be futile for her to search for work.

At the request of SAIF claimant was evaluated by Mr. Vallee, who is also a vocational consultant. In a 20-page report outlining the results of his evaluation, Mr. Vallee noted that claimant is skilled in reading and certain mathematical functions. She scored in the "superior" range (95th percentile) on one of the tests administered. Because of claimant's academic skill, and because it was apparent that she was capable of at least some employment, Mr. Vallee suggested a retail sales position in a Christian bookstore. According to the vocational test results, the position was consistent with both claimant's skills and interests. Mr. Vallee also identified eight employers in claimant's geographical area who were willing to employ workers

on a reduced schedule basis. Mr. Vallee presented his analysis of the retail position to claimant's then-treating physician, Dr. McKitrick. After reviewing the analysis, Dr. McKitrick opined that claimant was capable of doing the work four hours per day.

Despite the favorable vocational results, claimant voiced a number of personal, as well as physical, problems that she felt would preclude her from accepting the job suggested by Mr. Vallee.

Entitlement to permanent total disability may be established in two ways: claimant may prove that she is totally disabled from a physical standpoint alone, or that she is less than physically incapacitated but is rendered incapable of regular employment by the combination of her physical disabilities and unfavorable social/vocational factors, such as advanced age, poor education and limited prior work experience. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Unless claimant is physically incapacitated, however, she must prove that she is motivated to work and that she has made a reasonable work search effort, ORS 656.206(3); Home Insurance Co. v. Hall, 60 Or App 750 (1983), unless such an effort would be futile. Smith v. Brooks-Scanlan, 54 Or App 730 (1981).

After reviewing the record, we find that claimant is not totally disabled from a physical standpoint alone. In fact, the evidence is nearly unanimous that claimant is capable of regular, albeit part-time, work. See Pournelle v. SAIF, 70 Or App 56 (1984); Hill v. SAIF, 25 Or App 697 (1976). Therefore, claimant must satisfy the "motivation" requirement of ORS 656.206(3), unless a work search would be futile. Morris v. Denny's, 50 Or App 533 (1981); Butcher v. SAIF, 45 Or App 313 (1980). The scope of the futility exception to the seek-work requirement is determined on a case-by-case basis. George M. Turner, 37 Van Natta 531, 536 (1985). In the present case, we find that a work search by claimant would not be futile. We further find that claimant has not satisfied ORS 656.206(3).

Although claimant was only 45 years of age at the time of the hearing, it is clear that she considers herself retired. She has suggested that she does not have to work, and she feels the effort would be futile. She has, in fact, not looked for work since her injury. Although claimant initially cooperated with vocational personnel, by 1981 she was beginning to cancel appointments with her counselors and to make various excuses for not following through. The physicians at the Northwest Pain Center were concerned about claimant's ability to follow through, and neither of the vocational consultants who testified at hearing could determine a vocational direction in which claimant wished to proceed.

We find that although claimant is capable of work she is motivated neither to search for it nor to engage in it if it is offered. Under these circumstances, an award of permanent total disability is not appropriate. We also find that claimant has been adequately compensated by the various awards of unscheduled and scheduled disability she has received thus far.

ORDER

The Referee's order dated May 3, 1985 is reversed.

INEZ CUELLAR, Claimant
Philip Garrow, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 84-10754
December 19, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Holtan's order that upheld the insurer's partial denial of claimant's thoracic outlet syndrome. The issue on review is compensability. We adopt and draw from the Referee's statement of the facts.

Claimant suffered a compensable injury or occupational disease in March 1981 while employed by American Forest Products (American). Claimant was employed as a lumber grader, a position requiring extensive use of the hands and wrists. While employed by American, claimant's symptoms were confined to the hands and wrists and were suggestive of carpal tunnel syndrome, although EMG studies and other objective tests proved normal.

Claimant left American in May 1981 and in August of that year began work for the U.S. Forest Service, where she performed a variety of jobs including firefighting and timber cruising. Claimant's hand and wrist symptoms continued, and conservative treatment failed. In early 1982 she underwent carpal tunnel surgery, first on the right and, a month later, on the left.

Following her surgeries, claimant was essentially symptom free for about six months. She then sought treatment for a recurrence of her symptoms, as well as new and additional symptoms, in October of 1982. A second surgery was performed in December of 1983 to remove bilateral neuromas thought to be causing claimant's symptomatic recurrence. Claimant's symptoms continued following that surgery, however.

Because claimant's more recent symptoms included pain and numbness in the arms and shoulders, her then-treating doctor began to suspect thoracic outlet involvement. Dr. Eckland referred claimant to Dr. Adams, a thoracic surgeon. It was Dr. Adams's opinion that claimant was suffering from thoracic outlet syndrome and he recommended surgery to remove the eighth cervical rib on the right. The surgery was performed in November 1984 and claimant's right arm and shoulder symptoms resolved. In the meantime, her claim for thoracic outlet syndrome was denied by the insurer on the ground that the newest condition was not related to claimant's 1981 employment at American.

In affirming the insurer's denial, the Referee relied primarily on the medical evidence, finding the testimony of the witnesses to be somewhat vague as a result of the passage of time. The Referee accepted the opinions of the doctors who examined or treated claimant for carpal tunnel syndrome and found no evidence of a thoracic outlet condition at the time claimant was employed by American. Consequently, the Referee held that claimant failed to prove the requisite causal connection between her American employment and the thoracic outlet syndrome.

Claimant assigns a number of errors on review. First, she argues that the Referee admitted several exhibits in violation of OAR 438-07-005(3), the so-called "ten day" rule. The Referee did admit exhibits offered by the insurer on the day of the

hearing. He also gave claimant the opportunity to depose the authors of the documents admitted, however. Claimant declined. The Referee has discretion to admit evidence not filed as required by the rule. OAR 438-07-005(4). Under the aforementioned circumstances, we find no abuse of discretion by the Referee.

Claimant next argues that the insurer is estopped by the rule set forth in Bauman v. SAIF, 295 Or 788 (1983), from denying claimant's claim for hand and arm symptoms, which claimant argues was previously accepted by the insurer. We find that the condition denied by the insurer (along with the symptoms it produces) differs from the one the insurer originally accepted. Bauman does not preclude partial denials of conditions that are not related to the accepted claim. Clyde C.Wyant, 36 Van Natta 1067 (1984).

Claimant next argues that Dr. Adams, the physician who ultimately performed claimant's thoracic surgery, should be considered claimant's treating physician and that his opinion should, therefore, be given additional weight. Although Dr. Adams may be considered claimant's most recent treating doctor, we note that he did not see claimant for several years after she left the employ of American Forest Products. He, therefore, never treated claimant for carpal tunnel syndrome, nor was claimant under his care during the extended period prior to the onset of her thoracic outlet symptoms. We are not persuaded that Dr. Adams's opinion is entitled to greater weight than the opinions of the several doctors who are simply uncertain regarding claimant's diagnosis or the etiology of her condition. We agree with the Referee that claimant has failed to prove a compensable connection between her original employment and her thoracic outlet condition.

Because we find that claimant has failed to sustain her claim on the facts, we need not consider the insurer's defense based on the last injurious exposure rule.

ORDER

The Referee's order dated April 22, 1985 is affirmed.

EUGENE DIAS, Claimant
Michael B. Dye, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 84-07798
December 19, 1985
Order on Remand

Claimant has requested review of Referee Leahy's order that dismissed claimant's request for hearing after neither claimant nor anyone on claimant's behalf appeared at the scheduled hearing. After the hearing was dismissed the parties determined that claimant was waiting in the building but not in the hearing room per se. The parties have now agreed that the order of dismissal should be set aside and that this matter should be again set for hearing before Referee Leahy in Portland. Based upon the stipulation of the parties, and having ourselves concluded that substantial justice compels remand in this case, this matter is hearby remanded to the Hearings Division for further proceedings as scheduled pursuant to the rules and practices of the Hearings Division.

IT IS SO ORDERED.

GLEN D. DOVER, Claimant
Ringo, Walton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 85-0558M
December 19, 1985
Own Motion Order

SAIF Corporation has submitted to the Board claimant's claim for an alleged worsening of his July 6, 1979 industrial injury. Claimant's aggravation rights have expired. SAIF Corporation opposes reopening this claim as they do not feel claimant's condition has materially worsened since the last arrangement of compensation and claimant has not been gainfully employed for about five years.

Based on the current record, the Board declines to reopen claimant's claim. Although claimant's treating physician indicates that claimant's condition is medically nonstationary and he is unable to work, we are not persuaded that his condition has materially worsened so as to justify a reopening of his claim. It is evident that claimant experiences periodic exacerbations of his compensable condition which generally subside with no curative treatment. Dr. Neumann indicates that his treatment is not curative and is meant to assist in management of claimant's pain and possibly decrease his discomfort. We also note that claimant has not performed gainful employment for about five years. It would appear that claimant has voluntarily removed himself from the general labor market. Cutright v. Weyerhaeuser Company, 299 Or 290 (1985). Therefore, the request for own motion relief is hereby denied.

IT IS SO ORDERED.

PETER A. FRANZWA, Claimant
David C. Force, Claimant's Attorney
Coons, et al., Attorneys
Richard C. Pearce, Defense Attorney

WCB 84-01412
December 19, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Neal's order which: (1) set aside its de facto denial of claimant's medical services claim; and (2) assessed a penalty and accompanying attorney's fee for an unreasonable denial and processing. On review, the insurer contends that claimant's current condition is not causally related to his compensable injury and that its conduct was not unreasonable.

The Board affirms the order of the Referee with the following comment concerning the penalty issue.

The insurer asserts that no penalty should be assessed because at the time of its denial there were no amounts "then due." We disagree. In Harold A. Lester, 37 Van Natta 745 (1985), we concluded that penalties could be assessed on amounts "then due" either at the time the conduct being penalized occurred, or as of the hearing. See also Anthony A. Bono, 37 Van Natta 956, 957 (1985). Since we are persuaded that the insurer's denial and claim processing were unreasonable and that there were unpaid medical bills at the time of hearing, we agree with the Referee that the insurer should be penalized based upon these amounts "then due."

ORDER

The Referee's order dated June 27, 1985 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the insurer.

RICHARD A. JOHNSON, Claimant
Doblie & Assoc., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-00831
December 19, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Seymour's order which set aside its denial of claimant's occupational disease claim for lung cancer. The issue on review is compensability.

Claimant was a firefighter for a municipality for 23 years before the diagnosis of his lung cancer. He had also been a smoker of one to two packs of cigarettes per day for 30 years. According to the evidence presented at hearing, claimant's last occupational exposure to a fire was on October 4, 1983, and he smoked his last cigarette on November 13, 1983 the day before Dr. Gordon performed a left pneumonectomy. The pathology report confirmed that claimant had "metastatic grade III squamous cell carcinoma."

The occupational disease statute applicable to claimant is found at ORS 656.802(1)(b) and (2). ORS 656.802(2) was amended by the 1983 legislature to change the burden of proof of the insurer or employer.

Claimant's last occupational exposure to the byproducts of combustion was October 4, 1983. The amendment of the statute became effective on October 15, 1983. Claimant's lung cancer was diagnosed November 2, 1983. The claim was assigned a "Date of Injury" of November 7, 1983, the date claimant left work, based on the claim form signed by claimant on November 21, 1983. Temporary disability compensation was begun effective November 12, 1983. Claimant continued to smoke cigarettes until November 13, and surgery was performed on November 14, 1983.

The first issue is which standard of proof must be met by SAIF. The courts have consistently held that the date of disability controls procedural rights in the occupational disease context rather than dates of exposure or of contracting disease. See e.g., Bracke v. Baza'r, 293 Or 239, 249 (1982); and Mathis v. SAIF, 10 Or App 139 (1972); but cf. Argonaut Insurance Companies v. Eder, 72 Or App 54 (1985) (asbestosis claim allowed after original statute of limitations lapsed claim but revised statute allowed claim based on last exposure to potentially injurious substance). Therefore, since claimant's disability began no earlier than November 7, 1983, the 1983 amendments apply to the determination of compensability of this claim and SAIF must prove by clear and convincing medical evidence that claimant's employment did not contribute to the disease.

"Clear and convincing" is a standard of proof between "by a preponderance" and "beyond a reasonable doubt." The trier of fact must be persuaded that the thing to be proven is "highly probable." Krueger v. Ropp, 282 Or 473 (1978); Cook v. Michael, 214 Or 513 (1958). Therefore, for SAIF to prevail we must

conclude after de novo review of the evidence that it is highly probable that claimant's employment did not contribute to his disease.

Opinions on the cause of claimant's cancer were provided from five experts. Dr. Gordon, the thoracic surgeon who performed claimant's pneumonectomy, opined that exposure to fire smoke had not been shown to be a significant cause of lung cancer and that claimant's condition was due to his cigarette smoking. Dr. Shafer, the radiation oncologist who treated claimant after surgery, opined that it was conceivable that claimant's occupation contributed to his condition as compared to his cigarette smoking exposure. Dr. Bilder, the pulmonary specialist who diagnosed claimant's lung cancer and who had four years experience as a volunteer fireman, reported that he had never seen the type of cancer that claimant had in a person who did not smoke cigarettes and opined that claimant's cancer was due to cigarette smoking. Dr. Hansen, the pulmonary specialist who examined claimant for the insurer, opined that claimant's squamous cell cancer was due to cigarette smoking and was not related to his occupation. Dr. Bendix, who holds a Ph. D. in physicochemical biology with a special interest in toxic substance exposures and who reviewed claimant's medical reports, opined that claimant's occupation had caused him additional unprotected exposure to carcinogenic byproducts of combustion and that his occupation had, therefore, contributed to the causation of his lung cancer.

The parties argued whether the opinion of Dr. Bendix should be considered as "medical evidence" within the context of the statute because she does not hold a degree or license as a practitioner of any healing art. Her training and experience in the areas of biology, chemistry, and toxicology qualify her as an expert in areas within her qualifications and which are relevant to the issue of medical causation of claimant's disease. Barrett v. Coast Range Plywood, 294 Or 641 (1983); Galego v. Knudson, 281 Or 43 (1978). Her opinion is not the opinion of a licensed medical practitioner, but it is an example of the scientific study of disease that leads teachers and clinicians to more accurate diagnosis and treatment of human conditions. We consider her opinion, weighing it according to its relevance to the issues and the persuasiveness of its reasoning.

Dr. Shafer's opinion is expressed as a conceivable possibility that occupational exposure was contributory to claimant's disease. Dr. Bendix's opinion is based on the generalization that some people who are exposed to some carcinogenic substances get some kinds of cancers, without providing a persuasive basis for finding that this firefighter's condition was caused in any part by his exposure to anything except his own cigarettes. Dr. Bendix also rejects the conclusions of an exhaustive study done in Boston which comes to the opposite result she reached. She based her rejection on the unsupported assumption that building materials in that city were different in some relevant way from those used on the west coast and that another study done in Los Angeles was relevant to exposure to byproducts of combustion in a small Oregon city.

On the other hand, the doctors who examined claimant and treated his disease by surgery and who also have significant and relevant training and experience clearly opined that claimant's disease was due to cigarette smoking and that employment exposure

was not contributory in this case. The treating doctors' opinions are buttressed by the expert opinion of Dr. Hansen who also examined claimant and reviewed claimant's medical records. Based on their opportunity to examine claimant's cancerous lung, their consideration of the risks associated with being a firefighter, and their relation of the risks to this particular claimant and his disease, we are convinced that SAIF has shown that it is highly probable that employment exposure to smoke and other byproducts of combustion in the course of claimant's employment did not contribute to claimant's disease. Therefore, we find the evidence is clear and convincing that claimant's occupational exposure to byproducts of combustion did not contribute to the cause of his lung cancer. Accordingly, we reverse the Referee's order.

ORDER

The Referee's order dated December 5, 1984 is reversed. The SAIF Corporation's denial dated January 20, 1984 is reinstated.

TRUDY MARGULES, Claimant
Callahan, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-00185
December 19, 1985
Order Denying Motion to Strike Brief

Claimant has moved the Board for an order striking the SAIF Corporation's respondent's brief on the ground that it was not timely served on claimant's attorney. The Board's records reflect that SAIF's brief was filed with the Board within the time prescribed by former OAR 438-11-010(3) (amended, WCB Admin. Order 1-1985 (Temp), eff. November 5, 1985). Neither filing nor service of briefs on Board review is jurisdictional. Accepting the representations of both parties as true, we conclude that, through no fault of SAIF, claimant's attorney did not timely receive a copy of SAIF's brief. We conclude that the remedy sought by claimant is unduly harsh.

Claimant's motion to strike SAIF's brief is denied. Claimant shall be allowed 14 days from the date of this order to file a reply brief. Thereafter, this matter will be reviewed in the ordinary course of business.

IT IS SO ORDERED.

GLENN E. MUIR, Claimant
Pozzi, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 83-08477
December 19, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Podner's order which upheld the self-insured employer's denial of his myocardial infarction claim. On review, claimant contends that his work activity was a material contributing cause of his myocardial infarction.

Following our de novo review of the medical and lay evidence, we conclude that this claim should be analyzed under an industrial injury theory. Thus, claimant must establish that the stress of claimant's work was, within the range of reasonable medical probability, a material contributing cause of his

myocardial infarction. Adams v. Gilbert Tow Service, 69 Or App 318 (1984). In addition, claimant must establish both legal and medical causation by a preponderance of the evidence. Bush v. SAIF, 68 Or App 230 (1984).

Furthermore, we conclude that the opinion of Dr. Kloster, cardiologist, was not based on a significantly inconsistent or inaccurate history. Consequently, unlike the Referee, we have not discounted Dr. Kloster's opinion that claimant's work activity on the day in question was a material contributing factor in precipitating claimant's myocardial infarction.

We are persuaded that claimant has established the requisite legal causal relationship between his work activities and his heart attack. However, the preponderance of the persuasive evidence, even with due consideration of the opinion of Dr. Kloster, does not establish the requisite medical causal relationship. Accordingly, we affirm the Referee's order which found the claim noncompensable.

ORDER

The Referee's order dated May 17, 1985 is affirmed.

JAMES M. WOODWARD, Claimant
Joel B. Reeder, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 84-04194 & 84-04195
December 19, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Tenenbaum's order that upheld the SAIF Corporation's denials of claimant's occupational disease claim for carpal tunnel syndrome and aggravation claims for claimant's 1979 and 1980 neck, back and shoulder injuries. The issues are compensability of an occupational disease and aggravation.

The Board affirms the order of the Referee, with the following observation. In her order, the Referee relates that she observed claimant outside the hearing room, during a break in proceedings, engaging in activities that were inconsistent with his testimony as to his right hand disability. While the better practice would have been for the Referee to state her observation on the record in order to allow the parties to deal with it as they chose, we find that her failure to do so, if error, was harmless. Considering the record as a whole, there is ample evidence in addition to the observation outside the hearing room to support the Referee's findings and conclusions, with which we agree.

ORDER

The Referee's order dated May 23, 1985 is affirmed.

PAUL Z. STEWART, Claimant
Coons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-01688
December 23, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Lipton's order that dismissed claimant's request for hearing on the issue of penalties and attorney fees for delayed referral for vocational assistance, on the ground that sole jurisidiction over such matters is vested in the Director of the Workers' Compensation Department. The issue is jurisidiction.

The Board affirms and adopts the order of the Referee. Joel I. Harris, 36 Van Natta 829, 838-40 (1984), aff'd mem, 72 Or App 591 (1985).

ORDER

The Referee's order dated July 31, 1985 is affirmed.

JAMES C. SWATZEL, Claimant
Richard Wm. Davis, Defense Attorney

WCB 82-10612
December 23, 1985
Order of Dismissal

The Claimant has requested review of Referee's order dated November 7, 1985. The request for review was filed with the Board on Decmber 12, 1985 , more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

NORMAN E. THURSTON, Claimant
Haugh & Foote, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-03289
December 23, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Shebley's order that upheld the insurer's denial of claimant's aggravation claim. Referee Shebley found a portion of the claim barred by the doctrine of res judicata and concluded, in any event, that claimant had failed to establish that his worsened condition was causally related to his original industrial injury. The issues are res judicata and the compensability of claimant's aggravation claim.

Claimant injured his low back lifting a piece of steel in the course of his employment as a warehouseman on July 29, 1979. Immediately after the accident claimant complained of low back pain and radicular symptoms in his right leg. Within the next three months claimant was examined by three osteopaths. Drs. Trostel and Sirounian suspected a herniated disc at L5-S1. Dr. Aversano, on the other hand, suspected an injury at the L4-5 level.

Claimant received eight months of conservative treatment

and his symptoms gradually abated. His claim was closed by Determination Order dated May 23, 1980 with an award of 16 degrees for 5 percent unscheduled permanent partial disability.

Claimant returned to his previous position as a warehouseman and worked until December 1981 when he was laid off as a result of a work force reduction. He remained off work for approximately a year and a half. During this period of unemployment claimant began to experience mild pain in his left sacroiliac joint and left foot. He first noticed the pain in his left foot while driving his car to various locations in search of work. Claimant was treated conservatively by an osteopath, Dr. Howell, and by Dr. Hadeed, a chiropractor. Dr. Hadeed, in a conclusory report, related claimant's left-sided symptoms to his 1979 industrial injury.

Claimant obtained employment as a security guard in late 1983. After approximately five weeks on the job claimant began patrolling a route which required that he frequently ascend and descend stairs. Two days later he began to experience a dramatic increase in low back and left leg pain. By the end of the third day he was unable to continue patrolling his route and shortly thereafter he quit his job as a security guard.

After the dramatic increase in claimant's left-sided symptoms, claimant's lower back was X-rayed and a CAT scan and an EMG were performed. The X-rays and CAT scan revealed marked degenerative changes throughout claimant's lumbar spine, including extensive osteophyte formation and the near total loss of the L5-S1 disc space. The EMG indicated compression of the L5 nerve root. The record also reveals that claimant had been severely diabetic for more than a decade and that he had poor circulation in both lower extremities, especially the left.

Given all of this information, four doctors offered opinions regarding the cause of claimant's complaints. Dr. Vore thought that claimant's diabetes and circulatory deficiencies played a primary role in his symptomology. Dr. Hadeed thought that claimant's symptoms were due to the degenerative loss of the L5-S1 disc space or to his diabetic condition, but was unsure which was the primary cause of claimant's complaints. Dr. Silver attributed claimant's symptoms to nerve root entrapment secondary to the degenerative loss of the L5-S1 disc space. Dr. Rosenbaum thought that claimant's symptoms were due primarily to nerve root compression secondary to arthritic spurring.

On July 25, 1984 the insurer denied claimant's claim for aggravation in a letter which stated in pertinent part:

> "As you know, we have been processing your claim for aggravation benefits for the above-captioned claim due to the pain and numbness you have been experiencing in your left leg since September, 1983.
>
> "As you know, we have been attempting to develop medical evidence to indicate the cause of your current condition. There is evidence that your left leg and foot numbness is due to your diabetic condition. There is also evidence that your symptoms are due to a degenerative problem in your back. Therefore, since there is no medical evidence to indicate

> that this condition is directly related to your July 30, 1979 industrial injury, we must respectfully deny your claim for aggravation benefits."

Claimant did not contest this denial.

During mid-1984 claimant underwent two vascular operations on his left leg. These surgeries failed to improve claimant's left leg symptoms. Shortly after the insurer's July 1984 denial it became clear to Dr. Vore that claimant's diabetic condition and circulatory deficiencies had played only a minor role in his left leg symptomology. He referred claimant to Dr. Silver who recommended myelography. Four months after the insurer's July 1984 denial, a myelogram was performed. It revealed a large extradural defect at L4-5. All of claimant's physicians subsequently agreed that this defect was a ruptured disc and that this disc was the cause of claimant's left-sided symptoms. Dr. Silver sought the insurer's authorization to perform surgery.

In a letter dated March 6, 1985 the insurer denied authorization for claimant's low back surgery stating in pertinent part:

> "A thorough review of your file indicates that your current condition and need for treatment is due to degenerative changes, osteoarthritis, spurring, and nerve root compression at the L4-5 level. Medical reports indicate that these degenerative changes are due to the aging process, and are not directly related to the industrial injury of July 30, 1979. These degenerative changes were previously denied in our Notice of Denial issued July 25, 1984. We must therefore reiterate and clarify our denial of these degenerative changes in your low back; specifically, we are denying compensability of your degenerative disk disease, osteoarthritis, spurring, and nerve root compression at the L4-5 level. We must also deny treatment of these degenerative conditions, including nerve root decompression surgery recommended by David Silver, M.D. and J. Victor Vore, M.D."

Claimant requested a hearing on this denial and a hearing was held on May 9, 1985. The insurer argued that claimant's claim was barred by the uncontested July 1984 denial under the doctrine of res judicata and that even if not barred, the claim was noncompensable.

On the issue of res judicata, the Referee concluded that that portion of claimant's claim relating to nerve root compression at L4-5 was not barred by the uncontested July 1984 denial because the ruptured disc, which everyone now agrees is the cause of the compression, had not been discovered at the time of the denial and thus could not have been included within the scope of the denial. At the same time the Referee concluded that that portion of the claim relating to left leg symptoms secondary to

the ruptured disc was barred because these symptoms had been recognized at the time of the denial even though attributed by the denial to other, noncompensable conditions.

We do not fully agree with this analysis. The party asserting the affirmative defense of res judicata has the burden of establishing the scope of the order or denial upon which it relies. Lewis Twist, 34 Van Natta 290, 293 (1982), aff'd, Tektronix Corp. v. Twist, 62 Or App 602, rev den 295 Or 259 (1983); see Patricia M. Dees, 35 Van Natta 120, 124 (1983). We conclude that the insurer has failed to establish that the scope of its July 1984 denial is as broad as construed by the Referee. Reading the July 1984 denial in light of the medical evidence available at the time that it was issued, three conditions fall within its scope: (1) claimant's diabetic condition and related circulatory problems; (2) the degenerative loss of the disc space at L5-S1; and (3) the arthritic spurring throughout claimant's lumbar spine. The denial mentioned claimant's left leg symptoms, but only with regard to the above three conditions; it did not deny the left leg symptoms independent of these conditions. We conclude, therefore, that the uncontested July 1984 denial does not bar that portion of claimant's claim relating to left leg symptoms secondary to the ruptured L4-5 disc. See Alaene R. Smith, 35 Van Natta 310, 312-13 (1983).

On the merits of claimant's claim, we agree with the Referee that claimant has failed to establish that his worsened condition is causally related to his 1979 industrial injury. In a short report dated January 8, 1985, Dr. Silver stated that he was uncertain whether claimant's nerve root compression was caused by a large bone spur, a ruptured L4-5 disc or a combination of these conditions. He stated that he was unable specifically to relate claimant's need for surgery to the July 1979 industrial injury and referred the insurer to Dr. Vore for clarification of this point.

Upon inquiry from the insurer, Dr. Vore reviewed claimant's medical records and opined that claimant had "a strong case" for a causal relationship between his L4-5 nerve root compression and the July 1979 industrial injury. He thought that nerve root compression at L4-5 was reflected in some early medical reports.

After the March 1985 denial, Drs. Vore and Silver each submitted another opinion regarding the causal connection between claimant's need for surgery and his July 1979 industrial injury. Dr. Vore softened his previous opinion stating that although he thought there was a connection between claimant's nerve root compression at L4-5 and his 1979 industrial injury, it was difficult to articulate and other physicians might well disagree with his conclusion. Dr. Silver modified his earlier uncertain opinion and opined that claimant's symptoms were due to a ruptured disc at L4-5 which was causally related to the 1979 industrial injury. Dr. Silver relied heavily upon a report by Dr. Aversano dated two months after claimant's 1979 injury which had attributed claimant's right-sided symptoms to the L4-5 disc. Dr. Silver theorized that the 1979 injury had hastened the degeneration of the L4-5 disc, eventually resulting in claimant's left-sided symptoms.

In testimony at the hearing, Dr. Rosenbaum also offered an opinion on the issue of medical causation. In his opinion claimant's symptoms were due to a ruptured L4-5 disc which was

unrelated to the 1979 industrial injury. He noted that claimant's right-sided symptoms had resolved after the 1979 injury and that claimant's left-sided symptoms had developed rather suddenly several years later. He termed the shift in symptoms from right to left "unusual" and emphasized the relatively long passage of time between the disappearance of the right-sided symptoms and the appearance of the left-sided symptoms as indicative of a lack of causal relation between the 1979 injury and the ruptured L4-5 disc. He also reviewed claimant's CAT scan films and noted osteophyte formation in the lateral recesses at the L5-S1 level. He opined that in 1979 claimant had sustained a transient nerve root injury secondary to these degenerative changes and that this injury had been the cause of claimant's right-sided symptoms. This injury, he thought, had healed and claimant's right-sided symptoms had disappeared. The left-sided symptoms in 1983, in his opinion, were the result either of degenerative processes unrelated to the 1979 injury or a new injury during claimant's work as a security guard. He also convincingly critiqued Dr. Aversano's early report of L4-5 involvement which had formed the basis of Dr. Silver's and Dr. Vore's opinions. He explained that the clinical findings recorded by Dr. Aversano were more consistent with a problem at L5-S1 than at L4-5. He also noted that two other doctors who had examined claimant at about the same time as Dr. Aversano both concluded that the problem related to L5-S1 rather than L4-5.

Although the opinions of Drs. Silver and Vore provide a possible connection between claimant's 1979 industrial injury and his later left-sided symptoms, we are more convinced by the thoroughly documented and well-reasoned opinion of Dr. Rosenbaum. We, therefore, affirm the Referee on the merits.

ORDER

The Referee's order dated June 7, 1985 is affirmed.

CARLOTTA M. YAUNEY, Claimant
Brandt & Ehmann, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-08765
December 23, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Leahy's order that set aside its denial of claimant's claim for a left knee condition. The issue is compensability.

Claimant was age 33 at the time of the hearing and had worked for her Oregon employer for approximately one and one-half years. She had worked for the same employer in Nebraska for nine years prior to the Nebraska mill having closed. At the time her symptoms began, claimant was a lumber grader. Claimant has been obese since adolescence, at one time weighing as much as 305 pounds. At the time of the hearing claimant weighed 199 pounds.

On July 10, 1984 claimant reported to the company nurse complaining of swelling and pain in her left knee. The nurse wrapped the knee and sent claimant back to work. When the pain did not subside, the nurse referred claimant to her own doctor, Dr. Lundquist. Dr. Lundquist referred claimant to Dr. Weeks, an orthopedic surgeon, who became her treating physician. Dr. Weeks, in his report of July 24, 1984, diagnosed significant

patellofemoral abnormality in that the left intercondylar sulcus was markedly deformed with the patella riding laterally, and that there was a marked loss of articular cartilage of the patellar surface and hypertrophic spurs on the lateral femoral condyle and patella. Physical examination noted moderate crepitus on gentle range of motion. Prognosis for full recovery was guarded. Dr. Weeks noted that claimant had no prior history of knee injuries and that there was no specific incident that brought on claimant's present symptoms.

The insurer formally denied claimant's claim on August 6, 1984. On August 14, 1984 Dr. Weeks wrote to the insurer stating that the denial was not right, and further stating, "[T]his is definitely a work aggravated condition." Dr. Weeks recommended surgical intervention and referred claimant to Dr. Gillespie, another orthorpedic surgeon, for a second opinion.

Dr. Gillespie's rendition of claimant's history includes the following:

> "[Claimant] is not sure when or how this problem started, [it is] seemingly more severe and came to a head in July 84.
>
> "Closer questioning however, notes that she always has favored her knees. Squatting and kneeling are avoided and she tends to reach for the floor by bending at the hips and back. That has been a problem for the last few years, she has had a 'bad back', a previous physician has suggested she lift with her knees, which she has found impossible to do for years. She also admits to intermittent crepitation in the left greater than the right knee. [Claimant] has been significantly obese. . . ."
>
> Dr. Gilliespie concluded his report:
>
> "It is also this examiner's opinion that [claimant's] condition was not caused by work. These knees would be in this much trouble, I feel, regardless of what work she had done or upon what surface she had stood. . . ."

Dr. Gillespie's diagnosis of claimant's knee condition was the same as Dr. Weeks' diagnosis and he agreed that surgery was indicated; however, Dr. Gillespie opined that surgery would be of little benefit unless it was preceded by significant weight loss. Dr. Weeks agreed with all of Dr. Gillespie's findings "except the work aggravation problem."

In his deposition, Dr. Weeks testified that he did not know what claimant's work activities were and that he was also unaware of claimant's off-job activities. He further testified that claimant's knee condition was one that would result after a long period of time. Regarding the basis for his conclusion that claimant's knee condition was work-related, Dr. Weeks was questioned and responded:

"Q. When you say that it's a work aggravated problem, what led you to conclude that work caused something in the knee?

"A. From what she told me, that whatever it was it started at work."

The Referee reached his decision by treating this case as one involving a claim for an injury. He based his reasoning upon the sudden onset of symptoms, although he acknowledged that claimant had a preexisting condition that "lighted up at work." We conclude that this matter should have been treated as a claim for an occupational disease. The evidence establishes that claimant clearly had arthritic-type problems with both knees, left worse than right, that preexisted her Oregon employment. Both Dr. Weeks and Dr. Gillespie recognized that claimant's current condition was gradual in onset and did not arise out of any specific accident, incident or trauma. The test must, therefore, be whether claimant's work activities impacted upon claimant's underlying condition such as to make it compensable. That is the essence of the test for an occupational disease. See ORS 656.802(1)(a); James v. SAIF, 290 Or 343, 348 (1981).

Assuming without deciding that claimant may have established legal causation for an occupational disease, i.e. that her left knee symptoms manifested themselves while claimant was at work, claimant must also prove by a preponderance of the evidence that employment exposure was the major contributing cause of her knee condition. Dethlefs v. Hyster Company, 295 Or 298 (1983); Gabriel v. Hyster Company, 72 Or App 377 (1985). If claimant's present condition represents a worsening of a previous or underlying condition, claimant must prove by a preponderance of the evidence that work activities caused a pathological, as opposed to symptomatic, worsening of that underlying condition. Wheeler v. Boise Cascade Corp., 298 Or 452 (1985); Weller v. Union Carbide, 288 Or 27 (1979).

We find that Dr. Weeks' opinions fall short of the required standard of proof. He testified that he had no knowledge of claimant's work or off-work activites. We fail to see how, given this lack of knowledge, Dr. Weeks could arrive at a reasoned conclusion as to whether work, as opposed to off-work, activities were the major contributing cause of claimant's knee condition or a worsening of an underlying preexisting condition. In the face of Dr. Gillespie's well-reasoned opinion that work activites were not the cause of claimant's knee condition, we find that the evidence fails to establish that it is more probable than not that claimant's work was the major contributing cause of her left knee condition or that work activities caused a pathological worsening of an underlying preexisting condition. This claim is not compensable.

We note that our decision in this case was not affected by the insurer's argument in reliance on Nelson v. EBI Companies, 296 Or 246 (1984). The question of compensability of a claim does not turn upon whether or not a claimant has made an effort to mitigate disability by losing weight. Lobato v. SAIF, 75 Or App 488, 491 (1985). The test is whether work activites were the major contributing cause of a claimant's condition, regardless whether excessive weight may also have been a factor.

ORDER

The Referee's order dated March 15, 1985 is reversed. The insurer's formal denial dated August 6, 1984 is reinstated and affirmed.

DEBORAH K. CAMPBELL, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-02145
December 27, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of Referee Podnar's order on reconsideration that set aside its preclosure partial denial and awarded a penalty and attorney fee for improper unilateral termination of temporary disability compensation. The issue is entitlement to temporary disability compensation.

The Board affirms the order of the Referee with the following observation. Our de novo review of the record establishes that at no relevant time did claimant return to work nor was she released by her attending physician to return to her regular work. When her initial attending physician ceased treating claimant he specifically stated that claimant was unable to work, and that he was discharging claimant from his care and referring her to other physicians solely because she was not keeping scheduled appointments. The insurer's remedy was to seek either an independent medical examination or termination or reduction of compensation pursuant to ORS 656.325 and OAR 436-54. Unilateral termination of temporary disability compensation was improper.

ORDER

The Referee's order dated July 5, 1985 is affirmed. Claimant's attorney is awarded $450 as a reasonable attorney fee for services on Board review, to be paid by the insurer in addition to compensation.

ANDREW J. CLARK, Claimant
Francesconi & Cash, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-03216
December 27, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Mulder's order which awarded compensation for permanent total disability as a result of claimant's low back injury. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

The Board affirms the order of the Referee with the following comment. Claimant's medical limitations do not render him permanently and totally disabled, however, they have restricted him and prevent return to the types of work for which he has training and experience. Claimant cooperated with vocational rehabilitation efforts, but his inoperable painful neurogenic claudication condition prevented meaningful rehabilitation. Claimant must lie down frequently and has little

tolerance for standing or sitting. Claimant cooperated with vocational counselors and attempted to find work. We find claimant has proven that he was permanently and totally disabled. Cf. Ronald Meacham, 36 Van Natta 386 (1984), aff'd mem., 73 Or App 98 (1985) (PTD, back and hip injuries, not cooperative with vocational counselors but sought work, additional training needed to obtain job within limitations, required to lie down often to relieve pain).

ORDER

The Referee's order dated June 7, 1985 is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the self-insured employer.

LARRY J. GILDERSLEEVE, Claimant
David C. Force, Claimant's Attorney
Coons, et al., Attorneys
Fishleder & Wheeler, Defense Attorneys

WCB 83-11716
December 27, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of those portions of Referee Baker's order that set aside its denial of a claim of aggravation of claimant's accepted right carpal tunnel syndrome, set aside its denial of claimant's request for surgery for the same condition and awarded claimant's attorney an employer-paid fee of $3,000. The issues are aggravation, medical services and attorney fees.

The Board affirms the Referee's order, with the following comments. See John B. Bruce, 37 Van Natta 135, aff'd mem, 76 Or App 732 (CA A35070, December 11, 1985).

The employer advanced three major arguments in favor of reversing the Referee's decision regarding claimant's aggravation claim. The first was that claimant's return to work as an arborist, against medical advice to the contrary, precludes his aggravation claim. The employer relied upon Raynell A. Lobato, 36 Van Natta 1271 (1984). In Lobato v. SAIF, 75 Or App 488, 491 (1985), the Court of Appeals reversed our Lobato case and held that the mitigation of damages rule of Nelson v. EBI Companies, 296 Or 246 (1984), does not apply in determination of the compensability of an aggravation of an accepted claim.

Secondly, the employer argued that claimant had not established a worsening of his condition, as required by ORS 656.273. On de novo review of the evidence as a whole, including claimant's believable testimony, we conclude that claimant's condition did worsen, both symptomatically and objectively. ORS 656.273(7); Garbutt v. SAIF, 297 Or 148 (1984). The employer's assertion that, "Symptoms are insufficient to establish a claim for aggravation . . . ," is incorrect. An increase in symptoms may be sufficient to establish a claim for aggravation. Billy Joe Jones, 36 Van Natta 1230 (1984), aff'd mem, 76 Or App 402 (1985); James W. Foushee, 36 Van Natta 901 (1984).

Finally, the employer argued that application of the last injurious exposure rule relieved it of responsibility for claimant's current condition because claimant sustained an

industrial injury to his right elbow while employed in California. The employer relied upon Daniel P. Miville, 36 Van Natta 1501 (1984). That case has since been reversed and remanded. Miville v. SAIF, 76 Or App 603 (1985). We conclude, however, that neither Miville case has any application to this case. Under either the Board's or the Court's application of the last injurious exposure rule or the rule of Grable v. Weyerhaeuser Co., 291 Or 387 (1982), a subsequent out-of-state or off-the-job injury must contribute in a material way to the claimant's present condition. On de novo review, we conclude that the California injury to claimant's elbow made no contribution, material or otherwise, to claimant's wrist disability.

We adopt in full the Referee's reasoning regarding the reasonableness and necessity of microsurgery to claimant's wrist.

We also affirm the Referee's award of $3,000 in attorney fees. That award is the maximum under our rules, OAR 438-47-020, that can be awarded in the Referee's discretion in a denied claim case. Higher awards may be granted after a showing of extraordinary efforts and services. Our review of the record persuades us that this case approaches the border of being extraordinary, and we conclude that the Referee did not abuse his discretion in awarding the maximum fee.

ORDER

The Referee's order dated March 3, 1985 is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the self-insured employer in addition to compensation.

PAMELA J. JOHNSON, Claimant
Coons, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 84-01868
December 27, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Foster's order that set aside its denial of claimant's claim for medical services and awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for the neck and shoulders, whereas the Determination Order made no permanent disability award. The issues on review are the compensability of medical services and extent of unscheduled permanent partial disability.

On the compensability issue we affirm the Referee's order. On the extent issue, we reverse. Claimant suffered a compensable injury to her upper back while working in a sawmill in May 1983. She treated briefly with a chiropractor and returned to work at her old job for approximately six weeks before being terminated for reasons unrelated to her injury. Claimant continued to treat with her chiropractor until July 1983; she then did not seek treatment or take medication for several months. She returned to her chiropractor in April 1984, however, complaining of headaches and recurrent neck and shoulder symptoms.

Claimant improved during mid-1984 and by August 17 she had completed a nurse's aide training course and was actively searching for work. A physical examination completed that date revealed no objective evidence of disability. Claimant was again

examined by her treating chiropractor, Dr. Grubka, in January 1985; again, no objective disability was found. Dr. Grubka felt that claimant was stationary and no further chiropractic appointments were scheduled.

Claimant was 35 years old at the time of the hearing, had a high school diploma and more than a year of college. She had been trained and was employed as a healthcare aide.

In order to establish entitlement to an award of unscheduled permanent partial disability, claimant must prove that she has suffered a permanent loss of earning capacity as a result of her compensable injury. ORS 656.214(5). A condition precedent to an unscheduled award is proof that impairment of the whole person in fact exists. See OAR 436-65-600 (renumbered 436-30-380, May 1, 1985). After reviewing the record we are not persuaded that claimant was permanently impaired at the time of the hearing. See Gettman v. SAIF, 289 Or 609 (1980). The reports of her chiropractor, which constitute the last medical evidence generated prior to the hearing, suggest that claimant had essentially resolved from the effects of the compensable injury and that she was nearly asymptomatic. Although we do not doubt that claimant continues to experience at least some discomfort as a result of her injury, we do not find that her pain is disabling, Harwell v. Argonaut Ins. Co., 296 Or 505 (1984), or that her loss of earning capacity, if any, is permanent. Claimant is not entitled to an award of unscheduled disability.

ORDER

The Referee's order dated June 28, 1985 is reversed in part and affirmed in part. That portion of the order that awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability is reversed and the Determination Order dated July 24, 1984 is reinstated. Claimant's attorney's fee shall be adjusted consistent with this order. The remainder of the Referee's order is affirmed. For prevailing before the Board on the employer-initiated issue of the compensability of medical services, claimant's attorney is awarded $400, to be paid by the self-insured employer.

THOMAS K. OTOS, Claimant
Pozzi, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-12180
December 27, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Pferdner's order that awarded claimant 112.5 degrees for 75 percent scheduled permanent partial disability for loss of use or function of the right leg in lieu of the 45 degrees for 30 percent scheduled disability granted by Determination Order. The issue on review is extent of scheduled permanent partial disability.

Claimant sustained a compensable injury when a one-ton roller fell on his right knee. Although claimant sustained a fractured fibula and tibia as a result of the accident, his ongoing disability has centered in the knee. Claimant's primary problem is lateral movement of the knee joint. He also experiences pain and weakness, along with occasional joint swelling.

Despite the seriousness of claimant's injury, a thorough examination conducted several months before the issuance of the Determination Order was essentially favorable. The evaluation was conducted by a consulting orthopedist, Dr. Larson, who noted that claimant had no swelling or pain on extension or flexion. Knee extension was equal bilaterally at 135 degrees. Muscle strength was not severely diminished. The extensor mechanism was normal, as was the patella. Only slight joint line and ligamentous tenderness was noted. Good alignment of the lower extremity was found. The only significant finding was lateral instability in the knee joint. Pain was found to be more of a problem than the instability.

In rating claimant's right leg disability, the Evaluation Division's worksheet specifically considered claimant's knee instability, range of motion and weakness, as well as disabling pain and surgery. After reviewing the record, we find the Division's evaluation to accurately reflect the extent of claimant's disability. The Determination Order shall be reinstated.

ORDER

The Referee's order dated July 9, 1985 is reversed and the Determination Order dated November 8, 1984 is reinstated. Claimant's attorney's fee shall be adjusted consistent with this order.

TWYLA R. OWEN (ROBERTS), Claimant
Bloom, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05612
December 27, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Peterson's order that awarded an extraordinary insurer-paid attorney fee for services of claimant's attorney at hearing. The issue is attorney fees.

The Board affirms and adopts the order of the Referee.

Because the statutory basis for awarding insurer paid attorney fees where the insurer requests Board review is predicated upon the notion that a claimant's compensation not be disallowed or reduced, ORS 656.382(2), there is no statutory authority for an award of attorney fees where there is no issue as to claimant's compensation. Harold L. Dotson, 37 Van Natta 759 (1985). See also Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (December 4, 1985). There being no issue as to claimant's compensation in this case, no attorney fee is awarded on Board review.

ORDER

The Referee's order dated June 19, 1985 is affirmed.

NANCY J. POPPENHAGEN, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10093
December 27, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Leahy's order that upheld the SAIF Corporation's partial denial of claimant's low back condition. The issue on review is compensability.

We affirm the order of the Referee with the following comment. Claimant argues on review that SAIF's partial denial was invalid in that it attempted to deny future responsibility for claimant's condition before the extent of claimant's disability had been determined. Claimant cites Safstrom v. Riedel International, Inc., 65 Or App 728 (1983), and its progeny as support for her assertion. The Referee did not address the issue in his order.

In Safstrom, the insurer issued a denial purporting to deny future responsibility for the claimant's condition even though the claimant evidenced symptoms of the original injury. The court held that under these circumstances, a denial that effectively prohibited the Evaluation Division from determining the extent of the claimant's disability was invalid. The court also suggested, however, that a partial denial might be appropriate where there is both a discrete, noncompensable condition and a compensable injury. Safstrom, supra, 65 Or App at 730. See also Joji Kobayashi, 36 Van Natta 1558, 1563 (1984), reversed on other grounds, 76 Or App 320 (1985), in which we held that whether or not the claimant has recovered from the compensable injury is irrelevant in determining the propriety of the denial.

In the present case, we find that claimant suffers from both a discrete, noncompensable condition and a compensable injury. The effects are separable. Under these circumstances, Safstrom does not apply. SAIF's denial was permissible.

ORDER

The Referee's order dated May 22, 1985 is affirmed.

MARY C. RALPH, Claimant
Evohl F. Malagon, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-01528
December 27, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Howell's order which dismissed her request for a hearing because it was not filed within 60 days of a valid denial and good cause was not shown for the delay although the request was filed within 180 days of the denial. The issue on review is whether good cause was shown for filing a hearing request more than 60 days but less than 180 days after a valid denial.

The Board affirms and adopts the well reasoned order of the Referee. See Cogswell v. SAIF, 74 Or App 234 (1985); EBI Companies v. Lorence, 72 Or App 75 (1985).

ORDER

The Referee's order dated August 1, 1985 is affirmed.

WILLIAM C. SHOOPMAN, Claimant
David C. Force, Claimant's Attorney
Coons, et al., Attorneys
SAIF Corp Legal, Defense Attorneys

WCB 84-09530
December 27, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of that portion of Referee Baker's order which awarded 25 percent (80 degrees) unscheduled permanent disability, whereas an August 1, 1984 Determination Order had awarded no permanent disability. On review, SAIF contends that the award should be reduced. We agree and modify.

Claimant was 36 years of age at the time of hearing. In December 1983 he sustained his compensable back injury while working as a laborer for a veneer mill. Dr. Freeman, claimant's treating orthopedist, diagnosed thoracolumbar strain and a connective tissue disorder. X-rays revealed some irregularity in the thoracic area, suggestive of an "old Scheuermann's disease." Treatment has been conservative, primarily consisting of physical therapy, exercise, medication, and weight reduction.

In April 1984 the Orthopaedic Consultants performed an independent medical examination. Claimant complained of back pain after sitting or standing for prolonged periods, as well as when bending or twisting. The Consultants diagnosed thoracic spine strain, by history, and functional overlay, although no interference during the examination was noted. Stating that claimant could return to his former occupation "with perhaps temporary limitations on heavy lifting," the Consultants opined that claimant suffered no loss of function as a result of his compensable injury. Dr. Freeman did not concur with this report or its findings.

In May 1984 a vocational rehabilitation evaluation was conducted. Claimant completed 11 years of formal education and received his GED while serving in the army. He has performed several work activities involving mill work and/or manual labor. For example, claimant has worked as a raiman operator, jitney driver, and as a dockhand for a fishery. He also has experience as a night janitor and as a city police officer. Claimant further reported that he had operated his own seafood business for approximately 15 months and had managed a fast food restaurant for some five years. Noting that claimant appeared to have an excellent personality and very good verbal skills, the vocational consultant concluded that claimant possessed transferable skills in restaurant management and sales.

In June 1984 Dr. Rockey, orthopedist, performed an independent medical examination. Claimant's complaints included left lumbosacral pain which was aggravated by prolonged sitting or by twisting or bending. Dr. Rockey diagnosed lower thoracic spine strain, which had essentially healed, and mild preexisting thoracic arthritis, which was not currently disabling. Dr. Rockey also noted a localized arthritic change in the lumbosacral area, but concluded that this was not the result of claimant's compensable injury.

An August 1, 1984 Determination Order closed the claim. Claimant was awarded no permanent disability.

In November 1984 claimant was examined by Dr. Baker, orthopedist. Claimant reported daily episodes of localized, nonradiating lower dorsal "pulling" pain. This pain was generally precipitated by sitting for 45 minutes, standing for 15 minutes, flexing for two minutes, and by engaging in lifting or twisting activities. Claimant denied experiencing radiating left leg symptoms, other than one transient episode approximately two months prior to the examination. Dr. Baker concluded that claimant's impairment of function was mild, resulting from a healed dorsal muscle strain superimposed on his preexisting condition, and on obesity.

In February 1985 Dr. Freeman reported that claimant experienced thoracic pain on rotation and lateral bending. There was no pain on flexion or extension and range of motion findings were otherwise within normal limits. Dr. Freeman further noted that claimant had lost 40 pounds and was currently employed as a stock and security salesman.

Claimant experiences constant thoracic pain, which radiates throughout his spine depending on the degree of his physical activity. Prolonged standing or sitting, as well as bending or twisting, increases his pain. These physical limitations prevent him from returning to most of his past manual labor jobs, as well as engaging in the physical portions of his former managerial posts. Claimant's sitting limitations would restrict his performance as a police officer. Although his symptoms do not foreclose him from conducting his sales activities, he does reduce his driving to accommodate them.

As a result of his pain and limitations, claimant has curtailed, if not eliminated, several of his household chores and recreational activities. Claimant's weight has fallen from 294 pounds, his weight at the time of the injury, to approximately 244 pounds. However, he has noticed no change in his symptoms as a result of this weight reduction nor from his participation in a back exercise program. Claimant takes prescription medication.

We agree with the Referee that claimant has sustained a permanent loss of earning capacity as a result of his compensable injury. However, we conclude that the Referee's award should be reduced.

In rating the extent of unscheduled permanent disability, we consider claimant's physical impairment, which includes lay testimony concerning his disabling pain and physical limitations, as well as all of the relevant social and vocational factors set forth in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985). We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a total award of 15 percent unscheduled permanent disability adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated March 15, 1985 is modified in part. In lieu of the Referee's award, claimant is awarded 15 percent (48 degrees) unscheduled permanent disability, which is

his total award to date resulting from his back injury. Claimant's attorney's fees shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

CAROLYN J. CHAMP, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-08533
December 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Baker's order which awarded 96 degrees for 30 percent unscheduled permanent partial disability in addition to the Determination Order dated November 9, 1983, which awarded only temporary disability compensation. The issue on review is extent of unscheduled permanent partial disability.

Claimant was injured in a motor vehicle accident in the course of her employment. She suffered injuries to her upper back which have resulted in permanent, mildly disabling pain which is occasionally worsened by the stresses and activities of her job as a real estate manager. She has returned to work and performs her job well. The employer has made allowances for claimant's disability, including the purchase of a special automobile.

At the time of hearing claimant was 42 years old. She had a high school education plus some college level course work and a realtor's license.

To prevail on the issue of unscheduled permanent partial disability, a worker must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971).

We rely on medical assessment and claimant's credible testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985). Howerton v. SAIF, 70 Or App 99 (1984).

Considering the factors of claimant's training and experience, her return to work for a sympathetic and cooperative employer, and the Referee's finding that claimant was highly motivated and sincere, with the other relevant social and vocational factors, we find that claimant will be adequately compensated for the permanent disability resulting from her industrial injury by an award of 64 degrees for 20 percent unscheduled permanent partial disability.

ORDER

The Referee's order dated March 27, 1985 is modified to award claimant 64 degrees for 20 percent unscheduled permanent partial disability in lieu of prior awards. Claimant's attorney fee shall be adjusted accordingly.

JEFFREY T. CLAFLIN, Claimant
Daniel J. DeNorch, Defense Attorney

WCB 84-00101
December 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Fink's order which upheld the insurer's partial denial of claims for medical services and time loss due to erysipelas and cellulitis as not related to a compensable ankle sprain. The issue on review is compensability.

Claimant is required to prove by a preponderance of the evidence that the infections were caused in some part by his industrial injury. Claimant sprained his left ankle on August 19, 1979 in the course of his employment as a car salesman. At the time of the ankle sprain injury, claimant had a severe untreated fungal infection on the same foot. In September 1979 claimant was hospitalized for treatment of erysipelas infection, cellulitis, and severe tinea pedis.

The medical doctors who treated claimant for the infections and reviewed the file concluded that there could not have been any contribution by the ankle sprain injury to the introduction or spread of the erysipelas and cellulitis. Claimant offered the opinion of Dr. Morrow, a chiropractor, which relied on a theory of loss of structural integrity to explain how the ankle sprain led to proliferation of infectious organisms inside claimant's leg. Another chiropractor opined that Dr. Morrow was not qualified by training and licensure to express an expert opinion about infectious disease processes.

The Referee concluded the opinion of Dr. Morrow was entitled to no weight because Dr. Morrow was not qualified as an expert. Even if we were to grant some weight to Dr. Morrow's opinion, we would not be persuaded by the record that claimant's industrial injury contributed in any part to the erysipelas and cellulitis condition in his left leg as compared to the non-industrial fungal infection. Therefore, the Referee's order is affirmed.

ORDER

The Referee's order dated May 8, 1985 is affirmed.

DELMER J. HULTBERG, Claimant
Emmons, et al., Claimant's Attorneys
Gleaves, et al., Defense Attorneys

WCB 84-12594
December 30, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Daron's order that upheld the insurer's denial of claimant's industrial injury claim involving the left knee. The sole issue on review is compensability.

Claimant alleges that he injured his left knee on two occasions in the course of his employment on October 3, 1984. He testified that he and another employe were moving boxes of hardware from a truck into a hardware store when the other employe handed claimant a box, causing him to lose his balance and step backward, resulting in a twisting of the knee. A second

pain-causing incident allegedly occurred later the same day. Claimant noticed pain and swelling immediately, but he said nothing to his fellow employe.

Claimant testified that upon his arriving home after work, his parents noticed that he was limping and inquired as to the cause. Claimant stated that he told his parents of the twisting injuries. Claimant's parents corroborated his statement at the hearing. Claimant returned to work the next day and the employe with whom he had worked on the day of the alleged accident noticed his limp. The employe testified that claimant told him he had twisted his knee on October 3rd, but the employe could not remember whether claimant told him it had occurred on the job.

Two of the employer's management personnel also noted claimant's limp, but neither inquired as to the cause. Claimant did not explain the cause to his employer or request a claim form at the time. Claimant ultimately indicated to one of the managers that the injury was not work-related. Claimant testified that he was concerned about losing his job if he reported an injury.

Five days after the alleged accident claimant visited the emergency room of a Corvallis hospital where he was examined by Dr. Reeves. The emergency room record shows that claimant did give a history of moving heavy objects while at work on the day of the alleged injury. It also indicates, however, that claimant could remember no specific trauma. Dr. Reeves referred claimant to an orthopedist, Dr. Lewis, for further treatment later in the week. Claimant described the twisting incident to Dr. Lewis and indicated that it was work-related. Claimant underwent surgery before the end of the month. He eventually filed a workers' compensation claim on October 31, 1984. The employer made a notation on the Form 801 that claimant had denied the existence of a connection between his work and the knee injury. Claimant testified that the employer never inquired as to the cause of his injury.

The Referee upheld the subsequent denial of the claim. Although he made no specific credibility finding regarding claimant or his witnesses, the Referee accepted the written record over the testimony. He was disturbed by what he found to be inconsistencies between claimant's testimony and the written record prepared soon after the alleged incident occurred. That record indicates no particular traumatic incident involving claimant's knee.

While we agree with the Referee that the facts of this case are a bit puzzling, we find that the evidence preponderates in favor of compensability. Although we did not observe claimant's demeanor at hearing and, therefore, are unable to make a credibility finding in that regard, our reading of the transcript satisfies us that claimant answered the questions presented to him in an honest and straightforward manner. We are also satisfied that claimant's witnesses testified truthfully, even though they were obviously concerned for claimant's welfare.

The documentary evidence does not directly support claimant's version of the facts. However, the notation appearing in the emergency room record implies that claimant at least suggested to his physician that he had injured himself on the job. We find that this notation, coupled with the testimony of claimant and his witnesses, makes it more likely than not that claimant suffered a compensable injury on October 3, 1984.

ORDER

The Referee's order dated June 11, 1985 is reversed. Claimant's attorney is awarded $1,500 for services at hearing and $650 for services on Board review, both fees to be paid by the insurer.

GEORGE E. KANARY, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-11003
December 30, 1985
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Myers's order which awarded 22.5 degrees (15 percent) scheduled permanent partial disability for loss of use of the left leg in addition to the 30 degrees (20 percent) awarded by the Determination Order and 48 degrees (15 percent) unscheduled permanent partial disability for injury to the cervical and thoracic spine in addition to the 112 degrees (35 percent) awarded by the Determination Order. Claimant contends that he is entitled to an award of permanent total disability, or in the alternative, that he is entitled to an increased award of unscheduled permanent partial disability. The SAIF Corporation cross-requests review, asserting that the Determination Order's disability awards should be reinstated.

We adopt the Referee's findings of fact, which we summarize. Claimant was injured on February 22, 1984 when the 100 ton ore truck he was driving rolled over. Claimant sustained a cervicothoracic strain, a strain of the medial collateral ligament of the left knee, various bruises and contusions around his head and shoulders and temporary damage to his eyes as a result of being exposed to hydraulic fluid. Only the knee and back injuries involve permanent residuals. Claimant's treatment has been conservative.

The Referee found that claimant was a credible witness. He tesified that he suffers daily pain in his mid back and headaches, and that his left knee "buckles" when he turns to the left. As of the hearing, claimant knew of no job he could perform on a full-time basis. However, after the hearing was adjourned, but before the record was closed, claimant returned to work with his employer at a modified position. Contrary to claimant's assertion on Board review, there is no evidence that claimant's return to work was on a trial basis. Claimant is age 59 and completed the tenth grade. His treating physician opines that claimant is capable of performing light to moderate work and has a 30 pound lifting restriction.

Claimant's return to full-time gainful employment adequately demonstrates that he is not incapacitated "from regularly performing work at a gainful and suitable occupation." ORS 656.206(1)(a). Claimant is not entitled to an award of permanent total disability. Claimant has, however, sustained a significant loss of earning capacity. On de novo review of the record as a whole, and considering all of the relevant social and vocational factors, we agree with the Referee that claimant is appropriately compensated by an award totalling 160 degrees (50 percent) unscheduled permanent partial disability for injury to his back.

We disagree, however, with the Referee's rating of claimant's left knee disability. The preponderance of the medical evidence persuades us that claimant has a mild residual laxity of the left medial collateral ligament superimposed upon preexisting arthritic changes which were not changed in any material way by his injury. This results in a lack of stability, which causes some give way when claimant turns to his left, and a mild decrease in range of motion. Considering these factors, we conclude that claimant has sustained no more than a 20 percent loss of use of the left leg (knee).

ORDER

The Referee's order dated July 1, 1985 is reversed in part and affirmed in part. That portion of the Referee's order that granted claimant an increased award of scheduled permanent partial disability for loss of use of the left leg is reversed and the Determination Order award of 30 degrees (20 percent) scheduled permanent partial disability is reinstated. The Referee's allowance of attorney fees shall be modified accordingly. The remainder of the Referee's order is affirmed.

JOSEPH M. ALLEN, Claimant
Callahan, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-11335
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Tenenbaum's order that found claimant was not a subject worker when he was injured on February 10, 1984. The issue is claimant's status as a subject worker under ORS 656.027(3).

The employer in this case was an informal, unnamed partnership consisting of two men and their wives. The record establishes that the "trade, business or profession" of this partnership was the purchase, renovation and rental of dwellings. Claimant and another person were employed to dismantle and salvage lumber from a garage associated with one such dwelling. The total labor cost for claimant and the other worker was $102.50.

ORS 656.027(3) provides:

> "All workers are subject to ORS 656.001 to 656.794 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 purposes 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."

Pursuant to this provision the Referee concluded that claimant was a "casual" worker, that claimant's employment was not in the course of the trade, business or profession of the employer, and that even if claimant's employment was in the trade, business or profession of the employer, the employer was nonsubject (i.e. the employer employed no other subject workers in the state). See Bisbey v. Thedford, 68 Or App 200 (1984); Konell v. Konell, 48 Or App 551 (1980), rev den 290 Or 449 (1981).

We agree with the Referee's conclusions that claimant was a "casual" worker and that the employer was nonsubject. We, therefore, affirm the Referee's order. We disagree, however, with the Referee's conclusion that claimant's employment was not in the course of the trade, business or profession of the employer.

ORS 656.005(14) defines "employer" as "any person . . . who contracts to pay a remuneration for and secures the right to direct and control the services of any person." ORS 656.005(21) defines "person" to include any "partnership, joint venture, association [or] corporation." Under these definitions, a partnership as an entity may be an employer within the meaning of ORS chapter 656.

The Referee's conclusion that claimant's employment was not in the course of the trade, business or profession of the employer was premised upon claimant's failure to produce evidence of the trades, businesses or professions of the persons comprising the informal partnership. Under the circumstances of the present case we conclude that for purposes of ORS 656.027(3), the partnership as a whole was the employer rather than the partners as individuals. In light of this conclusion it was unnecessary for claimant to produce evidence of the trades, businesses or professions of the individual partners. Claimant needed only to establish the trade, business or profession of the partnership as an entity and that his employment was in the course of this trade, business or profession. Claimant did so in this case.

ORDER

The Referee's order dated April 19, 1985 is affirmed.

FRANK B. BAKER, Claimant
David C. Force, Claimant's Attorney
Coons, et al., Attorneys
Brian L. Pocock, Defense Attorney

WCB 83-08196
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of that portion of Referee Podnar's order that denied claimant's request for an award of permanent total disability. The issue on review is whether claimant is entitled to that award.

Claimant is a former laborer who sustained a compensable knee injury on March 23, 1983. He underwent a right medial meniscectomy a few weeks later and was diagnosed as suffering from

bilateral degenerative medial joint disease. In January 1984 claimant's physician advised that claimant was capable of sedentary work in a seated position.

In addition to claimant's bilateral degenerative joint disease, there is evidence that he experienced bilateral hand neuritis, neck and right hip pain and degenerative lumbar arthritis and disk disease before, and at the time of, the compensable injury. From his testimony, however, it appears that claimant's preexisting conditions did not actually curb his activity until after the injury occurred. Claimant's testimony in that regard was generally corroborated by that of his daughter. Neither is there persuasive evidence that claimant's compensable injury worsened any of claimant's preexisting conditions.

The Referee held that although claimant is otherwise entitled to an award of permanent total disability due to the combination of his physical and vocational impairment, the Referee was constrained to consider only those disabilities that developed before or at the time of the compensable injury. Therefore, the Referee did not consider those disabilities that, according to claimant's testimony, developed post-injury.

On review claimant argues that his noncompensable disabilities arose prior to the compensable injury and that they should, therefore, be considered in rating claimant's current extent of disability. ORS 656.206(3). Although we recognize that claimant did in fact have preexisting conditions, we disagree that they were disabling or that they were worsened by the industrial injury.

In John D. Kreutzer, 36 Van Natta 285, aff'd mem, 71 Or App 355 (1984), we noted:

> "We consider impairment caused by an industrial injury. If the injury caused the permanent worsening of a preexisting condition, then we take into account all impairment resulting from that condition. If the injury did not cause a worsening of the preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of the injury . . . Stated differently, . . . we do not consider the post-injury progression of a preexisting condition unless that condition was worsened by the injury." 36 Van Natta at 285.

See also Emmons v. SAIF, 34 Or App 603 (1978); Bob G. O'Neal, 37 Van Natta 255 (1985); Frank Mason, 34 Van Natta 568, aff'd mem, 60 Or App 78 (1982).

As was noted, there is no persuasive evidence that claimant's preexisting conditions were worsened by his industrial injury. Therefore, on review, we have considered only claimant's compensable injuries in determining the extent of his disability. After a review of the record de novo, however, we find that the combination of claimant's compensable injuries and his severe vocational handicaps entitles him to an award of permanent total disability.

Claimant's compensable injury has severely decreased his ability to stand and ambulate. The vocational evidence is that he is limited to sedentary work. Claimant also suffers from marked academic and vocational disability, however, that effectively preclude his employment in most sedentary occupations. Claimant went only through the first grade and he is unable to read. He scored no better than 3.6 grade level on several academic tests. His manual dexterity is poor. His vocational counselors have essentially given up attempting to locate employment because of claimant's severe deficits. We are convinced that at the time of the hearing, claimant was not regularly employable at a gainful and suitable occupation. He is, therefore, entitled to an award of permanent total disability, which shall be effective as of the date of the hearing.

ORDER

The Referee's order is modified. Claimant is awarded compensation for permanent total disability, effective June 3, 1985. Claimant's attorney is allowed 25 percent of the increased compensation awarded by this order, not to exceed $3,000, as a reasonable attorney fee.

PANFIL CAM, Claimant
Vick & Assoc., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Acker, Underwood & Smith, Defense Attorneys

WCB 84-04163, 84-05618, 84-07102, & 84-08444
December 31, 1985

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation, on behalf of Stanton Industries, requests review of those portions of Referee McCullough's order which: (1) set aside its June 5, 1984 denial of claimant's April 19, 1984 low back injury as a new injury; (2) upheld the denial of SAIF, on behalf of Chickadee Gardens Nursery, of the claim for aggravation of a December 1982 low back injury; and (3) set aside its April 9, 1984 denial of claimant's March 16, 1984 costochondral separation injury. Claimant cross-requests review of those portions of the order which awarded $2,000 attorney fees for overturning the June 5, 1984 denial and $500 for overturning the April 9, 1984 denial. The issues on review are compensability of and responsibility for the April 19, 1984 low back injury, compensability of the March 16, 1984 costochondral separation injury, and attorney fees.

The Board affirms and adopts the order of the Referee with the following comment. Many factors combine to provide the final assessment of reasonableness of an attorney fee in a particular case; however, there is no authority to consider the contingent nature of workers' compensation litigation as one of the contributing factors for setting a fee. Wattenbarger v. Boise Cascade, 76 Or App 125 (1985); Muncy v. SAIF, 19 Or App 783 (1974); Barbara A. Wheeler, 37 Van Natta 122 (1985). We find the attorney fees awarded to be reasonable in the circumstances of this case.

ORDER

The Referee's order dated April 24, 1985 is affirmed. Claimant's attorney is awarded $850 for services related to the April 19, 1984 low back injury claim and $400 for services related

to the March 16, 1984 costochondral separation claim on Board review, to be paid by the SAIF Corporation on behalf of Stanton Industries.

LESTER R. CARMAN, Claimant
Brown & Tarlow, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-07952
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Myers' order which: (1) assessed a penalty of 25 percent of the cost of thoracic outlet surgery for unreasonable delay in authorization of the surgery; and (2) awarded 112 degrees for 35 percent unscheduled permanent partial disability for injury to the cervical spine in addition to the 48 degrees for 15 percent awarded by the Determination Order. The issues are penalties and extent of unscheduled permanent partial disability.

The Board adopts and affirms those portions of the Referee's order relating to extent of unscheduled permanent partial disability. On the penalty issue, we reverse.

Dr. Misko formally requested authorization to perform thoracic outlet surgery on December 12, 1983. Claimant was referred to Dr. Rosenbaum for a second opinion. Dr. Rosenbaum recommended against surgery. The parties then selected Dr. Silver for a third opinion. Dr. Silver's opinion was equivocal. He ultimately concluded that if claimant viewed the symptoms that the surgery was designed to alleviate as disabling, surgery would be indicated. Dr. Misko requested authorization to perform the surgery on several additional occasions and each time the insurer withheld authorization, until, finally, in August 1984 Dr. Rosenbaum stated that surgery was indicated. The insurer at that point authorized the surgery. Under the facts of this case, we find the question whether the insurer's conduct was unreasonable to be extremely close.

We conclude, however, that even if the insurer's conduct regarding the surgery was unreasonable, there were no "amounts then due" upon which to base a penalty. ORS 656.262(10); EBI Companies v. Thomas, 66 Or App 105, 111 (1983). The Referee based his approach to the penalty upon our order in Harold A. Lester, 37 Van Natta 745 (1985) (Order after Remand). We find the facts of Lester not to be on point. In Lester we assessed a penalty for unreasonable delay in obtaining a medical report which was essential to claim closure and rating of permanent disability, reasoning that the delay unreasonably deprived the claimant of permanent disability benefits to which he was entitled. We looked to the time of the delay to determine if any amounts were then due, opposed to basing a penalty on amounts due at hearing. In Donald O. Otnes, 37 Van Natta 522, 524 (1985), and Gary L. Clark, 35 Van Natta 117, 119 (1983), we held that the costs of medical services were not "amounts due" until the medical services had been rendered. We adhere to those holdings. See also Whitman v. Industrial Indemnity Co., 73 Or App 73 (1985) (penalty assessed on unpaid medical bills during delay in acceptance or denial beyond 60 days). In this case, no payments for medical services associated with the surgery were due until after the surgery was performed. The penalty and penalty-associated attorney fee will be set aside.

ORDER

The Referee's order dated July 1, 1985 is affirmed in part and reversed in part. That portion of the Referee's order that assessed a 25 percent penalty and a $300 penalty-associated attorney fee is reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $250 as a reasonable attorney fee on Board review for prevailing against the insurer's request for reduction in claimant's permanent partial disability compensation, to be paid by the insurer in addition to compensation.

SUSAN D. CHAPMAN, Claimant
Cottle & Howser, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-02929
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Brown's order which increased claimant's unscheduled permanent disability award for a low back injury from 15 percent (48 degrees), as awarded by an August 22, 1984 Determination Order, to 50 percent (160 degrees). On review, the insurer contends that the award should be reduced. We agree and modify the Referee's order.

Claimant was 33 years of age at the time of hearing. In August 1982, while working as a housekeeper for a nursing home, she suffered a low back injury in a lifting incident. Following a period of conservative treatment, a lumbar laminectomy was eventually performed in June 1983. The 1983 surgery was at the site of a 1976 laminectomy. Following the 1976 surgery claimant had experienced periodic pain, but did not seek medical treatment between June 1979 and her August 1982 injury.

In March 1984 Dr. Dunn, claimant's treating neurosurgeon, completed a "Physical Limitations Chart." Dr. Dunn concluded that claimant could sit, stand, walk, and drive an automobile, each for a period of two to three hours per day. She was precluded from bending, squatting, crawling, kneeling, or pushing/pulling. Dr. Dunn further opined that claimant: (1) could occasionally lift and carry up to 10 pounds; (2) must be able to change positions as needed; and (3) could work only four hours per day.

In approximately May 1984 claimant returned to work for her employer as a part-time bookkeeper. In June 1984 Dr. Dunn released claimant to a six hour day and in July 1984 concluded that she was able to return to full time employment.

In June 1985 Dr. Rosenbaum, neurosurgeon, performed an independent medical examination. Claimant's chief complaint was periodic low back pain, which worsened with prolonged sitting. She also experienced occasional left leg paresthesias and numbness. Claimant believed that she could continue her bookkeeping duties without limitations, as long as she avoided prolonged sitting or heavy physical activity. Dr. Rosenbaum concluded that claimant's loss of function was mild. Inasmuch as claimant had suffered a slight preexisting impairment from the 1976 laminectomy which had been essentially asymptomatic prior to her 1982 injury, Dr. Rosenbaum attributed claimant's current loss of function to claimant's recent injury. Dr. Rosenbaum further opined that claimant could continue her bookkeeping duties without restrictions.

An August 1984 Determination Order awarded 15 percent unscheduled permanent disability. Claimant requested a hearing.

Claimant experiences constant low back and left leg pain, which increases when she is physically active. Her left leg pain worsens following prolonged periods of sitting. To relieve her pain claimant takes approximately eight to 12 aspirin a day and lies down after her workday. She also takes prescribed pain medication approximately twice a month.

Claimant has an tenth grade education, but has obtained her GED. She also has completed a workshop in basic bookkeeping. In addition to her work experience in housekeeping and bookkeeping, claimant has worked as a service station attendant, an auto parts clerk, and as a salesperson. She currently works six hours a day performing the "more simple bookkeeping" tasks for her employer. Her duties include posting payments, sending statements, and paying the bills. Claimant's current hourly wage is approximately 40 cents less than her hourly wage as a housekeeper. Her employer has made accommodations for her physical limitations. However, whenever claimant works more than six hours or exceeds her physical restrictions, her pain increases.

Following her 1976 surgery claimant was advised to be careful, but she could not recall any particular limitations placed upon her activities. Prior to her 1982 injury claimant performed various household chores and engaged in several recreational activities, which included camping, fishing, hunting, and gardening. Since her 1982 injury these activities have been significantly curtailed, if not eliminated.

The Referee found that claimant was a credible and reliable witness. After considering the guidelines contained in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985) and claimant's significant postural limitations, the Referee increased claimant's permanent disability award to 50 percent.

We agree that claimant's injury, surgery, and subsequent physical limitations have resulted in a permanent loss of earning capacity. ORS 656.214(5). However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider her physical impairment, which includes her credible and reliable testimony concerning her disabling pain, and all of the relevant social and vocational factors set forth in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985). We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 25 percent unscheduled permanent disability award adequately compensates claimant for her compensable injury.

ORDER

The Referee's order dated August 20, 1985 is modified. In lieu of the Referee's award, and in addition to the Determination Order's award of 15 percent (48 degrees) unscheduled permanent disability, claimant is awarded 10 percent (32 degrees), which gives her a total award to date of 25 percent (80 degrees) unscheduled permanent disability for her compensable low back injury. Claimant's attorney's fees shall be adjusted accordingly.

DONALD W. COURTIER, Claimant
Carney, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys
Rankin, et al., Defense Attorneys

WCB 83-02937 & 83-02542
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee St. Martin's order that: (1) affirmed EBI Companies' (EBI) denials of claimant's claims for aggravation of his low back condition and medical services alleged to be related to claimant's 1981 compensable injury; (2) affirmed Pepsi-Cola Company's (Pepsi) denial of claimant's new injury claim; (3) denied claimant's request for a penalty against EBI for its alleged unreasonable failure to pay interim compensation; and (4) denied claimant's request for interim compensation alleged to be payable by Pepsi, along with penalties and attorney fees for Pepsi's alleged unreasonable failure to pay interim compensation. Claimant also asserts that the Referee abused his discretion by admitting an exhibit offered in violation of OAR 438-07-005(3)(b), the "ten-day" rule. The primary issue on review is whether claimant suffered either an aggravation of his compensable condition or a new injury while employed by Pepsi in 1983 and, if so, whether EBI, as the insurer on the risk at the time of claimant's original injury, or Pepsi, which was self-insured at the time of claimant's alleged worsening in 1983, is responsible. The remaining issues are penalties against EBI, interim compensation, penalties and attorney fees against Pepsi, and whether the Referee abused his discretion by admitting an exhibit.

With regard to the Referee's admission of the exhibit, we find no error. The Referee has discretion to admit an exhibit filed outside the time limits set forth by administrative rule. OAR 438-07-005(4). In the present case, the Referee found no prejudice to any party by the submission of an exhibit nine (instead of ten) days before the hearing. The exhibit is an attorney's statement with which Dr. Puziss, a consulting physician, concurred. The Referee gave opposing parties an opportunity to depose Dr. Puziss, and such a deposition in fact occurred. We find that the Referee did not abuse his discretion, and we have considered the exhibit on review.

On the issues of penalties and fees as to both EBI and Pepsi and interim compensation as to Pepsi, we affirm the order of the Referee. We also affirm that portion of the order that upheld Pepsi's denial of claimant's new injury claim. With regard to claimant's aggravation claim against EBI, however, we reverse. Because we find that claimant has established an aggravation claim, we need not address the issue of the denial of medical services.

Claimant was compensably injured in April of 1981 when he strained his low back while lifting and handling cases of soft drink bottles. At the time of the injury, claimant's employer, Pepsi, was insured by EBI. Claimant received conservative treatment and was released to return to work approximately one month after the injury. After working a month, however, claimant again left work due to pain. Claimant's chiropractor did not anticipate that claimant would suffer permanent impairment, however.

In November of 1981 claimant suffered injury to the

thoracic spine in a noncompensable motor vehicle accident. As a result, he was temporarily disabled and symptomatic in the mid-back for approximately three weeks. The effects of the injury apparently subsided thereafter. Claimant was released to return to his regular work on December 3, 1981. On January 1, 1982 Pepsi became self-insured.

Claimant's low back symptoms continued into early 1982, and were particularly noticeable during periods of his regular heavy work. When claimant was allowed to drive a fork lift, which was lighter work, his symptoms improved. Dr. Rinehart, who had become claimant's treating doctor, advised him to take time off from work. Claimant continued to work, however, for financial reasons.

By way of a January 28, 1982 Determination Order claimant was awarded temporary total disability and temporary partial disability, but no permanent disability. Claimant appealed the Determination Order and was examined by consulting physician, Dr. Puziss. Dr. Puziss found claimant to be medically stationary with no permanent impairment. Claimant's treating doctor stated that if claimant had impairment, it might be related to the noncompensable motor vehicle accident. On February 18, 1983 Referee Williams affirmed the Determination Order, finding that claimant had no permanent disability as a result of the 1981 compensable injury.

Soon after receiving the Referee's Order, claimant filed an aggravation claim with EBI, asserting that his symptoms in 1982, and particularly a flare up in early 1983, represented an aggravation of the original compensable injury. EBI denied the aggravation claim. Claimant then filed a claim with Pepsi, asserting that the same symptoms and flare up constituted a new injury for which Pepsi was responsible as a self-insured employer during the time at issue. Pepsi also denied this claim.

Claimant was again examined by Dr. Puziss in March of 1983. Dr. Puziss reported that claimant's symptoms were likely related to his original injury, but that there had been no actual worsening of claimant's condition and no increase in impairment. Dr. Rinehart essentially concurred.

In early 1984 Dr. Puziss stated his concurrence with a statement by claimant's attorney that claimant's work at Pepsi, after the company became self-insured, resulted in a mere recurrence of the original symptoms and that the later employment did not independently contribute to the cause of claimant's disability. Dr. Puziss was thereafter deposed and he reiterated his opinion regarding the later employment. He also indicated, however, that he could not be sure that claimant's most recent symptoms were related to the original injury. He did feel, however, that claimant's symptoms were related to a degenerative disc condition that preexisted claimant's employment and was made symptomatic by the original injury. He also acknowledged that claimant's 1982 and 1983 symptoms were at least partially disabling in that they resulted in his having to do lighter work.

Claimant testified that he never fully recovered after the original injury, but that he improved in early 1982. He alleges that his condition worsened in 1983 during a period of regular heavy employment.

The Referee concluded that claimant had failed to prove either an aggravation or a new injury as a result of his later employment. Although it is unclear from the Referee's order, he apparently found claimant's representation to the employer in March of 1983 that he was missing work as a result of his motor vehicle accident, rather than the original injury, to be significant. The Referee also apparently found significant the fact that claimant had at one time been involved in a labor dispute with the employer. He fails to note, however, that at the time of claimant's alleged worsening in late 1982 and early 1983, claimant had returned to work for the employer.

After reviewing the record, we find that claimant has proved that he suffered an aggravation of his original injury. The record establishes that claimant suffered a low back injury in 1981 from which he never fully recovered, although he did improve during periods of light work. When claimant resumed his regular heavy work in 1982 and early 1983, he suffered an exacerbation of his symptoms. The medical record suggests that claimant did not experience a worsening of his underlying condition, but did notice increased symptoms resulting in periods of temporary disability and the need for medical treatment.

A worsening of symptoms without a concomitant worsening of the underlying condition is not necessarily fatal to a claim for aggravation. See Billy Joe Jones, 36 Van Natta 1230 (1984) aff'd mem, 76 Or App 402 (1985); James W. Foushee, 36 Van Natta 901 (1984). A major factor to be considered in determining if a symptomatic worsening alone is sufficient is whether claimant has received a permanent disability award that takes into account expected future symptomatic flare ups. Jimmie B. Hill, 37 Van Natta 728, 729 (1985). In the present case, the only award made to claimant was one for temporary total disability. He has received no permanent disability award. Under these circumstances, we find a symptomatic worsening, which resulted in temporary disability and medical treatment, to be sufficient to establish a claim for aggravation, which is the responsibility of EBI.

ORDER

The Referee's order dated January 11, 1985 is reversed in part and affirmed in part. That portion of the order that affirmed EBI Companies' denial of claimant's aggravation claim is reversed and the claim is remanded to EBI for processing according to law. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $800 for services at hearing and $450 for services on Board review for his participation in overturning the Referee's order as it pertains to the aggravation claim. These fees shall be paid by EBI Companies.

TERRIE EGGMAN, Claimant
Burt, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-06456
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Leahy's amended order which upheld the insurer's denial of claimant's claim for injury to her right shoulder and neck. The issues are the admissibility of certain exhibits and the compensability of claimant's claim.

The hearing in this case was held on April 3, 1985. At the beginning of the hearing, Exhibits 1 through 5 offered by the insurer were admitted. Immediately thereafter, claimant offered a letter from her chiropractor dated the day of the hearing. The letter was designated as Exhibit 6, but the Referee reserved ruling on its admissibility. Claimant also indicated that three months before the hearing she had written the insurer demanding all medical and other documentary evidence in its possession. See OAR 438-07-015(2). The insurer had replied by sending what the Referee had just admitted as Exhibits 1 through 5. Claimant had been informed by her chiropractor that he had sent the insurer a Form 827. A copy of this form had not been forwarded to claimant by the insurer. Claimant requested that the record be held open for further medical information from claimant's chiropractor and the Referee granted her request.

Later in the hearing, the insurer attempted to introduce chart notes composed by a nurse who worked at the plant where claimant was employed. These notes were marked Exhibit 1A and were offered by the insurer solely for the purpose of impeaching claimant's testimony. Claimant objected to the admission of this exhibit on discovery and hearsay grounds. The Referee correctly overruled the discovery objection. See OAR 438-07-015(2). The Referee reserved ruling on the hearsay objection and held the record open to give claimant the opportunity to depose the author of the chart notes.

By letter dated April 17, 1985, claimant forwarded to the Referee a copy of the missing Form 827 and eight other pages of medical information obtained after the hearing from claimant's chiropractor. The Form 827 was addressed to the wrong insurance company, thus explaining why the correct insurer had not received it. Claimant stated that with the exception of a Form 828 admitted as Exhibit 2 at the hearing, she had seen none of the documents submitted with her letter prior to obtaining them from her chiropractor. Claimant's letter and its enclosures were marked as Exhibit 7. Claimant made no mention in her letter of Exhibit 1A offered at the hearing by the insurer and we conclude that she declined the opportunity to depose the author of that exhibit. In a letter dated May 6, 1985, the insurer objected to the documents offered with claimant's letter on the ground that they had not been timely submitted.

In an Opinion and Order dated May 21, 1985, the Referee ruled on the admissibility of the various disputed exhibits and rendered his decision on the compensability of claimant's claim. He ruled Exhibit 6 (the letter from claimant's chiropractor dated the day of the hearing) and Exhibit 7 (claimant's April 17, 1985 letter and its enclosures) inadmissible on the ground that they had not been timely submitted. Although the Referee did not rule expressly on the admissibility of Exhibit 1A (the chart notes offered by the insurer for purposes of impeachment) or otherwise discuss the exhibit, the Referee stated that his decision was based upon Exhibits 1 through 5. Because Exhibit 1A falls within this sequence, we conclude that the Referee admitted that exhibit.

On June 4, 1985 the Referee issued an Amended Opinion and Order. The Amended Opinion and Order deleted a portion of the discussion contained in the original Opinion and Order that the Referee, upon reflection, had decided was not relevant to his decision. Exhibits 1A, 6 and 7 were mentioned at the beginning of

the Amended Opinion and Order, but the Amended Opinion and Order did not otherwise discuss these exhibits or expressly rule on their admissibility. The opinion did state that the Referee's decision was based upon Exhibits 1 through 5. We conclude, therefore, that the Referee admitted Exhibit 1A and excluded Exhibits 6 and 7 for the reasons stated (or in the case of Exhibit 1A, not stated) in his original Opinion and Order. The Referee made no credibility findings in either the original or amended Opinion and Order.

On Board review claimant makes no argument for the exclusion of Exhibit 1A. Her objection to the exhibit on hearsay grounds, to the extent that it is cognizable in a workers' compensation case, see ORS 656.283(6); Armstrong v. SAIF, 67 Or App 498, 501 n. 2 (1984), was dispelled through her opportunity to depose the author of the exhibit. Herbert D. Rustrum, 37 Van Natta 1291, 1292 (1985). We conclude that the Referee did not err in admitting Exhibit 1A.

It was error, however, for the Referee to exclude Exhibits 6 and 7 on timeliness grounds. Claimant submitted the exhibits within seven days of receiving them and thus complied with the technical requirements of the second paragraph of OAR 438-07-005(3)(b). Under these circumstances, the Referee had no discretion to deny admission of the exhibits. Susan F. Vernon, 37 Van Natta 1562 (1985); Merle Barry, 37 Van Natta 1492 (1985). The employer makes no other argument for the exclusion of the exhibits. Although not admitted, Exhibits 6 and 7 are in the record in this case and have been considered on review. Herbert D. Rustrum, supra, 37 Van Natta at 1293; Michael Cochran, 35 Van Natta 1726, 1727 (1983).

Having defined the scope of the record on review, we now turn to the merits of claimant's claim. Claimant asserts that she injured her right shoulder and neck in the course of her employment as a screwdriver blade straightener for a tool manufacturing company. The job required that she pound screwdriver blades with a three-pound hammer. Claimant testified that after a few days on this job she complained to her supervisor of right shoulder and neck pain, and her supervisor transferred her to another work station. She also testified that she had not experienced that kind of pain before in those portions of her body.

Nearly a month after the alleged injury, claimant visited a chiropractor, Dr. Krall, and thereafter received two months of conservative care. Claimant missed no work because of the alleged injury. Based upon his examination and treatment of claimant and the history received from her, Dr. Krall opined that claimant had been injured in the course of her employment.

The only other medical opinion in the record is that of Dr. Howell, an osteopath. In a report dated March 2, 1984, he related that claimant had visited his office 13 months before the date of the alleged injury complaining of neck and upper back pain. Claimant told him that she had experienced chronic pain in her neck and upper back since her involvement in a serious automobile accident in September 1979. Dr. Howell examined claimant and noted moderately intense chronic muscle spasms throughout claimant's thoracocervical region bilaterally including the trapezius muscles. After a follow up examination a week later, it was Dr. Howell's impression that claimant's personality played a role in generating her pain and that she was unmotivated

in resolving her symptoms. Claimant did not appear for her next appointment and was not seen again by Dr. Howell.

After relating the above history, Dr. Howell stated:

> "[Claimant] is thought to be an individual with chronic underlying muscle spasm, predisposing her to complaints of neck and back pain. Individuals like this frequently develop symptoms which do not represent new injuries, but in fact, either symptomatic changes without material worsening of their underlying conditions [sic]. Often the complaints of pain are merely manifestations of underlying personality factors or psychological states, also unrelated to their work activities."

Dr. Howell's report contradicts claimant's statement that she had not experienced chronic and severe pain in her neck and right shoulder prior to November 1983. Claimant's testimony on this point is also contradicted by Exhibit 1A, the chart notes offered by the employer for impeachment purposes. Based upon these contradictions, it is our conclusion that claimant is not a reliable historian.

From a medical form included in Exhibit 7, it is clear that claimant gave an inaccurate history to her chiropractor, Dr. Krall. Claimant told Dr. Krall about her September 1979 automobile accident, but also told him that her symptoms following the accident were limited solely to the left side of her body. Dr. Krall's opinion acknowledges a reliance upon history received from claimant. Under these circumstances, we do not find Dr. Krall's opinion persuasive on the issue of whether claimant sustained an injury in the course of her employment. See Kenneth L. Frisby, 37 Van Natta 280, 281 (1985). Claimant has submitted no other credible evidence in support of her claim and thus has failed to carry her burden of proof. The Referee's order finding claimant's claim noncompensable, therefore, is affirmed.

ORDER

The Referee's order dated May 21, 1985 is affirmed.

KENNETH W. EMERSON, Claimant
Wade P. Bettis, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05601
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests, and claimant cross-requests, review of Referee Wasley's order which awarded claimant 40 percent (128 degrees) unscheduled permanent disability for a neck and upper back injury, whereas an April 23, 1984 Determination Order had awarded no permanent disability. On review, the sole issue is extent of permanent disability. We agree with SAIF's contention that the award should be decreased. Consequently, the Referee's order is modified.

At the time of hearing claimant was a 45 year old manager of a wildlife wintering area for the Department of Fish and Wildlife. In August 1983 he sustained his compensable injury

when he fell from a truck and landed on his head. X-rays did not reveal any fractures or gross dislocations. However, a marked narrowing of the cervical discs was detected.

Claimant returned to work approximately one week after his injury. His duties as manager of the wildlife wintering area entailed backroad driving and considerable bending and lifting when storing or distributing hay to the wildlife. Upon claimant's return, these duties were modified. Specifically, Dr. Kehr, claimant's treating chiropractor, recommended that claimant refrain from repetitively lifting more than 10 to 20 pounds for two to three hours a day and limit his daily loading activities to 10 to 12 eighty pound bales of hay. Dr. Kehr concluded that these restrictions were permanent.

In March 1985 Dr. Bill, orthopedist, reported on claimant's recent examination. Claimant's complaints included neck and shoulder pain, with a burning sensation radiating about both shoulder blades, the back of his neck and into his head. He also experienced blurred vision, tingling in the left arm, and coldness in both feet. Dr. Bill diagnosed cervical strain, by history, and cervical spondylosis. Inasmuch as claimant was asymptomatic prior to his injury, Dr. Bill concluded that claimant's underlying condition had been aggravated by the injury.

Dr. Stephens, orthopedist, agreed that claimant's injury was the cause of his current problems. X-rays demonstrated advancing cervical disc degeneration and also moderate thoracic spine degeneration. Considering the extreme stress that claimant's work placed on his neck, Dr. Stephens predicted that claimant's symptoms would gradually worsen. Dr. Stephens concluded that claimant was unable to do any heavy lifting and should avoid riding on rough roads. Noting that these restrictions severely limited claimant's activities, Dr. Stephens opined that claimant suffered from "much more significant disability" than 10 percent.

Claimant experiences constant pain from the top of his head to his shoulder blades. He suffers from dizziness, blurred vision, headaches, and ringing in the ears. Claimant also complains of numbness in his left arm and a cold sensation in both feet. His neck rotation is limited. He cannot look over his shoulder. Claimant avoids raising his head and extends his head forward for only 15 minute periods while performing paperwork. Any lifting or extension of his neck increases his symptoms. Claimant takes pain and anti-inflammatory medication, which gives him some temporary relief.

As a result of his injury claimant has significantly curtailed his recreational activities, such as horseback riding and backpacking. His symptoms have also altered his sleeping patterns and affected his personality.

Claimant has a high school education and has completed a six month correspondence course as a draftsman. He has worked for the Department of Fish and Wildlife for 16 years. His job as wildlife manager has primarily been a "one-man station", but he occasionally supervises seasonal workers. The position requires knowledge in land management, forest practices, and all phases of land use.

We agree that claimant has sustained a permanent loss of

earning capacity as a result of his compensable injury. ORS 656.214(5). However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider claimant's physical impairment, including his testimony concerning disabling pain, and all of the relevant social and vocational factors set forth in OAR 436-65-600 et seq. (renumbered OAR 436-30-380, May 1, 1985). We do not apply these rules as rigid mechanical calculations that are determinative of the final result. Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a total award of 25 percent unscheduled permanent disability adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated July 25, 1985 is modified. In lieu of the Referee's award, claimant is awarded 25 percent (80 degrees) unscheduled permanent disability for his neck and upper back injury, which is his total award to date. Claimant's attorney's fees shall be adjusted accordingly.

NORMAN P. HILLIARD, Claimant
Philip Garrow, Claimant's Attorney
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-13758 & 84-11060
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Willamette Industries, a self-insured employer, requests review of Referee Seymour's order that set aside its denial of claimant's aggravation claim and affirmed the SAIF Corporation's denial of claimant's new injury claim involving the low back. The issue on review is responsibility.

We affirm the order of the Referee with the following comment. The Referee found the evidence with respect to responsibility to be in equipoise. He then held:

> "This being so, I believe that there is a presumption that the claimant's current back pain would be a continuation of his original accepted claim. There would need to be a preponderance of the evidence that it was a new claim for the new employer to [be] liable. Based solely on this analysis, I am finding that Willamette Industries [which was on the risk at the time of claimant's first work incident] is responsible."

As Willamette Industries correctly argues on review, the Referee applied a presumption that does not exist in cases involving responsibility. There is no presumption that the first party remains responsible once the evidence is found to be in equipoise. In fact, the presumption is precisely the opposite. In Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984), the Court held:

"If the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability, the finding is for the worker against the last employer whose employment may have caused the disability." 296 Or at 245. (Emphasis added.)

The Court also held, however, that the "last injurious exposure rule" is not intended to transfer liability from an employer whose employment caused a disability to a later employer whose employment did not. Starbuck, supra, 296 Or at 244. In the present case, our de novo review persuades us that claimant's current condition is the result of an aggravation of the injury incurred at Willamette Industries. Therefore, while we disagree with the Referee's reasoning in this case, we affirm his result.

Claimant's attorney submitted a brief on review in defense of the Referee's finding that claimant's condition is the result of an aggravation rather than a new injury. Accordingly, claimant's attorney is entitled to a reasonable attorney fee on Board review. See Robert Heilman, 34 Van Natta 1487, 1488 (1982).

ORDER

The Referee's order dated May 21, 1985 is affirmed. Claimant's attorney is awarded $300 for services on Board review, to be paid by the self-insured employer.

CHARLOTTE KUKLHANEK (Deceased), Claimant
Roberts, et al., Defense Attorneys

WCB 78-03366
December 31, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The representative of the deceased beneficiary of the deceased claimant requests review of Referee St. Martin's order that upheld the insurer's de facto denial of compensation for claimant's beneficiary. The party requesting review filed no brief. We perceive the issue to be whether there is a statutory basis upon which the deceased beneficiary may continue the deceased claimant's claim.

We adopt the Referee's findings of fact, from which we draw. Claimant sustained an industrial injury on May 23, 1977. Her claim was accepted, processed and closed by a Determination Order issued March 14, 1978. Claimant requested a hearing and, shortly thereafter, committed suicide. Claimant's mother, whom the evidence indicates was dependent upon claimant for support, then went forward with claimant's request for hearing on the issue of permanent disability. ORS 656.218(3). At the time of claimant's injury, claimant had a son over the age of 21 years who was an institutionalized quadriplegic. Claimant had no spouse. Sometime prior to the hearing, claimant's mother died.

The Referee analyzed this case under ORS 656.204(5), which allows compensation for a "dependent" of the deceased injured worker if the injured worker leaves no spouse or child for whom compensation may be paid. He reasoned that claimant's child

was a "dependent invalid child" as that term is defined by ORS 656.005(6), thus a "child for whom compensation may be paid," and concluded that the existence of the child barred the mother's claim from the beginning.

We note that claimant's child is not a party to this proceeding and that, so far as we can tell by the record, no claim for compensation has ever been made by the child or anyone on the child's behalf, including the State of Oregon. We find that it is not necessary for us to determine what, if any, effect the existence of claimant's child may have on claimant's deceased mother's ability to continue the claim. Survival of actions in workers' compensation cases is governed strictly by statute. See Majors v. SAIF, 3 Or App 505 (1970). Assuming without deciding that claimant's mother could have continued the claim under ORS 656.218(3) as a surviving dependent, we find no statutory basis under which claimant's claim could survive the death of her statutory beneficiary. We, therefore, find and hold that claimant's claim was extinguished by the death of the last person authorized by statute to continue it.

The Board affirms the order of the Referee.

ORDER

The Referee's order dated July 2, 1985 is affirmed.

ROBERT A. LEPPLA, Claimant
Welch, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-09514
December 31, 1985
Order on Review (Remanding)

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of Referee St. Martin's order setting aside its denial of claimant's occupational disease claim for his low back condition. The insurer contends that certain exhibits were wrongfully excluded by the Referee. It concedes that if the exhibits are admitted, remand is appropriate to provide claimant an opportunity to cross-examine with respect to them. Claimant contends that the Referee's order should be affirmed or, in the alternative, that the case should be remanded. The issues are whether the disputed evidence was properly excluded and, in the event that the evidence should have been admitted, whether remand is appropriate.

The insurer contends that the February 5, 1985 report by Dr. Martens of Orthopaedic Consultants and the February 11, 1985 supplemental report by Dr. Martens should have been considered. Dr. Martens opined that claimant's Grade I spondylolisthesis and exogenous obesity are major factors causing his symptoms. His opinion is directly pertinent to this compensability dispute. Both reports were submitted in accordance with OAR 438-07-005(3), but were ruled inadmissible at the February 11, 1985 hearing.

In Merle Barry, 37 Van Natta 1492 (October 24, 1985), we held that where the technical requirements of OAR 438-07-005(3)(b) have been complied with, evidence cannot be excluded as untimely submitted. There being no other objection to the admissibility of Dr. Martens' reports, they must be considered.

Subject to a limited official notice exception not

applicable here, review by the Board is limited to evidence found in the hearing record. See Groshong v. Montgomery Ward Co., 73 Or App 403 (1985). Since the excluded exhibits were made part of the record at the hearing, however, we need not remand the case to consider them. See Edward Morgan, 34 Van Natta 1590 (1982).

Claimant contends and the insurer concedes that if the disputed exhibits are admitted, the case should be remanded to provide claimant an opportunity for cross-examination with respect to them. We have discretion to remand for further evidence taking where we determine that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee. ORS 656.295(5). ORS 656.283(6) requires that workers' compensation proceedings be conducted in such a manner as to achieve substantial justice. In Herbert D. Rustrum, 37 Van Natta 1291, 1292 (1985), we recognized that under certain circumstances, admitting a document without affording an opportunity for cross-examination of the author can be inconsistent with this statutory obligation.

There having been no sufficient opportunity for cross-examination of Dr. Martens, we find that the case has been insufficiently developed. Considering that conceivably these exhibits may be of significance in relation to the over all weight of the evidence, remand to provide an opportunity for cross-examination is appropriate.

ORDER

The Referee's order dated April 12, 1985 is vacated. Dr. Martens' February 5, 1985 and February 11, 1985 reports are admitted into evidence. This matter is remanded to the Hearings Division for the limited purposes of: (1) providing an opportunity for cross-examination with respect to Dr. Martens' reports; and (2) permitting the Referee to reconsider the case on the merits in light of Dr. Martens' observations and opinions.

DAVID W. MARTIN, Claimant
Cowling & Heysell, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 84-06596
December 31, 1985
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of those portions of Referee Thye's order that affirmed the insurer's denial of claimant's low back aggravation claim and, in the alternative, denied claimant's request for an award of permanent partial disability for the low back. Claimant also asserts that the Referee erred in admitting several exhibits allegedly submitted by the self-insured employer in violation of OAR 438-07-005(3)(a). The issues on review are aggravation or, in the alternative, extent of unscheduled disability, and whether the Referee erred by admitting certain exhibits.

On the merits, we agree with the Referee that claimant has failed to establish a compensable aggravation. We also agree with the Referee that claimant is not entitled to an award of permanent partial disability.

The remaining issue is whether the Referee erred by admitting several exhibits submitted by the self-insured employer nine days before the hearing. OAR 438-07-005(3)(a) requires the insurer to file with the Hearings Division all exhibits upon which

the insurer intends to rely not less than 20 days before the hearing date. OAR 438-07-005(4) gives the Referee discretion to admit exhibits filed in violation of the "20-day rule," but it also requires him or her to determine if good cause has been shown for the failure to file within the prescribed time limits.

In the present case, the Referee made no specific finding with regard to whether good cause had been demonstrated. Rather, he merely found that claimant would not be prejudiced by the late admission of the exhibits, and he allowed them into the record. The Referee should have made a "good cause" finding. See Bruce D. Craig, 37 Van Natta 1143, 1145 (1985). Because he did not, we have not considered the exhibits subject to claimant's objection on review.

ORDER

The Referee's order dated April 2, 1985 is affirmed.

BRENDA MILLER-ELLS, Claimant
Francesconi & Cash, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 85-07050
December 31, 1985
Interim Order Denying Motion to Reopen Record

The insurer has moved the Board for an order reopening the record for the inclusion of additional evidence. We lack the statutory authority to do so. ORS 656.295(5); Bailey v. SAIF, 296 Or 41, 45 (1983); Muffett v. SAIF, 58 Or App 684, 687 (1982). Treating the insurer's motion as one for an order remanding this matter to the Referee, we deny the motion at this time. We will, however, consider the issue of remand at the time of Board review. Any evidence submitted to the Board not previously considered by the Referee will be considered solely for the purpose of determining whether remand is appropriate. Bailey v. SAIF, supra.

IT IS SO ORDERED.

DOROTHY M. PITCHER, Claimant
Vick & Assoc., Claimant's Attorneys
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08815 & 84-07688
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Western Fire Insurance Company requests review of that portion of Referee St. Martin's order which set aside its denial of claimant's aggravation claim for a right shoulder condition. On review, Western contends that a subsequent employer, insured by the SAIF Corporation, is responsible for claimant's condition. SAIF cross-requests review of that portion of the Referee's order which awarded claimant an attorney fee for SAIF's alleged unreasonable delay and refusal to join in a request for the issuance of an order pursuant to ORS 656.307.

The Board affirms that portion of the Referee's order which pertains to the responsibility issue. However, that portion of the order which awarded an attorney fee for an unreasonable delay and failure to join in a request for a .307 order is reversed.

Subsequent to the Referee's order, the Board issued its

decision in Sylvia A. Weaver, 37 Van Natta 656, 659-60 (1985). In Weaver, a Referee had assessed penalties and accompanying attorney fees for an insurer's delay in requesting or acquiescing in the issuance of an order under ORS 656.307. The Board reversed, concluding that there was neither statutory authority: (1) to require an insurer to concede compensability for the purpose of obtaining a .307 order; nor (2) to penalize delays in requesting or acquiescing in the issuance of a .307 order. The Board relied upon EBI Companies v. Thomas, 66 Or App 105, 111-12 (1983).

Here, the Referee found SAIF's delay and failure to join in the request for the issuance of a .307 order unreasonable and awarded an attorney's fee. No penalty was assessed since there was no evidence of compensation "then due" upon which to base the penalty. The Referee discussed EBI v. Thomas, supra., but concluded that the Court of Appeals' reasoning in a prior case, SAIF v. Moyer, 63 Or App 498, 503 (1983), was more persuasive. In Moyer, the court concluded that ORS 656.262(9) [now subsection (10)] allowed for penalties where an insurer's unreasonable denial of compensability resulted in the delay of temporary total disability payments that would have otherwise issued had a paying agent order been requested.

We conclude that the reasoning expressed in EBI v. Thomas is controlling. In the present case, the Referee's assessment of an attorney fee was not based on an unreasonable denial of compensability, which was the basis for the penalty in Moyer. Rather, the Referee's assessment was based on an unreasonable delay and refusal to join in a request for a .307 order. As discussed in Weaver, there is no statutory authority for such an award under these circumstances. Accordingly, that portion of the Referee's order which awarded an attorney's fee shall be reversed.

ORDER

The Referee's orders dated May 6, 1985 and May 7, 1985 are affirmed in part and reversed in part. That portion which awarded an attorney's fee concerning the SAIF Corporation's delay and refusal to join in a request for the issuance of an order pursuant to ORS 656.307 is reversed. The remainder of the Referee's order is affirmed.

GEORGE E. SALLENG, Claimant
Robert Guarrasi, Claimant's Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-10523
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of that portion of Referee Michael Johnson's order which awarded 128 degrees for 40 percent unscheduled permanent partial disability due to a low back strain injury in lieu of the Determination Order dated December 27, 1984 which awarded 48 degrees for 15 percent permanent disability. The insurer also requests authorization for an offset of overpaid permanent disability compensation paid pursuant to the Referee's award of compensation against future awards of permanent disability in the event the Referee's award is reduced. The issues on review are extent of unscheduled permanent partial disability and authorization of an offset against future awards of permanent disability.

Claimant suffered a low back strain injury while working as a tree planting supervisor on February 1, 1983. He cannot return to his regular work. He has a minimal loss of function of his back. He has a 26 pound lifting limit and has limited his recreational activities to avoid pain. He is capable of performing light to medium work. He did return to work as a real estate salesperson, but the southwestern Oregon economy made it difficult for claimant to make a living in that industry. Claimant's prior work experience was in heavy labor. Claimant suffers from chronic pain which waxes and wanes in his right leg. He has preexisting spinal abnormalities at L5-S1 and S1.

To prevail on the issue of unscheduled permanent partial disability, a worker must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. The extent of disability is measured by the loss of earning capacity caused by the industrial accident and "taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury." Barrett v. D & H Drywall, 300 Or 325, 331 (1985). "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971). Subsequent wages may be considered an indication of the extent of lost earning capacity although it is not determinative. Jacobs v. Louisiana Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549 (1972).

We rely on medical assessment and claimant's credible testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-65-600 et seq. (renumbered 436-30-380 et seq., May 1, 1985). Howerton v. SAIF, 70 Or App 99 (1984).

The Referee relied on Dr. Bert's cursory report of January 30, 1985 to find that claimant suffered moderate impairment. When Dr. Bert's report is read with Dr. Bert's similarly cursory concurrence with the report of Orthopaedic Consultants and his full assessment of impairment based on physical examination in October 1984, we find that claimant suffers permanent impairment based on minimal loss of range of motion and moderate pain. The pain occasionally increases to a severe level when claimant exceeds his prescribed limitations and decreases to minimal levels when claimant is inactive. A fusion has been considered but not recommended at this time.

Considering claimant's impairment and his credible testimony with the relevant social and vocational factors, we find that claimant would be adequately compensated by an award of 64 degrees for 20 percent unscheduled permanent partial disability. Therefore, the Referee's order shall be modified accordingly.

No offset will be authorized against future awards of permanent disability compensation based on an overpayment due to the Referee's order. ORS 656.313; Hutchinson v. Louisiana Pacific, 67 Or App 577, rev. den., 297 Or 340 (1984). Claimant's attorney shall be awarded a reasonable fee for defending claimant's compensation against reduction by offset.

ORDER

The Referee's order dated May 3, 1985 is modified in part and affirmed in part. Claimant is awarded 64 degrees for 20% unscheduled permanent partial disability in lieu of prior awards. The Referee's order is affirmed in all other respects. Claimant's attorney is awarded $200 for services on Board review in connection with the overpayment offset claim, to be paid by the insurer.

RUSSELL D. SCHWEITZ, Claimant
Philip H. Garrow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11465
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Holtan's order that: (1) ordered it to pay claimant temporary total disability compensation for an injury incurred in Oregon, despite claimant's prior acceptance of benefits under Idaho law for the same injury; and (2) assessed penalties and an associated attorney fee against SAIF for its failure to pay benefits or otherwise process claimant's claim pursuant to an Opinion and Order dated August 21, 1984. The issues on review are whether claimant may recover benefits from two jurisdictions for the same injury and penalties and attorney fees.

Claimant, who is an Oregon domiciliary, was injured in Oregon on September 3, 1983 while employed by an Oregon corporation that does business in Oregon, Washington and Idaho. Just before claimant's Oregon injury, he worked for approximately two months for the employer in Idaho. Following his injury, claimant submitted claims first in Idaho, and later in Oregon. The Idaho State Insurance Fund accepted the claim and paid benefits, which claimant accepted.

Claimant's Oregon claim was denied by the SAIF Corporation on the grounds that claimant was not an Oregon "subject worker" at the time of his injury. A hearing was held on the denial, and on August 21, 1984 Referee Michael Johnson set the denial aside, thereby ordering SAIF to "process the claim according to law. . . ." Russell D. Schweitz, WCB No. 83-11543, August 21, 1984. Despite this order, SAIF neither processed the claim nor paid claimant benefits. SAIF did request review of Referee Johnson's Opinion and Order before the Board. However, SAIF's request for review and its subsequent argument before the Board consisted only of its assertion that claimant was not an Oregon subject worker at the time of his injury. SAIF did not argue in the alternative that if claimant's claim were held to be compensable, SAIF should not be required to pay claimant benefits when he had already accepted them from the Idaho Fund. Neither did SAIF argue that it should at most be responsible for the difference between what claimant had received from the Idaho Fund and his entitlement under Oregon law.

While Board review was pending, claimant requested a second hearing, seeking enforcement of the prior Opinion and Order. Ultimately, Referee Holtan ordered SAIF to pay claimant temporary total disability compensation from September 3, 1983 through November 16, 1983. The Referee also assessed a penalty and associated attorney fee against SAIF for its failure to process the claim pursuant to the prior Opinion and Order. SAIF then requested Board review of Referee Holtan's order.

While this second request was pending, the Board remanded WCB Case No. 83-11543 to Referee Johnson for consideration of documents apparently omitted from the first proceeding. Russell D. Schweitz, 37 Van Natta 648 (1985). The Referee thereafter advised the Board that the parties had no objection to the inclusion of the documents into the record and had requested that the Board proceed with its review. The Board then reviewed the Referee's order de novo and affirmed it on August 1, 1985. Russell D. Schweitz, 37 Van Natta 1411 (August 1, 1985). The effect of the Board's order was to direct SAIF to process claimant's claim and pay all benefits according to law. SAIF did not seek appellate court review of the Board's order and the order became final as a matter of law on August 31, 1985. ORS 656.295(8).

SAIF now asks the Board to review Referee Holtan's enforcement order, arguing that it should not be required to pay claimant benefits when he has already accepted them from the Idaho Fund for the same injury. In the alternative, it argues that it should at most be required to pay only the difference in value between what claimant received in Idaho and what he is entitled to receive in Oregon. (For a similar case involving the issue of responsibility between insurers located in different states, see Miville v. SAIF, 76 Or App 603 (1985).

After reviewing the chronology of this claim, we find that SAIF is barred from raising its arguments before us. Its failure to raise them in its appeal from Referee Johnson's order bars it from raising them now. Clearly, the issues now raised by SAIF were among those that could have been raised on appeal both to us following the initial order, and later before the Court of Appeals. See ORS 656.295(8).

On the issue of penalties and attorney fees, we affirm the order of the Referee.

ORDER

The Referee's order dated March 19, 1985 is affirmed. Claimant's attorney is awarded $550 for services before the Board, to be paid by the SAIF Corporation.

DONALD A. SCRANTON, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-05142
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Seifert's order which set aside its partial denial of claimant's current left wrist and hand condition. On review, SAIF contends that claimant's recent medical treatment for swelling in his left hand and forearm, as well as for a large mass in the first web space of his left hand, is not causally related to his compensable left carpal tunnel syndrome condition. We agree and reverse.

Claimant was 30 years of age at the time of hearing. His symptoms first arose in September 1983, while he was working as a lift truck operator for a cannery. Claimant experienced pain and a burning sensation in his left wrist and forearm, with a tingling sensation into his fingers.

In October 1983 claimant sought treatment from Dr. Stanford, orthopedist, who diagnosed probable median nerve irritation. Although EMG findings did not show a great deal of compromise, Dr. Stanford recommended a carpal tunnel release in the hopes of relieving claimant's increasingly persistent pain and numbness. In February 1984 claimant was examined by Dr. Jewell, who diagnosed carpal tunnel syndrome and recommended surgery. Dr. Stanford subsequently performed a left carpal tunnel release.

In June 1984 Dr. Stanford reported that claimant's post-surgery EMG had been normal. Claimant continued to complain of pain and stiffness. However, Dr. Stanford had no explanation for claimant's complaints nor did he propose further treatment.

In July 1984 Dr. Nye, hand surgeon, performed an independent medical examination. Claimant demonstrated a full range of motion. His scar appeared well-healed. Diagnosing claimant's condition as relieved carpal tunnel syndrome, Dr. Nye noted a "small neuroma of the ulnar nerve or at least ulnar nerve irritation secondary to scar formation." Dr. Nye recommended that claimant attempt to return to his regular work on a modified basis. Should claimant's symptoms persist, Dr. Nye suggested that exploration of the ulnar nerve might be necessary. Dr. Stanford agreed with Dr. Nye's plan and diagnosis.

In September 1984 claimant began working for a convenience store as a clerk and cashier. His symptoms continued. However, he was able to perform his duties until late January 1985, when his wrist and hand became extremely swollen. This swelling followed claimant's completion of a "back-to-back" shift and a "popping" sensation in his wrist as he was moving a coffee table.

In February 1985 claimant began receiving treatments from Dr. Crockett, chiropractor. Claimant's complaints included left hand pain, numbness, and swelling. Dr. Crockett diagnosed carpal tunnel syndrome, ulnar nerve lesion, and myalgia/myositis. Thereafter, claimant received "pressure point" therapy which gave him some relief.

Also in February 1985 claimant returned to Dr. Stanford. Claimant had last seen Dr. Stanford in October 1984. Dr. Stanford reported that claimant had cellulitis and "what looked like might be an insect bite on his hand." Although Dr. Stanford was not sure whether claimant had an insect bite, he noted that claimant felt that the problem was related to his ongoing difficulties.

In April 1985 claimant was reexamined by Dr. Nye. Claimant described the onset of an intense swelling in his left hand in late January 1985, which had recently receded. Dr. Nye found no symptoms in the surgery's scar area, but noted a "large localized mass in the dorsum of his first web space." The mass was aspirated and revealed a cloudy fluid. Dr. Nye concluded that this acute infectious process was a new problem, unrelated to claimant's previous injury or surgery. Dr. Stanford concurred with Dr. Nye's opinion.

Dr. Crockett disagreed with the specialists' opinions. It was Dr. Crockett's conclusion that the large mass and recent

swelling were directly related to claimant's original carpal tunnel condition. Dr. Crockett based his opinion on claimant's inability to regain full use of his wrist since the surgery. Thus, Dr. Crockett reasoned that claimant's attempts to guard against certain movements had placed more stress on other areas of the wrist and forearm, culminating in claimant's recent problems.

Claimant had no prior left wrist problems. His surgery gave him some relief, but he still experienced pain and numbness extending from the ring and little finger into the base of his palm and wrist. The swelling in his wrist and hand began while he was experiencing pain and weakness following the surgery.

The Referee set aside SAIF's denial of responsibility for the large mass and recent swelling in the left hand and wrist. The Referee reasoned that claimant's left wrist had never completely healed following the surgery and that the chronology of events, as well as claimant's testimony, were more consistent with the conclusion that claimant's recent problems were related to his compensable injury.

Claimant is entitled to medical services for conditions resulting from his compensable injury. ORS 656.245(1). It is claimant's burden to prove that the condition for which he receives medical services was caused by his compensable injury and that the treatment is reasonable and necessary. Poole v. SAIF, 69 Or App 503, 505-06 (1984). Although we may be persuaded by lay testimony on medical issues, should we find the lay testimony insufficient to resolve complicated medical issues, we are not bound by that testimony and may require expert medical opinion to resolve the issue. Kassahn v. Publishers Paper Co., 76 Or App 105, 109 (1985); Uris v. Compensation Department, 247 Or 420, 424 (1967).

Considering the complexity of the causal relationship issue, we have determined that its resolution can best be achieved through an appraisal of the opinions offered by the various medical experts. Although claimant's testimony is by no means rejected as probative evidence, these medical opinions shall be given significant weight. Following our review of these opinions and the record as a whole, which necessarily includes claimant's medical histories and testimony, we are not persuaded that claimant's current left wrist and hand problems are causally related to his compensable carpal tunnel syndrome and surgery.

In reaching our conclusion we find the opinions of Drs. Nye and Stanford more persuasive than that of Dr. Crockett. We tend to accord slightly greater weight to these opinions because, unlike Dr. Crockett, the other physicians had examined claimant before and after his recent onset of pain and swelling. See Faye L. Ballweber, 36 Van Natta 303, 304 (1984). Furthermore, both physicians are specialists and have performed surgery on claimant's wrist and hand. Finally, potential causal factors such as an insect bite and claimant's subsequent clerking activities present other plausible explanations for claimant's current problems.

Neither of these factors are addressed by Dr. Crockett, claimant's current treating physician. We generally accord greater weight to the conclusions of treating physicians, absent persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810, 814 (1983). As detailed above, we have found persuasive reasons not to follow the opinion of Dr. Crockett.

ORDER

The Referee's order dated July 22, 1985 is reversed. The SAIF Corporation's partial denial issued April 23, 1985 is reinstated.

JAMES A. STEELE, Claimant
Velure & Bruce, Claimant's Attorneys
Brian L. Pocock, Defense Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 85-05796 & 85-05795
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Aetna Casualty Company (Aetna) requests review of Referee Leahy's order that: (1) affirmed EBI Companies' (EBI) denial of claimant's claim for a new injury at EBI's insured's; and (2) set aside Aetna's denial of claimant's aggravation claim for carpal tunnel syndrome, thereby holding Aetna to be the insurer responsible for claimant's condition. The issues on review are whether claimant's carpal tunnel syndrome is compensable and, if so, which of the two insurers in this case is responsible for claimant's condition.

We affirm the order of the Referee. Like the Referee, we are convinced that claimant's carpal tunnel syndrome is compensable and that his employment at Aetna's insured was, in fact, the cause thereof. In such a case, we need not apply the last injurious exposure rule to determine which of two insurers is responsible. See Boise Cascade v. Starbuck, 296 Or 238, 245 (1984).

The compensability of claimant's condition was at issue in this case, and claimant prevailed. His attorney is, therefore, entitled to a fee for services before the Board. Cf. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985).

ORDER

The Referee's order dated July 22, 1985 is affirmed. Claimant's attorney is awarded $550 for services before the Board, to be paid by Aetna Casualty Company.

JAMES M. TREANOR, Claimant
Bloom, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB TP-85016
December 31, 1985
Third Party Order

This matter is submitted to the Board for resolution of a dispute regarding the insurer's approval of a settlement with a third party against whom a civil action was commenced pursuant to ORS 656.578. The Board's jurisdiction is pursuant to ORS 656.587. Claimant, by and through counsel, wishes to accept the proferred settlement. The insurer, by and through counsel, initially objected to the settlement and refused to approve it unless claimant would compromise certain of his entitlements under the Workers' Compensation Law. After the dispute arose, the matter was presented to us for resolution by claimant.

Since submission of this matter, we are informed by counsel for both parties that the dispute arose due a misunderstanding as to how the settlement proceeds should be distributed. Having been fully informed by the parties, we conclude that the settlement should be accepted.

Pursuant to ORS 656.587, this order shall constitute approval of the settlement of the case now pending in the Circuit Court of the State of Oregon for Multnomah County captioned James Treanor v. Hanna, Case No. A8407-04040, for not less than the sum of $2,000. Distribution of the proceeds of the settlement shall be pursuant to ORS 656.593(1). Costs, exclusive of attorney fees, allowed pursuant to ORS 656.593(1)(a) shall not exceed $116.15.

IT IS SO ORDERED.

LINDA L. VALLEY-CHEEVER, Claimant
Emmons, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 85-01508
December 31, 1985
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Howell's order that: (1) denied her request for temporary total disability compensation; and (2) denied her request for penalties and attorney fees for the insurer's alleged unreasonable failure to pay compensation. The issues on review are whether claimant is entitled to temporary total disability compensation and penalties and attorney fees.

Claimant compensably injured her mid-back in April 1979. Her claim was accepted as nondisabling and she was sent the customary notice of acceptance form, advising her of her right to appeal the classification of her claim. Claimant did not seek reclassification within one year of the injury date.

Claimant was treated with conservative care for approximately a year following her injury. She then apparently sought no treatment until May of 1982, when she visited Dr. Saboe, a chiropractor. Dr. Saboe authorized no time off from work, but did suggest that claimant suffered permanent impairment as a result of her industrial injury. In August 1982 the insurer issued a denial of Dr. Saboe's treatment, alleging that it was not related to claimant's 1979 industrial injury.

Claimant filed a request for hearing, raising not only the insurer's denial of medical services as an issue, but also aggravation, the compensability of an industrial injury and a request to reclassify the nondisabling injury as disabling.

Hearing was held on March 2, 1984 before Referee Peterson. The Referee's April 2, 1984 Opinion and Order lists only the compensability of chiropractic treatment as an issue, and his decision appears to resolve only that issue. There is no indication that claimant pursued the aggravation or reclassification issues at hearing. By chance, claimant's ORS 656.273 aggravation rights expired on the date of Referee Peterson's order. In setting aside the insurer's denial of claimant's chiropractic treatment, Referee Peterson ordered:

> "It is therefore ordered that [the insurer's] denial of September 17, 1982 shall be disapproved, that [the insurer] shall accept responsibility for the treatment provided by [claimant's chiropractor], and that this claim shall be and hereby is remanded to [the insurer] for further processing and the payment of

compensation due as a result of the compensability of that treatment."

Claimant did not seek reconsideration, clarification or Board review of the Referee's order.

Pursuant to Referee Peterson's order, the insurer accepted responsibility and paid for claimant's chiropractic treatment. It did not process a claim for aggravation nor pay temporary total disability compensation, however. Claimant again requested a hearing, seeking to enforce what claimant asserted to be Referee Peterson's order to the insurer to process claimant's aggravation claim and to pay attendant temporary total disability compensation. Claimant also sought penalties and attorney fees for the insurer's alleged unreasonable failure to comply with Referee Peterson's order. Hearing was held before Referee John Howell on July 2, 1985.

In his July 16, 1985 Opinion and Order Referee Howell denied claimant's requests for temporary total disability payments and penalties and attorney fees. The Referee followed our recent orders in Garland Combs, 37 Van Natta 756 (1985) and Deborah L. Greene, 37 Van Natta 575 (1985). As the Referee correctly noted, Combs and Greene have interpreted the statutory provisions involving the closure of nondisabling claims as providing: (1) that formal closure is not required in order to close a nondisabling claim; (2) that any hearing request or request for reclassification of a nondisabling claim must be made within one year of the date of injury; (3) that after one year, but not more than five years from the injury date, a nondisabling claim may be reclassified as disabling only if an aggravation claim is perfected; and (4) after five years from the date of injury a nondisabling claim may not be reclassified as disabling.

Applying the foregoing priciples, Referee Howell found that the insurer was not required to close claimant's claim either before or after Referee Peterson's April 1984 Opinion and Order. He found that because claimant did not seek claim reclassification within one year of the date of her injury, and because claimant apparently did not litigate an aggravation claim before Referee Peterson at the time of the 1984 hearing, Referee Peterson lacked jurisdiction to reclassify the claim as disabling. Further, because claimant's aggravation rights expired on the date of Referee Peterson's order, claimant's claim could not thereafter become disabling. Thus, the Referee held that since the insurer could not have become liable for disability compensation after the expiration of claimant's aggravation rights, it had no obligation to close the claim or to investigate claimant's entitlement to compensation.

Claimant argues on review that Referee Peterson's order implicitly directed the insurer to process her aggravation claim and to pay attendant temporary total disability compensation. Claimant points to the language of the order that conjunctively "remands" the claim for "further processing" and "the payment of compensation due as a result of" claimant's chiropractic treatment. Claimant also argues that her inclusion of the aggravation issue in her request for hearing before Referee Peterson implicitly perfected her aggravation claim, thereby preserving his jurisdiction on that issue.

The insurer responds that the absence of discussion regarding an aggravation or claim reclassification in the body of Referee Peterson's Opinion and Order, coupled with an absence of a specific directive to process the aggravtion claim in the order itself indicates that neither the aggravation issue nor the reclassification of claimant's claim were actually litigated before the Referee. The insurer also argues that claimant's failure to appeal Referee Peterson's order resulted in its finality, forever precluding claimant from raising issues that could have been litigated in the previous hearing.

After reviewing the complex procedural circumstances of this case, we find that we agree with Referee Howell. We agree with Referee Howell that because claimant did not seek reclassification of her claim within one year after her injury, Referee Peterson was without jurisdiction to reclassify her claim absent the perfection of an aggravation claim. ORS 656.262(12). We also agree that although claimant raised aggravation as an issue before Referee Peterson, she apparently did not pursue it at hearing, and the mere raising of the issue did not preserve the Referee's jurisdiction to reclassify the claim. Finally, we agree with Referee Howell that the insurer's obligations to claimant terminated as of the date of Referee Peterson's order due to the coincidental expiration of claimant's aggravation rights on that date.

We agree with the insurer that claimant's failure to appeal Referee Peterson's order now precludes her from asserting issues that could have been litigated at the prior hearing. Million v. SAIF, 45 Or App 1097, 1103 (1980). We disagree with claimant that Referee Peterson's order directed the insurer to process claimant's aggravation claim. We cannot infer that directive from the Referee's order order absent a more specific provision in that regard. A fair reading of the Referee's order leads us to conclude that the only issue addressed therein was the compensability of claimant's medical services claim.

ORDER

The Referee's order dated July 16, 1985 is affirmed.

ROBERT L. YOUNGBLOOD, Claimant
Robert J. Guarrasi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00538
December 31, 1985
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Baker's order that directed payment of a penalty and attorney fee for alleged unreasonable delay in payment of compensation. The issue is the penalty.

On December 21, 1984 claimant and the SAIF Corporation entered into a stipulated settlement in which SAIF agreed, among other things, to accept a previously denied claim and pay claimant a lump sum of temporary total disability benefits. SAIF agreed to make the lump sum payment within 14 days of the approval of the stipulation by a Referee. The fourteenth day was Friday, January 4, 1985. On that date SAIF's claims examiner calculated the amount of temporary total disability compensation due as $2,486.55.

This case arises only because SAIF, at the time relevant in this case, had an internal accounting policy that specified that branch claims offices could not issue checks to a single claimant for more than $2,000 in temporary disability compensation in a single week. The claims examiner testified that no exceptions to the policy were permitted. The claims examiner, when faced with this problem, prepared a check for $1,948.92, which was the nearest, based upon daily benefit rate, she could approach her $2,000 limit, and mailed the check that day. The following Monday the claims examiner mailed a second check for $537.63, which was the remainder of the compensation due. The claims examiner testified that she made several unsuccessful attempts on the Friday afternoon to reach claimant's attorney to explain the situation.

On these facts, the Referee directed SAIF to pay a penalty for late payment of compensation of 25 percent of the second check and awarded a $500 insurer paid attorney fee. The Referee's reasoning was as follows:

> "The applicable principle is that a due date is a due date; the question is not one of substantial compliance. In everyday life it is not uncommon, when due dates are specified, for penalties to be imposed despite the excuse that the payment was only a little late. Certainly the delivery system for compensation to injured workers should be at least as strict. Also, there is the practical problem of where to draw the line if the statutory deadline were to be administratively undermined by accepting excuses of substantial compliance, no demonstrated prejudice to claimant or lack of intent by the insurer. Where the maximum time to act is specified by the law, augmented in this case by the express agreement of the parties, it is not reasonable to exceed it. . . ."

ORS 656.262(10) provides:

> "If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

The touchstone of the statutory authorization for the imposition of penalties is the word "unreasonably." What is reasonable, or, in the context of this and similar cases, what is not unreasonable, depends upon the facts and circumstances of each case. See Lester v. Weyerhaeuser Co., 70 Or App 307, 311 (1984). We have stated several times that in our view the goal of penalties in this forum is to provide a punishment that fits the crime. See, e.g., Harold A. Lester, 37 Van Natta 745 (1985) (order after remand).

We conclude that, under the specific facts of this particular case, and notwithstanding the terms of the stipulation, there was no unreasonable delay in the payment of compensation. What delay there was was fully and adequately explained and was, in our view, justified under the circumstances. The Referee's order will be reversed.

ORDER

The Referee's order dated July 26, 1985 is reversed.

VICTORIO R. CASTILLEJA, Claimant
Michael B. Dye, Claimant's Attorney
Rankin, et al., Defense Attorneys
Liberty Northwest, Defense Attorney

WCB 84-00697 & 84-05900
December 27, 1985
Order of Abatement

The Board has received the employer's motion for reconsideration of our Order on Review dated December 3, 1985.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and respondents are requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

CELIA GARCIA, Claimant
Olson Law Firm, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-00892
December 12, 1985
Order of Abatement

The Board has received claimant's request to reconsider our Order on Review dated November 20, 1985.

In order to allow sufficient time to consider the request, the above noted Board order is abated and the self-insured employer is requested to file a response to the request within 21 days.

IT IS SO ORDERED.

JERRY W. SARGENT, Claimant
Evohl F. Malagon, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 84-02567
December 20, 1985
Order of Abatement

The Board has received the self-insured employer's request for reconsideration of our Order on Review dated November 25, 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 21 days.

IT IS SO ORDERED.

DANA R. SMITH, Claimant
Pozzi, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-09178
December 10, 1985
Order of Abatement

The Board has received claimant's motion for reconsideration of our Order on Review dated November 15, 1985.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and the employer/insurer is requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

BILL M. STURTEVANT, Claimant
Cummins, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07560
October 15, 1985
Order of Abatement

The Board has received the Saif Corporation's request that we reconsider our Order on Review dated September 27, 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.

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
Geraldine P. Brown, Claimant.

BROWN,
Petitioner,

v.

GATES, McDONALD & COMPANY,
Respondent.

(82-09846; CA A33486)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 1, 1985.

Robert Wollheim, Portland, argued the cause for petitioner. With him on the brief was Welch, Bruun and Green, Portland.

Scott Terrall, Portland, argued the cause for respondent. On the brief were Daniel L. Meyers, and Meyers & Terrall, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Review dismissed as to portion of order finding claim properly closed; affirmed as to portion upholding insurer's denial of aggravation claim.

RICHARDSON, P. J.

This is a workers' compensation case. Claimant injured her low back on October 31, 1981, and the insurer accepted her claim. An October 20, 1982, determination order awarded her temporary total disability from October 31, 1981, through September 22, 1982, and ten percent unscheduled permanent partial disability. She later filed an aggravation claim, which the insurer denied on December 21, 1982. The referee found that her claim had been prematurely closed, because she was not medically stationary on September 22, 1982. He ordered that the claim be reopened. The insurer sought review by the Workers' Compensation Board, which held that the claim was not prematurely closed and remanded the case to the referee for a determination of the extent of disability, which had not been determined because the referee had ordered the claim reopened. It also upheld the denial of the aggravation claim.

Claimant seeks review of the Board's order. She assigns as error, first, the Board's decision that she was medically stationary and that her claim was therefore properly closed and, second, its decision that the denial of her aggravation claim was correct.

We do not have jurisdiction of the portion of the order holding that her claim was properly closed. *Dean v. SAIF*, 72 Or App 16, 695 P2d 90, *rev den* 298 Or 822 (1985).

We do, however, have jurisdiction of the portion of the order upholding the denial of claimant's aggravation claim. *See Price v. SAIF*, 296 Or 311, 675 P2d 479 (1984); *Ragan v. Fred Meyer, Inc.*, 73 Or App 363, 367, 698 P2d 988 (1985).

To establish the aggravation claim, claimant must prove by a preponderance of the evidence a worsening of her condition since the last award or arrangement of compensation and a causal relation between that worsening and her compensable injury. ORS 656.273(1); *Hoke v. Libby, McNeil & Libby*, 73 Or App 44, 46, 697 P2d 993 (1985). She has failed to sustain her burden of proof. She testified that her condition had improved since her claim was closed. She said that she had been able to increase her activities and that her low back pain had been less severe. *See Garbutt v. SAIF*, 297 Or 148, 151, 681 P2d 1149 (1984); *Kuhn v. SAIF*, 73 Or App 768, 772, 700 P2d 253 (1985); *Hoke v. Libby, McNeil & Libby, supra.* Dr.

Post, claimant's treating orthopedist, testified that there were no material objective differences in her condition between his November 15, 1982, examination and his examination on October 12, 1983. His opinion was that her condition had not materially changed.

There were several doctors who, after Post had released claimant for work in November, 1982, stated that she should not work, but that does not, as she asserts, necessarily mean that her condition had worsened after Post had released her for work. Claimant asserts that, because three doctors diagnosed a hip condition, trochanteric bursitis, after the determination order was issued that had not been diagnosed before, she has established her claim. Her argument fails for two reasons. First, there is evidence that the condition did exist before the determination order was issued. Dr. Rosenbaum, a neurosurgeon, examined her on August 3, 1982, and noted that she had tenderness in that area. Second, there is insufficient evidence that the hip condition is a worsened condition resulting from the original injury. *See* ORS 656.273(1). None of the doctors who diagnosed the condition related it to her compensable back injury. Post testified that claimant did experience pain in her hips, but he related that pain to her compensable back injury and her preexisting degenerative disc disease, and he disagreed with the diagnoses of trochanteric bursitis. Although he related part of her hip pain to her compensable injury, he did not state that it was a worsening of that injury. To the contrary, as stated above, he found no worsening of her condition. The insurer's denial of her aggravation claim was correct.

Review dismissed as to the portion of the order holding that claimant's claim was properly closed; affirmed as to the portion upholding the insurer's denial of the aggravation claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Charlotte Clemmer, Claimant.

CLEMMER,
Petitioner,

v.

BOISE CASCADE CORPORATION,
Respondent.

(82-09118; CA A31935)

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.

Cynthia S. C. Shanahan, 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.

Affirmed.

ROSSMAN, J.

In this workers' compensation case, claimant seeks compensation for an alleged aggravation of a compensable injury. The Board reversed the referee's determination that there had been a worsening of the original injury. On *de novo* review, we conclude that there has been no worsening of claimant's compensable injury and affirm.

The record shows that in October, 1980, claimant suffered a back injury while working on the green chain. Her claim was accepted. She began experiencing neck, head, right arm and forearm pain in May, 1981. In June, 1981, she underwent disk surgery. After the surgery, she still experienced pain in her neck and arms until October, 1981, when the pain subsided. She was released for work at that time. On November 3, 1981, a determination order was issued awarding 5 percent permanent partial disability. Claimant requested a hearing. On November 10, 1981, a report from Dr. Smith, her treating physician, indicated that she had experienced a recurrence of pain on the right side and headaches. A second letter from Smith on November 17, 1981, indicated that the headaches were not related to the compensable injury. On December 16, 1981, employer denied the claim for the headaches.

On June 1, 1982, claimant entered into a stipulation with employer, resolving the headache claim and increasing the award for the back injury to 17.5 percent. On June 28, 1982, claimant saw Dr. Zivin because of neck pain. He found

no abnormalities. On July 19, 1982, claimant visited another doctor, complaining of pain on the left side of her neck. On August 30, 1982, Dr. Grewe, a neurologist consultant, reported that claimant was experiencing numbness and constant pain in her neck, arm and shoulder.

From September 13, 1982, to December 1, 1982, claimant was off work due to pain. Although he recommended that she take time off, Dr. Martin, her treating physician, reported that he saw no change in her condition and, on that basis, SAIF denied time loss benefits on September 27, 1982. She was released for work on November 29, 1982. At the hearing, claimant testified that she continues to suffer constant pain. The referee found her testimony credible.

Claimant is entitled to time loss benefits if the record shows, by a preponderance of the evidence, that her condition has worsened since the stipulation of June 1, 1982. ORS 656.273. There is no objective medical evidence that it has. Grewe stated in his August, 1982, report that claimant's continued work on the green chain "aggravates" her condition, but that is merely his explanation of her symptoms. He offered no opinion as to whether her underlying condition has worsened. Martin reported no change in her condition as of September 17, 1982. On November 13, 1982, claimant was examined by Dr. Rosenbaum, who reported that she denied any complaints of pain, numbness, discomfort or disability in the past three months and stated that he found no change in her condition. On December 27, 1982, Grewe reported that a myelogram taken on that date was "unremarkable." No medical evidence supports claimant's position that her condition has worsened.

Claimant's testimony at the hearing that she is in constant pain indicates that she has experienced a recurrence of symptoms since her visit with Rosenbaum, but it does not establish that her condition has worsened. *See Van Horn v. Jerry Jerzel, Inc.*, 66 Or App 457, 674 P2d 617, *rev den* 297 Or 82 (1984). The record does not indicate that claimant's current symptoms are different from those which she had experienced before the settlement of June 1, 1982. In view of the objective medical evidence which indicates that there has been no worsening, claimant's subjective complaints are not sufficient to prove an aggravation. *Hoke v. Libby, McNeil & Libby*, 73 Or App 44, 697 P2d 993 (1985).

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Alfonso Rogers, Claimant.

ROGERS,
Petitioner,
v.
TRI-MET,
Respondent.
(83-07484; CA A34574)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 17, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Mildred J. Carmack, Portland, argued the cause for respondent. With her on the brief were William H. Replogle and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

GILLETTE, P. J.

Reversed and remanded.

GILLETTE, P. J.

Claimant seeks review of a Workers' Compensation Board decision upholding a referee's order which upheld a determination order closing his claim as of January 8, 1983. The Board also ordered that the claim be reopened as of January 4, 1984. Claimant asserts that the original closure was improper and that he is therefore entitled to temporary total disability payments for the year during which the claim was closed. We agree and therefore reverse and remand.

Claimant injured his left elbow when he was six years old. An operation at that time included the removal of part of the elbow, and the joint was left in a weakened condition. However, claimant had no further difficulties with it until 1979, while he was working as a bus driver for Tri-Met. A garbage truck ran a stop sign, and claimant had to stop his bus quickly in order to avoid an accident. He dislocated his elbow. Because of the pre-existing weakness, the elbow remained unstable and could not be restored to its pre-injury condition. In 1980, claimant received a permanent partial disability award of 86.4 degrees for 45 percent loss of his left arm. However, the claim had to be reopened the following year. As time passed, the elbow caused claimant increasing pain, radiating down to his hand, apparently in part because the elbow's position stressed the ulnar nerve. An operation in 1982 to move the nerve to a better location provided little benefit.

The slowness of the injury to resolve, and claimant's continuing pain, produced mental difficulties, including depression, irritability and frustration. Claimant reported these problems when he was at the Callahan Center in September, 1981, and references to them appear in some of the medical reports thereafter, through November, 1982, when Tri-Met arranged for a psychiatric evaluation by Dr. Voiss. The result of that evaluation, if it occurred, does not appear in the record, but on February 17, 1983, Voiss reported that claimant was then keeping his appointments on a regular basis. The obvious inference is that claimant had begun treatment with Voiss sometime before that date. Claimant continued with Voiss until April, 1983, and began again with a different therapist, considerably closer to his home, in November, 1983. By that time, he was having memory lapses and blackouts, as well as chronic pain and other problems.

The February 9, 1983, determination order at issue here was based solely on an evaluation of claimant's *physicial* condition. As to that condition, it was correct under the record as it existed at the time of the order. However, the failure to consider claimant's injury-produced psychological problems was erroneous. The references to his psychological state in the file were sufficient to require the Closing and Evaluation Division to determine whether that condition was medically stationary. Tri-Met had recognized as much when it sought the psychiatric evaluation. Claimant was apparently in therapy when the determination order was issued, yet there was no report from his psychiatrist concerning his current status. As a result, there was no evidence that would support a finding that his mental condition was medically stationary. The department erred in issuing the challenged determination order, and the referee and the Board erred in upholding it.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Raynell A. Lobato, Claimant.

LOBATO,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(83-04932; CA A33303)

Judicial review from the Workers' Compensation Board.

Argued and submitted March 4, 1985.

Malcolm J. Corrigall, Coos Bay, argued the cause for petitioner. With him on the brief were Debra A. Dunn and Ormsbee & Corrigall, Coos Bay.

Linda DeVries, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed and remanded for processing of aggravation claim in accordance with ORS 656.262.

WARDEN, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board reinstating insurer's denial of his aggravation claim. We reverse and remand for processing of the claim in accordance with ORS 656.262.

We adopt the Board's statement of facts:

> "On August 16, 1977 claimant strained his low back when he reached over to pick up some roofing while at work. The claim was closed by Determination Order dated June 5, 1978 which granted no award for permanent disability. Claimant received an award for 15% unscheduled disability by a stipulated order in November 1978. Claimant sought no treatment for his back from June 1978 until March 1983.
>
> "In March 1983 claimant reported to Dr. Whitney that his back pain had become increasingly more severe. Dr. Whitney stated: 'He has a chronic back strain with obesity.' The doctor noted that claimant had gained 30 to 40 pounds since he had last visited a doctor. He opined that claimant's condition had worsened.
>
> "In April 1983 Dr. Whitney opined: 'The treatment that I am offering [claimant] is due to the aggravation of his activity and his weight change and hopefully, we will get him to improve to the point that he can return to his level, at which he participated, when last declared medically stationary. But, a lot of this will depend on the weight loss.'
>
> "In September 1983 Dr. Whitney stated: '[Claimant] definitely had a back injury in 1977. His obesity is not causing his back injury, however, it can cause exacerbations and lack of improvement due to the extra weight. [Claimant] himself, has noted that when he gains weight the pain increases in his back and his ability to function decreases. The basic cause of his pain is the previous injury.'
>
> "In January 1984 Dr. Serbu examined claimant and opined that 'his problem is mainly related to his rather marked exogenous obesity, the patient having a mechanical type low back problem.' "

SAIF denied claimant's aggravation claim on the ground that Whitney's treatment was directed towards claimant's obesity rather than his industrial injury. The denial letter said, "In view of the fact that SAIF Corporation has not accepted responsibility for your obesity, we cannot accept responsibility for your current treatment." The referee set

aside the denial and ordered SAIF to accept claimant's aggravation claim.

Claimant first assigns as error the Board's reversal of

the referee's order requiring SAIF to accept the aggravation claim. The Board based its decision on *Nelson v. EBI Companies,* 296 Or 246, 674 P2d 596 (1984), in which the issue was the extent of the claimant's disability rather than the compensability of her condition. Therefore, we must first decide whether the principles stated in *Nelson* apply in determining whether a claimant has established a compensable aggravation under ORS 656.273. *Nelson* holds that a claimant's unreasonable failure to follow a weight reduction plan justifies the reduction of a permanent disability award. The Supreme Court said that "a claimant who has suffered personal injury has a duty to minimize his or her damages in workers' compensation cases. An unreasonable failure to follow needed medical advice is a form of lack of minimization." 296 Or at 252.

The Board explained its application of *Nelson* in the present context with little elaboration:

> "We have previously concluded that the general principles articulated in *Nelson* also apply in the context of a denied aggravation claim. *Dan Lingo,* 35 Van Natta 1261 (1983). The Supreme Court's holding in *Nelson* is grounded in the proposition that 'a claimant who has suffered personal injury has a duty to minimize his or her damages.' 296 Or at 252. Likewise, a claimant who has suffered a compensable injury should not be entitled to additional compensation in the form of an aggravation claim because he or she has increased his or her physical impairment by gaining weight."

We disagree. The rules and considerations that obtain when compensability is at issue differ from those applicable in determining the extent of a claimant's disability. When the issue is the extent of disability, the rule stated in *Nelson v. EBI Companies,supra,* rightly applies, because it allows a measured reduction of the claimant's benefits. Compensability, however, is an all-or-nothing determination. To extend the rule stated in *Nelson* to that determination would be inconsistent with the policy of construing the Worker's Compensation Act liberally for a worker's benefit, *Holden v. Willamette Industries,* 28 Or App 613, 560 P2d 298 (1977), because it could deny the worker all of the act's benefits when

the claimant's job was a material, but not primary, contributing cause of his disability.

Extending the *Nelson* rule would also be inconsistent with the standard that generally applies in determining the compensability of worsened conditions: whether claimant's work-related injury was a *material* contributing cause of the worsened condition. *Peterson v. Eugene F. Burrill Lumber,* 294 Or 537, 660 P2d 1058 (1983). That standard implies that some conditions may be compensable although primarily caused by events unrelated to the claimant's work. In this case, for example, claimant's weight gain may have been the sole cause of the worsening of his condition, and his weight may be a major cause of the condition itself. It is not, however, the only cause of his worsened condition. We are satisfied from Whitney's September, 1983, letter that claimant's 1977 compensable injury remains a material contributing cause of his present disability and that he would probably not have experienced back difficulties as a result of his weight gain if he had not originally suffered a compensable back injury. He would be insufficiently compensated for the consequences of his

work-related injury if the law required him to bear additional costs that are directly related to the original injury because of an increase in weight that would otherwise not have been disabling.

Claimant's condition has worsened. His compensable injury is a material contributing cause of his worsened condition. Therefore, he has a compensable aggravation claim which should have been accepted.

We need not discuss at length claimant's second assignment of error, because it concerns his claim for medical services under ORS 656.245. Acceptance of his aggravation claim entitles him to payment for those services.

Reversed and remanded for processing of the aggravation claim in accordance with ORS 656.262.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of A. Marlene Taylor, Claimant.

TAYLOR,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(83-06454, 83-08820; CA A33727)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 17, 1985.

Howard R. Nielsen, Salem, argued the cause for petitioner. With him on the brief was Allen & Vick, Salem.

Margaret E. Rabin, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge, and Joseph, Chief Judge, and Young, Judge.

JOSEPH, C. J.

Reversed; referee's order reinstated.

JOSEPH, C. J.

Claimant seeks review of a Workers' Compensation Board order that reversed a referee's order setting aside SAIF's denial of medical treatment after a compensable injury. On *de novo* review, we reverse. ORS 656.298.

Claimant suffered a compensable low back injury on August 27, 1981, while working as a housekeeper for Good Samaritan Hospital. She reported the injury the same day, in

the employer's emergency room, to Dr. Gulick, who diagnosed a low back strain. Except for some time in September, 1981, she continued to work after her injury. In October, 1981, Gulick determined that she was medically stationary with no permanent impairment and that she had degenerative disc disease aggravated by obesity. In May, 1983, Gulick reported to SAIF that claimant's obesity rather than her compensable back injury was the source of her back problems. On June 15, 1983, SAIF informed claimant that it no longer believed that her treatment was related to her compensable injury and denied further treatment.

Claimant began receiving chiropractic treatment for her injury in September, 1981. She has continued receiving treatment from Dr. Hamilton as needed to relieve her back pain. Hamilton believed that obesity and degenerative disc disease were minor factors in the back condition and considerably less significant than her original injury and the numerous work-related exacerbations she had experienced.

In support of its denial of payment for continued treatment, SAIF submitted evaluations by two other doctors. Dr. Fechtel reviewed the chiropractic chart notes and other SAIF file reports. He concluded that claimant was predisposed to low back injuries and that treatment after May, 1982, appeared unrelated to the compensable injury, but he did not indicate why. Dr. Wagner, a member of the employer's staff, examined claimant in September, 1983, and determined that her lower back discomfort resulted from "sacralization" of a lumbar vertebra. Hamilton disagreed.

When medical evidence is divided, we tend to give greater weight to the conclusions of a claimant's treating physician, unless there are persuasive reasons not to do so. *Weiland v. SAIF*, 64 Or App 810, 669 P2d 1163 (1983). The referee relied on Hamilton's analysis of claimant's symptoms because he was her treating physician. He had examined her on a regular basis since September, 1981, and had a better opportunity to evaluate her condition than the doctors who either did not examine her or who did so on a limited basis.

SAIF argues that Gulick is also a treating physician, because he was the first to diagnose her injury and he conducted follow-up examinations. Even if we consider him as a treating physician, there are persuasive reasons not to give his opinion greater weight than Hamilton's. According to the record, Gulick had not examined claimant for over a year when he recommended that SAIF stop paying for the back treatments. Further, he considered claimant's weight to be the primary factor for her need for continued back treatment, but he was unaware that she had lost 40 pounds and had realized no corresponding relief of pain.

A worker is entitled to compensation for the disabling results of work activity, even if a pre-existing condition also plays a causative role in the disability. *Nelson v. EBI Companies*, 296 Or 246, 250, 674 P2d 596 (1984); *Hoffman v. Bumble Bee Seafoods*, 15 Or App 253, 254-55, 515 P2d 406 (1973).[1] In the instant case, even though claimant's obesity

[1] Although *Nelson v. EBI Companies, supra*, requires the reduction of a permanent disability award if claimant unreasonably fails to follow a weight reduction program, that rule cannot properly be extended to determinations concerning compensability of an injury or aggravation because of its inconsistency with the materiality standard. *Lobato v. SAIF*, 75 Or App 488, ____ P2d ____ (1985).

may have predisposed her to back problems, her condition requiring treatment did not exist until the 1981 injury. Hamilton testified that, even if claimant were to lose additional weight, her back problems would continue as long as she remains employed where she works now. We find that claimant's work activity was a material contributing cause of her condition. Claimant has met her burden of proving by a preponderance of the evidence that her need for medical services is causally related to the original compensable injury. *See Brooks v. D & R Timber,* 55 Or App 688, 691, 639 P2d 700 (1982).

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Rex D. Gibson, Claimant.

WEYERHAEUSER COMPANY,
Petitioner,

v.

GIBSON,
Respondent.

(81-09211; CA A34568)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 12, 1985.

Paul L. Roess, Coos Bay, argued the cause for petitioner. With him on the brief was Foss, Whitty & Roess, Coos Bay.

James L. Edmunson, Eugene, argued the cause for respondent. With him on the brief were Evohl F. Malagon, and Malagon & Associates, Eugene.

Before Gillette, Presiding Judge, and Joseph, Chief Judge, and Young, Judge.

PER CURIAM

Affirmed.

PER CURIAM

Employer seeks judicial review of a Workers' Compensation Board order which awarded claimant permanent total disability. On *de novo* review, we find that claimant meets the statutory criteria for permanent total disability and therefore affirm.

Employer attempts to argue the issue of whether claimant's back and neck problems are a compensable consequence of his 1980 industrial injury. That issue was decided adversely to employer in *Weyerhaeuser Co. v. Gibson,* 61 Or App 226, 656 P2d 964 (1982). Therefore, the only issue for review is whether claimant is permanently and totally disabled.

In view of claimant's age, his chronic physical problems related to the industrial injury, the lack of present opportunities for the employment of his skills and the futility of requiring a continuing search for work, we agree with the Board's extent of disability determination.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jerry E. Kassahn, Claimant.

KASSAHN,
Petitioner,

v.

PUBLISHERS PAPER CO. et al,
Respondents.

(82-11458; CA A31131)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 19, 1984.

Diana Craine, Portland, argued the cause for petitioner. With her on the brief were Robert K. Udziela and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Cynthia S. C. Shanahan, Portland, argued the cause for respondents. With her on the brief were Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed and remanded for processing of claimant's aggravation claim in accordance with ORS 656.262.

WARDEN, J.

Claimant seeks review of an order of the Workers' Compensation Board affirming a referee's determination that claimant suffered neither an aggravation of a May 12, 1980, compensable industrial injury nor an occupational disease. We hold that claimant proved an aggravation and remand for processing of his claim in accordance with ORS 656.262.

Claimant first suffered a compensable injury to his back in 1972. His doctors performed a "bilateral L4-5-S1 posterior fusion" to treat a bilateral spondylolysis at L-5. A March 20, 1972, medical report described his condition as "acute lumbosacral strain superimposed on the spondylosis of the lumbosacral spine." He was awarded 40 percent unscheduled disability. After a year of recuperation, claimant returned to relatively heavy work. He sustained another back injury in 1978. The second determination order awarded no additional permanent partial disability.

On May 12, 1980, claimant suffered an additional on-the-job injury to his back when his foot slipped while he was rolling a log onto a chain. He had pain in the right lower back and right leg. Medical reports before the 1980 injury did not indicate a concentration of pain on the right side of claimant's body. Claimant's treating physician, Dr. Post, an orthopedist, prescribed rest, medication, physical therapy and a lumbosacral brace. Claimant was released to return to work on August 18, 1980. On September 19, 1980, Post issued a closing examination report in which he indicated that, despite considerable improvement since the May, 1980, injury, claimant was continuing to suffer low back pain, constant numbness in the right leg, diffuse aching in the right thigh and leg and an occasional feeling of loss of control of the right foot. Claimant used a back brace from time to time. Post concluded:

> "He feels that opposed to the status prior to May of this year, he is having more pain and less mobility in his back. Comparing our present examination with that in June of 1973, he has significant limitation of motion in extension, mild limitation in flexion, but no other change. I am not sure what permanent partial impairment was determined at the time of his previous claim closure, but I would think that his further loss of motion would be a reasonable indication of additional permanent impairment and the degree thereof."

Claimant was awarded temporary total disability from May 15 through August 17, 1980, but no permanent partial disability. He did not appeal. He returned to work for the same employer, operating Caterpillar equipment and working as a security and clean-up laborer.

On September 17, 1982, claimant sought treatment from Post for a spontaneous onset of back pain that occurred while claimant was kneeling in his garden picking tomatoes. No injury or significant incident precipitated the onset of pain. Post explained the relationship between claimant's May 12, 1980, injury and the worsening of his low back condition in 1982 in a February 2, 1983, letter to claimant's attorney:

> "Clearly, the patient's back problems relate to his long standing difficulties with spondylolisthesis, superimposed spinal strains, and L4-S1 lumbrosacral fusion. His most recent exacerbation, that of September 1982, is clearly related to his long standing and pre-existing back problems.
>
> "At this point the issue becomes more legal than orthopedic.
>
> "For instance, does the fact that in a treating physician's opinion there was increased permanent impairment following the injury of May 12, 1980 legally imply that subsequent exacerbations have relationship to that injury as well as to the long standing, pre-existing and underlying condition? My own inclination is to think that it was the pre-existing condition that was more important.
>
> "In answer to another of your questions, the patient certainly is materially worsened since the date of his claim closure on October 21, 1980 [following the May 12, 1980 compensable injury], and it is this fact that has precipitated his recent care and time loss."

The doctor authorized time loss from September 17, 1982, to March 18, 1983.

The referee affirmed the carrier's denial of the aggravation claim and the alternative occupational disease claim. The opinion and order acknowledged that "there is no question that claimant is materially worse since the date of his claim closure on October 21, 1980." It goes on, however, to explain the basis upon which the carrier's denial of the aggravation claim was upheld:

"This is a case that requires expert medical opinion to

sustain claimant's burden of proof on the issue of causation. *See Miller v. SAIF*, 60 Or App 557 (1982).

"* * * * *

"While [Post's report of February 2, 1983, quoted above] is an answer following common sense and from the point of view of a physician of the medical arts, it is not an answer in the medico-legal sense, i.e., the rules established by the cases in the Workers' Compensation Act. We do not have, then, a medical opinion as to the pivotal issue in this case. While slavish adherence to some talismanic language or 'magic words' is repugnant, nevertheless claimant does not have the necessary medical proof that the 1980 occurrence has contributed to the 1982 spontaneous onset. While I find that claimant, who is an honest and credible witness and highly motivated, never returned to his pre-May, 1980 injury status, Dr. Post stated that the patient's own description of the interval between September of 1980 and September of 1982 might be germane because he had no such description in his record. While I find that claimant was worse after 1980 (had increased residuals) I do not understand that this can be substituted for a direct medical opinion that there was a causal relationship to the 1980 occurrence."

The referee erred in concluding that "claimant does not have the necessary medical proof that the 1980 occurrence has contributed to the 1982 spontaneous onset."

Claimant argues that *Garbutt v. SAIF*, 297 Or 148, 681 P2d 1149 (1984), eliminates the necessity of a physician's opinion to support claimant's aggravation claim. We do not agree. *Garbutt's* holding that a claim for aggravation need not be supported by a written opinion from a physician relates only to the statutory adequacy of a claim, not to the sufficiency of proof. *See Garbutt v. SAIF, supra*, 297 Or at 152 (Peterson, C. J., dissenting). The Board may be persuaded by lay testimony on medical issues, but if the Board finds the lay testimony unpersuasive or insufficient to resolve complicated medical issues, it is not bound by that testimony and may require expert medical opinion to resolve the issue. *Uris v. Compensation Department*, 247 Or 420, 424, 427 P2d 753, 755, 430 P2d 862 (1967).

The letter from claimant's doctor makes it clear that claimant's condition has worsened and that at least part of his permanent impairment is a result of the May 12, 1980, injury.

Post expressed doubt about whether that necessarily means "that subsequent exacerbations have relationship to that injury * * *." The question, however, is not whether the exacerbation itself is related to the May 12, 1980, injury, but whether that injury "is a material contributing cause of

[claimant's] worsened *condition.*" *Grable v. Weyerhaeuser Company,* 291 Or 387, 401, 631 P2d 768 (1981) (emphasis supplied). *See Lobato v. SAIF,* 75 Or App 488, 492, ___ P2d ___ (1985). Because we can infer from the letter's statement concerning "increased permanent impairment following the injury of May 12" that the 1980 injury caused at least a part of claimant's present, worsened condition (*i.e.,* his condition *after* the "exacerbation"), and because our own examination of the record convinces us that the role played by the 1980 injury was material, we conclude that claimant has established a compensable aggravation. ORS 656.273.

Employer attempts to disprove the relationship between claimant's condition and the 1980 injury by arguing that "the symptoms which claimant initially experienced in September, 1982, were clearly not the same as those following the 1980 injury." The argument is based entirely on evidence that claimant's symptoms in 1980 were concentrated on the right side of his body, and that Post's chart notes initially describe claimant's pain in 1982 as a "spontaneous onset of *left* lumbar pain." (Emphasis supplied.) That notation is the only indication in the record that the worsening claimant suffered in 1982 related to the left side of his back. Post's chart notes also report that claimant "indicates the *midlumbar* areas as the source of pain." (Emphasis supplied.) At the hearing, claimant testified:

"Q. Okay. Can you describe for us how your back hurt on May 12, 1980 or on May 19. Let's take May 19 when you actually went to the doctor. Can you remember how your back felt? What was hurting you?

"A. It was like somebody was holding a torch to it, a real burning sensation.

"Q. Was that on the right, left or in the middle?

"A. It was more or less in the — well, the whole bottom part of my back.

"Q. Was one or both of your legs bothering you, as well?

"A. No, just the one, my right leg."

He later testified on cross-examination as follows:

"Q. Was this a sudden onset of pain? I mean, did it hit you hard, or did it kind of gradually get worse while you were picking tomatoes?

"A. It hit me hard.

"Q. It came on quickly?

"A. Yes.

"Q. Where did you hurt when the pain came on like that?

"A. From about the center of my back way down into my tailbone and down my right leg.

"Q. You weren't able to recall whether it was the left or the right? Do you recall it was in the center of your back?

"A. Yes."

Claimant's medical reports in the months following also suggest a concentration of symptoms on his right side. On November 3, 1982, Post wrote:

"Physical therapy has resulted in considerable improvement in Jerry's neck condition but his right lumbar area has continued to bother him. In addition, he has some radiating

discomfort in the right anterior thigh region and periodic feeling of numbness."

Dr. Smith's report of November 15, 1982, states:

"Six weeks ago he was picking tomatoes in his yard. He was on his knees and experienced muscle spasm in the right side of his low back. * * * He has right leg pain which has continued intermittently and is predominantly manifested by aching in the right shin. Occasionally his right foot 'flops' when walking. * * * There are no symptoms in the left leg."

The evidence is persuasive that claimant's condition in 1982 was a consequence of the 1980 injury rather than the injury of 1972.

Reversed and remanded for processing of claimant's aggravation claim in accordance with ORS 656.262.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Jefferson Davis, Claimant.

HOME INSURANCE COMPANY,
Petitioner,

v.

EBI COMPANIES et al,
Respondents.

(81-10466, 82-02086, 82-08340, 82-08341; CA A31665)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 15, 1985.

Deborah L. Sather, Portland, argued the cause for petitioner. With her on the brief were Frank A. Moscato and Moscato & Byerly, Portland.

Jerald P. Keene, Portland, argued the cause for respondent EBI Companies. With him on the brief were John Klor and Roberts, Reinisch & Klor, P.C., Portland.

Jaye Caroline Fraser, Eugene, argued the cause for respondent Truck Insurance Exchange. With her on the brief were Luvaas, Cobb, Richards & Fraser, P.C., Eugene.

James N. Westwood, Portland, argued the cause for respondent North Pacific Insurance Company. With him on the brief were Brian B. Doherty and Miller, Nash, Wiener, Hager & Carlsen, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Claimant was employed by Interstate Tractor and Equipment for approximately 14 years. During that time, several different worker's compensation carriers provided

coverage to Interstate: North Pacific Insurance Company (Oregon Auto), June 1, 1973, to June 30, 1975; EBI Companies, July 1, 1975, to August 1, 1979; Truck Insurance Company, August 1, 1979, to August 6 or 7, 1981; and Home Insurance Company, August 8, 1981, through the time of the hearing. The issue in this case is which of the four liability carriers is responsible for claimant's compensable injury. Home Insurance Company seeks review of an order of the Workers' Compensation Board, which affirmed the referee's order assigning responsibility for the claim to Home Insurance. Claimant is not a party to the review. We affirm.

Claimant was employed as a heavy equipment mechanic for Interstate. He sustained his first back injury on February 9, 1975, when he fell while steam cleaning an engine. He underwent surgery in July, 1975, for a herniated disc at the L5-S1 level. That claim, which was accepted by North Pacific, was closed by a determination order issued May 7, 1976. On April 12, 1976, claimant sustained a second injury. That injury was diagnosed by Dr. McHolick, claimant's treating physician, as a "myosistis type of flare up" attributable to the 1975 injury; claimant returned to work after conservative care. That claim was also accepted by North Pacific.

On October 24, 1977, claimant "felt something snap" in his back and suffered sharp pain when he lifted a 200-pound toolbox at work. A claim was filed against and accepted by EBI. Claimant again was treated conservatively and returned to work. He sustained additional injuries on March 13, 1978, while using a sledge hammer, and on August 9, 1978, while pulling on a drum line. McHolick initially characterized those injuries as related to the 1977 injury, and EBI accepted responsibility as an aggravation of that injury.

On March 18, 1981, claimant again developed severe back pain while moving a transmission weighing between 600 and 700 pounds. A laminectomy was performed on August 25, 1981, and a large, loose disc fragment was removed from the L4-5 area. Claims were filed against both EBI and Truck Insurance. Truck Insurance issued a denial on April 2, 1981;

EBI accepted responsibility through October 22, 1981, when it issued a "back-up" denial.

Claimant was released for "light work" and returned to his job at Interstate on December 21, 1981. He was still experiencing some back pain, and he wore a back support to help protect his back. On his return, his employer began screening his assignments to attempt to select lighter duty jobs for him. Although most of the jobs claimant was assigned to do were less strenuous than the jobs assigned to him before his August, 1981, surgery, they still required climbing on heavy machinery, pushing and pulling, twisting and bending in awkward positions and occasional lifting in excess of 50 pounds.

With the exception of a one-week layoff for lack of work and one day of sick leave for reasons apparently unrelated to his back, claimant worked from December 21, 1981, through January 20, 1982. During that period, he experienced no specific injurious incident or trauma, but developed a gradual increase in back and right leg pain which became so severe that he had to leave work. He also developed new

symptoms, including pain on the outside of his right foot and a weakness of the right calf muscles. He underwent a myelogram on February 11, 1982, which revealed a large extradural defect at the L5-S1 level (which had not been present when a previous myelogram was done, just before the 1981 laminectomy). Surgery was performed on February 22, 1982, and a free fragment of disc was removed at the L5-S1 level.

Claimant filed a new claim with Truck Insurance in February, 1982, for an occupational disease or injury of June 23, 1981, a new claim against North Pacific Insurance sometime after July 8, 1982, for an occupational disease or injury of June 23, 1981, and a claim against Home Insurance in August, 1982, for an occupational disease or injury of August 13, 1982. Truck Insurance denied the claim on February 23, 1982; North Pacific denied the claim on July 28, 1982; Home Insurance denied the claim on September 7, 1982.

With Home Insurance's denial, each of the insurers effectively had denied responsibility for claimant's disability after March 18, 1981. He requested a hearing on each of the denials: (1) EBI's October 22, 1981, backup denial of his

March, 1981, injury claim; (2) Truck Insurance's April 2, 1981, denial of his March, 1981, injury claim; (3) Truck Insurance's February 23, 1982, denial of his occupational injury or disease claim; (4) North Pacific's July 28, 1982, denial of his occupational injury or disease claim; and (5) Home Insurance's September 7, 1982, denial of his occupational disease or injury claim. A consolidated hearing on the denials was held on November 17, 1982.

The referee found that the evidence supported a conclusion that claimant's employment in December, 1981, and January, 1982, independently contributed to his disability and that Home Insurance therefore was liable for claimant's disability beginning in January, 1982. The referee concluded that Home Insurance was not liable for disability compensation or medical treatment before August 8, 1981, when its coverage began. He also concluded that any claims for compensation from March, 1981, through August 7, 1981, would have been the responsibility of Truck Insurance[1] but that such claims were unenforceable under ORS 656.319.[2] The referee

[1] The referee stated:

"I find that the evidence clearly shows that claimant's March 1981 injury independently contributed to his disability and the subsequent need for surgical removal of a herniated disc. Were it not for Truck Insurance Exchange's denial and claimant's untimely appeal, Truck Insurance Exchange would have become responsible for claimant's disability after March 1981. Claimant filed a second claim against Truck Insurance Exchange for an occupational injury or disease in June 1981. The evidence indicates that claimant's condition at that point was a continuation of the denied March 1981 injury. Claimant has shown no new injury in June, 1981."

[2] ORS 656.319(1) provides:

"With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:

"(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or

"(b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of al."

entered an order, providing in pertinent part:

"IT IS THEREFORE ORDERED that claimant's request for hearing from the April 2, 1981 denial of Truck Insurance Exchange is dismissed.

"IT IS FURTHER ORDERED that the October 22, 1981

denial of EBI Companies is affirmed to the extent that it denies *responsibility* for claimant's condition after March 1981.

"IT IS FURTHER ORDERED that the February 23, 1982 denial of Truck Insurance Exchange is affirmed.

"IT IS FURTHER ORDERED that the July 28, 1982 denial of North Pacific Insurance Company is affirmed.

"IT IS FURTHER ORDERED that the September 7, 1982 denial of Home Insurance Company is set aside. The claim is remanded to Home Insurance Company for acceptance and payment of all compensation due until closure pursuant to ORS 656.268." (Emphasis in original.)

Home Insurance sought review by the Board, contending that either Truck Insurance or EBI was the responsible insurer. The Board affirmed the referee's order but concluded that it was unnecessary to address the issue of EBI's backup denial. *See Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983). In this petition for review, Home Insurance asserts that the Board erred in assigning it responsibility, because there is insufficient evidence that during the time when Home was Interstate's insurer claimant suffered any injury that independently contributed to his disability. Home also argues that EBI should be precluded from relying on its October 22, 1982, denial of claimant's January, 1982, claim and that considerations of justice require that claimant be entitled to challenge Truck Insurance's denial of the 1981 injury claim.

In successive injury cases, we apply the "last injury rule" adopted from 4 Larson, *Workmen's Compensation Law* 17-71, 17-78, § 95.12 (1976):

"If the [last] injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second * * *.

"On the other hand, if the [last] incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributes the major part to the final condition. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition."

See Boise Cascade Corp. v. Starbuck, 296 Or 238, 675 P2d 1044 (1984); *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 586-87, 690 P2d 1068 (1984). The rule requires proof that the last injury "contributed independently" to a claimant's disability; given that proof, responsibility properly is placed on the insurer at the time of the last injury. *Industrial Indemnity Co. v. Kearns, supra*, 70 Or App at 587.

The primary medical evidence was from claimant's

treating physician, McHolick, who expressed the opinion that claimant's initial injury in 1975 increased his susceptibility to further injury but that interim injuries played a part in the eventual extrusion of other disc fragments. He indicated that the extruded disc fragments removed from the L4-5 level in August, 1981, and from the L5-S1 level in February, 1982, probably were related in that they may have originated from a single hole in the annulus fibrosis at the L5-S1 level, which was the site of claimant's first back surgery. He was unable to say specifically when the extrusion resulting in the February, 1982, surgery occurred, although there was evidence that it necessarily was after claimant's August, 1981, myelogram. He indicated, however, that claimant's twisting and lifting activities on the job could be a major contributing factor to the working out of a free disc fragment through a tear in the annulus fibrosis and that claimant's work activities in December, 1981, and January, 1982, "certainly could have" contributed to the later disc extrusion.

Although claimant had some continuing symptoms after his August, 1981, surgery and although he could recall no specific traumatic incident after his return to work in December, 1981, there was evidence that he had experienced increasing pain accompanied by new symptoms *after* his return to work. Even though he was on "light duty," his job as a heavy equipment mechanic required him to perform many of the same physically strenuous tasks as before. The medical evidence that he suffered a new disc herniation is undisputed, and McHolick testified that the exertion involved in the December, 1981, and January, 1982, employment could have triggered that herniation. In this type of case, it is not required that expert medical opinion link a specific exertion to the compensable condition. *Hamel v. Tri-Met,* 54 Or App 503, 508, 635 P2d 662 (1981). From the lay and expert medical evidence, we find that claimant suffered a new injury during his last

period of employment—when Home Insurance was his employer's insurer—which independently contributed to his disability. That his injury during that period may have concurred with an earlier injury to cause the disability does not operate to relieve Home Insurance of liability for claimant's disability beginning in January, 1982.

We turn, then, to the question of EBI's denial of October 22, 1981, by which it purported to deny responsibility for claimant's condition after March, 1981. We note that, although he was off work because of his back condition from before the time of EBI's denial until December 21, 1982, and thus may have been entitled to additional time loss benefits and an award of disability on that initially accepted claim, the Board's order made no provision for assignment of responsibility to any insurer for the period between EBI's October 22 denial and claimant's return to work on December 21, the earliest date on which Home Insurance could have become responsible. It is clear that under *Bauman v. SAIF, supra* and *U.S. National Bank v. Wagoner,* 71 Or App 266, 692 P2d 149 (1984), *rev den* 298 Or 773 (1985), absent claimant's fraud or misrepresentation, EBI could not have accepted the claim, made payments for over 60 days and then decided to litigate the issue of compensability. We see no reason to apply a different standard when the issue is responsibility. *See Jeld-Wen v. McGehee,* 72 Or App 12, 695 P2d 92 (1984). The ly

issue raised by Home Insurance on this review, however, is whether EBI is precluded from relying on its earlier denial to deny responsibility for claimant's *January, 1982, claim*. In view of our holding that that claim involves a new injury for which Home Insurance is the responsible insurer, we agree with the Board that it is not necessary to decide that question. Claimant has not appealed the failure of the Board to address which insurer should be responsible for the time period of October 22, to December 21, 1981, and that issue is not before us.

Finally, we decline to discuss Home Insurance's contention that claimant should be allowed to contest Truck Insurance's denial of the March, 1981, claim. Home Insurance has failed to demonstrate that that issue affects its interests, and claimant has not sought judicial review.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Charles Wattenbarger, Claimant.

WATTENBARGER,
Appellant,

v.

BOISE CASCADE CORPORATION,
Respondent.

(135,549; CA A32736)

Appeal from Circuit Court, Marion County.

Dale Jacobs, Judge.

Argued and submitted April 1, 1985.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief were Burt, Swanson, Lathen, Alexander & McCann, Salem.

Allan Muir, Portland, argued the cause for respondent. With him on the brief were Delbert J. Brenneman and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

This is an appeal of a proceeding under ORS 656.388(2) to determine attorney fees in a workers' compensation case. Claimant seeks an increase in the fee awarded and argues that the "reasonable attorney's fee" provided for by statute should reflect the risk factor involved in a contingent fee arrangement, and hence, that a multiplier should have been utilized to establish a reasonable fee in this case. We

reject claimant's argument and affirm the judgment of the circuit court.

In the underlying workers' compensation aggravation claim, the referee awarded claimant permanent total disability. The employer requested Workers' Compensation Board review. The Board affirmed the referee's decision and awarded claimant $800 in attorney fees. On reconsideration, the Board refused to apply a multiplier factor, and the award of attorney fees was affirmed. Pursuant to ORS 656.388(2), claimant petitioned the circuit court to set attorney fees. The court increased the award of attorney fees to $1,200, based on an hourly rate and the time expended. On appeal claimant asserts that the court improperly failed to apply a multiplier to take into account the risk inherent in a contingent fee arrangement.

The statutory scheme in workers' compensation cases is exclusive. Attorney fees must be expressly authorized by statute or they are not allowable. *Uris v. Compensation Department,* 247 Or 420, 428, 427 P2d 753, 430 P2d 851 (1967). The power to award attorney fees is no broader than that provided by statute. *SAIF v. Paresi,* 62 Or App 139, 142, 660 P2d 684, *rev den* 295 Or 259 (1983). If the statutory scheme is inequitable, the inequity must be remedied by the legislature, not the courts. *Forney v. Western States Plywood,* 297 Or 628, 634, 686 P2d 1027 (1984).

ORS 656.382(2) provides that, if an appeal is initiated by the employer or insurer and the Board "finds that the award should not be disallowed or reduced, employer or insurer must pay claimant a reasonable attorney's fee * * *." ORS 656.388(4) delegates to the Board the power and duty to establish a suggested schedule of fees for attorneys representing workers in workers' compensation cases. The Board has

established a schedule by rule. Applicable to this case is OAR 438-47-010(2), which provides that

> "[t]he amount of a reasonable attorney fee when authorized under 47-000 to 47-095, *including cases involving extraordinary services,* shall be based on the efforts of the attorney and the results obtained, subject to any applicable maximum fee provided by 47-000 to 47-095. A referee, the Board or a court may allow a fee in excess of the maximum amount fixed by 47-000 to 47-095 *for extraordinary services* on a showing by claimant's attorney in a sworn statement the *services* performed by the attorney." (Emphasis in original.)

The rule bases the award on the efforts and services of the attorney and the results obtained. It does not authorize the award of an increased fee on the basis of the risk to the attorney, and it does not provide for a multiplier.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Randal R. Senner, Claimant.

SENNER,
Petitioner,

v.

CONSOLIDATED METCO/CONSOLIDATED FREIGHTWAYS et al,
respondents.

(82-05948, 82-06563, 83-01044; CA A33009)

Judicial review from Workers' Compensation Board.

Argued and submitted April 8, 1985.

James Bradford Benziger, Portland, argued the cause and filed the brief for petitioner.

William H. Walters, Portland, argued the cause for respondent Consolidated Metco/Consolidated Freightways. With him on the brief were Donald P. Bourgeois and Miller, Nash, Wiener, Hager & Carlsen, Portland.

Bruce L. Byerly, Portland, argued the cause for respondent Consolidated Metco/Freightliner. With him on the brief was Moscato & Myers, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed; referee's order reinstated.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board which reversed an order of the referee. Claimant worked for Consolidated Metco (employer) from October, 1968, to May, 1982. Before August 1, 1981, Consolidated Freightways administered employer's workers' compensation claims; thereafter Freightliner administered them.[1] The Board reversed that portion of the referee's order which set aside Freightways' denial of claimant's 1979 claim for a right shoulder injury and his 1982 aggravation claim for that shoulder and which assessed penalties and attorney fees against Freightways for unreasonable denial of and unreasonable delay in processing the 1979 claim. We reverse the Board.

The decisive questions are whether claimant suffered a compensable injury to his right shoulder while at work on April 2, 1979, and whether he filed a timely claim. Little would be gained from repeating the evidence which persuaded the referee that he did or the Board that he did not. Their opinions detail the conflicting evidence. Claimant testified that on April 2, 1979, while working as a production set-up operator,

[1] Claimant does not seek review of the Board's affirmance of that part of the referee's order which affirmed Freightliner's denial of his 1982 "new injury or occupational disease" claim for his right shoulder.

he injured his right shoulder when he lifted a heavy object toward his work table. He testified that on that date he reported the incident to his foreman and supervisor, Sylvester, executed a form 801 and gave it to Sylvester, who gave him a copy of form 801. The record contains claimant's copy of form 801 which bears a carbon copy of Sylvester's signature. According to claimant, Sylvester signed the form 801 in claimant's presence. Respondents claim that they have no record that a form 801 was ever filed with employer or with its insurers. Employer and Freightways did not process the claim at that time.

Respondents did not produce Sylvester as a witness to explain why a carbon copy of his signature appears on the worker's copy of the form 801 or to contest claimant's testimony about the events of April 2, 1979, nor did respondents explain Sylvester's absence. There is no evidence that Sylvester's signature is not genuine or that he did not sign the

form on April 2, 1979. Nothing in the record contradicts claimant's testimony that Sylvester signed it, gave a copy to him at that time and kept the other copies. We conclude, on this record, that Sylvester's signature is genuine. Although the Board found claimant's statements to be "unpersuasive," we conclude that the referee's assessment of claimant's credibility was correct. The preponderance of the evidence establishes that claimant injured his right shoulder at work on April 2, 1979, and that he notified Sylvester immediately of his injury and his claim. *See* ORS 656.265.

The employer denied the 1979 injury claim in 1982, approximately three years after the event. That denial was unreasonable and unreasonably delayed.

In May, 1982, when claimant was examined by Doctor Harvey, his right shoulder condition had worsened. The evidence satisfies us that the referee's recitation of the facts was correct:

> "The swelling and pain in his right shoulder increased proportionately with the amount of work stress placed upon it.
>
> "Because of substantial layoffs, claimant was required to work full-time in the Hub assembly area from February 1, 1982, thereafter. That work involved a great deal of lifting, stacking, lifting overhead, and general use of his right shoulder and arm. There were no non-industrial activities which placed any similar kind of stress upon claimant's right arm and shoulder from February 1 through his last date of work of approximately May 10, 1982. Claimant continued to work as long as he was physically capable of doing so, although his symptoms worsened over that time period.
>
> "Finally, on or about May 7, 1982, claimant complained to his supervisor, Dennis Peterson, that he could not continue to do his job because of problems with his right shoulder * * *."

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Betty E. Madaras, Claimant.

MADARAS,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(WCB No. 83-07509; CA A34544)

Judicial review from Workers' Compensation Board.

Argued and submitted July 31, 1985.

Charles D. Beshears, Portland, argued the cause for petitioner. With him on the brief was Carney, Buckley, Kasameyer & Hays, Portland.

John A. Reuling, Jr., Assistant Attorney General, Salem, argued the cause for respondents. 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.

PER CURIAM

Reversed and remanded.

PER CURIAM

Claimant seeks reversal of a Board order which reversed the referee's determination that claimant is permanently and totally disabled for the reason that she has made no attempt to seek work, as required by ORS 656.206(3). SAIF argues that, because claimant is not totally disabled from a physical standpoint, she should be required to seek work to confirm her unemployability, unless the evidence of unemployability is clear and convincing. SAIF concedes that claimant has shown, by a preponderance of the evidence, that it would be futile for her to seek work. That is all that is required. *See Morris v. Denny's,* 50 Or App 533, 623 P2d 1118 (1981).

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of JOJI KOBAYASHI, Claimant.

KOBAYASHI,
Petitioner,

v.

SIUSLAW CARE CENTER et al,
Respondents.

(82-06757; CA A34085)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 17, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief were Donald N. Atchison and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Allan M. Muir, Portland, argued the cause for respondents. With him on the brief were Paul R. Bocci and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

GILLETTE, P. J.

Reversed and remanded for acceptance of claim.

GILLETTE, P. J.

Claimant seeks review of a Workers' Compensation Board order which sustained the referee and found that his current clubfoot condition is not compensably related to a previous compensable injury to his knee. We reverse and remand.

Claimant, who was born in 1950 and who is of dull normal intelligence, has a history of psychiatric difficulties and hospitalizations extending back to his childhood. He was hospitalized three times at the Oregon Health Sciences University Hospital in Portland in 1978 and 1980. At these times, he had suicidal tendencies, significant paranoia and showed a volatile personality. Among his problems were drug and alcohol abuse. Apparently, treatment helped resolve those latter difficulties but did not significantly alter his underlying mental illness.

Claimant's mother is a registered nurse, who tends to dominate claimant's life and to make his decisions for him. He has lived with her most of his adult life. He is a certified nursing assistant. He has worked in several nursing homes, apparently sometimes because she found jobs in them for him. Aside from dental problems, his physical health was good before his injury.

In early 1981, claimant, his mother and step-father moved to Florence, where he got a job at the Siuslaw Care Center. On his fourth day of work, he slipped on some jello and

fell, injuring his left knee. The knee was painful and swollen, but x-rays revealed no structural damage. It was the kind of injury that one would expect to resolve satisfactorily within a month or so. The injury, in fact, did not resolve as fast as expected, and claimant eventually saw orthopedists, spent time at the Callahan Center and had vocational counseling before he returned to work in October. From the beginning, his physicians saw considerable functional overlay in the failure of the knee to get better; his symptoms were well beyond the objective findings.

Claimant apparently received considerable attention from his mother and others as a result of the injury. His mother got him crutches and encouraged him to use them, although no doctor appears to have suggested that he do so.

She generally reinforced his "hurt" behavior. When he returned to work for Siuslaw Care Center under a modified job description, she encouraged him to see himself as unable to do what the job required (and what his physician released him to do) and supported his decision to quit after a couple of weeks because the employer was supposedly asking too much of him. All those who treated claimant at that time believed that he was, in fact, able to do much more than he thought he was able to do, that he needed to be weaned from relying on the injury and that his mother's reinforcement of the injury was a major obstacle.

At about the time claimant finally quit his job at the care center, he began noticing that his left foot was turning inward.[1] When he saw a chiropractor on February 12, 1982, the foot was fixed in a clubfoot position, but the chiropractor could straighten it manually. At the next visit, on February 17, the chiropractor could no longer move the foot. It has remained in that fixed position ever since, so far as claimant is consciously aware.

The contracture is not a physical condition; it is the result of claimant unconsciously focusing his psychological problems on his foot. One physician noted that when claimant put on his pants and shoes, he straightened out his foot to do so. However, there is no conscious malingering; claimant believes that his foot is immovable and is unaware of those occasions on which he unconsciously moves it.

It seems clear from the medical evidence that claimant learned from the attention that he received for his knee injury that he could get his psychological needs met by physical inadequacy. The improvement of his mental condition, which is probably the best it has been for years, is a direct result of his physical deformity; all of his distress has focused on his foot, leaving his mind clear—or, at least, clearer. Dr. Voiss, a psychiatrist who testified at the hearing, stated that claimant would be as disabled as he is now whether or not he had the knee injury; he might not have a clubfoot, but his psychological problems would have manifested themselves in some fashion which would have been as damaging to his

[1] Although he later gave earlier dates for the beginning of this occurrence, the most believable evidence is that it did not happen until November.

functioning as is the clubfoot. Voiss's testimony clearly and convincingly states the mechanism which has led to claimant's condition and is consistent with the rest of the medical record; we accept it.

The question that remains is whether a conversion reaction that focuses on a non-injured part of the body is compensable if the claimant "learned"—unconsciously—to express his or her psychological problems in a physical fashion as the result of a compensable injury. Claimant relies on several recent decisions of this court for the proposition that functional overlay or severe psychiatric disorder in connection with a compensable injury may be itself compensable. *See, e.g., Scheidemantel v. SAIF,* 70 Or App 552, 690 P2d 511 (1984) (psychological problem); *Chatfield v. SAIF,* 70 Or App 62, 688 P2d 434 (1984) (psychological problems); *Ferguson v. Industrial Indemnity, Co.,* 70 Or App 46, 687 P2d 1130 (1984), *rev den* 298 Or 553 (1983) (psychological problems); *Mesa v. Barker Manufacturing,* 66 Or App 161, 672 P2d 1378 (1983) (functional overlay). In all of those cases, the mechanism connecting the injury and the psychological difficulties was established. We find that it has been established here, as well.

Dr. Voiss testified:

> "Q. Well, Doctor, if he hadn't injured the leg in May, 1981, would his left leg be swollen up and look like it looks today?
>
> "A. Maybe yes, maybe no.
>
> "* * * * *
>
> "A. [W]hat happens is when you have this kind of situation such as Dr. Aflatooni describes as a conversion reaction, the person goes back — the event becomes a rationalization for the expression of the sense of being crippled, disabled, unable to function, unable to walk, and so forth. But, it becomes the rationalization that allows those feelings to be expressed. They're expressed, then, in that leg.
>
> "What happens with persons with this kind of dysfunction is that emotionally they begin to operate better. * * *
>
> "What you see in his crippling, if you will, or his distorted leg is the somatic statement that he is crippled, helpless, et cetera. * * *
>
> "* * * * *
>
> "Q. Doctor, what did the bumping of the knee in May, 1981, have to do with what resulted?
>
> "* * * * *
>
> "A. The relationship is that there is an idea that has crawled forward, so to speak, that this event serves as a rationalization for the development of these symptoms. * * *
>
> "It's the idea that creates the symptom and the disability, it is not any kind of physical event. But, if there's a physical event around, it will be used as a rationalization."

We understand this testimony to mean that the compensable incident directly led claimant to select the bizarre focus for his disability that is his deformed foot. That establishes compensability of the foot condition.

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
Phillip G. Powers, Claimant.
LIBERTY NORTHWEST INSURANCE CORPORATION,
Petitioner,
v.
POWERS,
Respondent.
(82-01936; 83-07914; CA A33741)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 12, 1985.

Keith D. Skelton, Portland, argued the cause and filed the brief for petitioner.

Jack Ofelt, Jr., Portland, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

YOUNG, J.

Affirmed.

YOUNG, J.

Liberty Northwest Insurance Corp. (Liberty) seeks review of an order of the Board affirming a referee's decision that rescinded Liberty's denial of responsibility on the basis of *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), and awarding claimant permanent total disability. We affirm.

In 1978, claimant sustained a compensable back injury as the result of lifting while employed by Reynolds Metals Company. Liberty, Reynolds' insurer at the time, accepted the claim. In late 1979, Reynolds transferred its insurance coverage to Travelers Insurance Company (Travelers). Claimant continued to work for Reynolds. On June 17, 1980, he was lifting heavy barrels and experienced severe back pain. He filed a claim with Travelers, which was denied.[1] On Travelers' advice, he filed a claim with Liberty. Liberty accepted the claim on the assumption that it was a continuation or aggravation of the 1978 injury. On February 11, 1982, a determination order awarded claimant, in addition to a period of temporary disability, an additional 25 percent unscheduled disability for the low back.[2] Claimant then requested a hearing on the extent of disability.

At a hearing on March 3, 1983, Liberty denied responsibility for the claim, because the evidence indicated that the barrel lifting incident on June 17, 1980, was a new injury. Liberty claimed that the evidence at the hearing was

[1] Claimant failed to file a timely request for a hearing protesting the denial. Consequently, the denial became final and claimant has no claim against Travelers. ORS 656.283; ORS 656.319.

[2] A determination order in 1981 awarded claimant 10 percent unscheduled disability for the back.

the first knowledge that it had of a new injury. After the referee recessed the hearing, Liberty notified claimant that it was denying responsibility on the ground that he had suffered a new injury which was the responsibility of Travelers.

At a second hearing on January 4, 1984, the referee summarily ruled that Liberty's denial of responsibility was an impermissible "back up" denial under *Bauman v. SAIF, supra.* He limited the hearing to the issue of the extent of claimant's disability and found that claimant was permanently and totally disabled.

Liberty makes two assignments of error. The first is that it was error to rescind its denial of responsibility. Alternatively, it contends that claimant is not permanently and totally disabled.

Bauman v. SAIF, supra, holds that, once an insurer has accepted a claim, it may not deny compensability unless there is a showing of fraud, misrepresentation or other illegal activity. 295 Or at 794. In *Jeld-Wen, Inc. v. McGehee,* 72 Or App 12, 695 P2d 92, *rev den* 299 Or 203 (1985), we held that the *Bauman* rule is equally applicable to denials of responsibility.

In the present case, the question becomes whether there are facts which entitle Liberty to claim one of the exceptions to the rule, *i.e.* fraud, misrepresentation or other illegal activity. At the hearing, Liberty stated that it was not alleging any such misconduct on the part of claimant. On appeal Liberty concedes that there is no evidence of fraud or fraudulent misrepresentation. Instead, Liberty claims that claimant made "false statements" to Liberty, Travelers and his doctors that caused Liberty to accept the claim.

The record in this case, including claimant's description of how he sustained his injuries in 1978 and 1980, may be obscure and lacking in specificity, but we find no basis for declaring claimant's statements "false." The problem is that Liberty discovered what it now believes are the "true facts" three years after it had accepted the claim. There is no evidence in this record that entitles Liberty to an exception under the *Bauman* rule.

We turn to the extent of claimant's disability. A laborious recitation of the medical evidence and claimant's physical limitations would be of no value. On the basis of our review of the evidence, we hold that claimant carried his burden of proving that he is permanently and totally disabled. ORS 656.206(1)(a),(3).

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Dwayne A. Kester, Claimant.

WEYERHAEUSER COMPANY,
Petitioner,

v.

DWAYNE A. KESTER,
Respondent.

(82-07338; CA A33371)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 1, 1985.

Allan M. Muir, Portland, argued the cause for petitioner. With him on the brief were Lawrance L. Paulson and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Richard Lee, Eugene, argued the cause for respondent. With him on the brief were Velure & Bruce, Eugene.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

PER CURIAM

Affirmed.

PER CURIAM

Employer petitions for review of an order of the Workers' Compensation Board finding claimant permanently and totally disabled. The Board not only found claimant's aggravation claim compensable but also concluded that claimant was entitled to a new determination of the extent of his disability after the termination of his vocational rehabilitation program at Klamath Work Activity Center without proving an aggravation. ORS 656.268(5); *Hanna v. SAIF,* 65 Or App 649, 672 P2d 67 (1983). On *de novo* review we agree with the Board and with its determination that claimant is permanently and totally disabled as of May 12, 1981.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Erma L. Parmer, Claimant.

PARMER,
Petitioner,

v.

PLAID PANTRY #54 et al,
Respondents.

(82-05555; CA A33092)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 13, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

David Horne, Beaverton, argued the cause and filed the brief for respondents.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Remanded to referee to take additional evidence.

RICHARDSON, P. J.

Claimant seeks review of an order on reconsideration,[1] of the Workers' Compensation Board affirming the referee's decision that the insurer is not responsible under ORS 656.245(1)[2] for paying for claimant's surgery. The issue is whether the Board should have remanded the case to the referee for taking further evidence under ORS 656.295(5).[3] We reverse and remand to the referee.

Claimant first injured her back in 1968, and in 1969 she underwent a partial laminectomy and a discectomy at L5-S1 on the left side. Apparently, the injury was not work-related. Over the years, several doctors treated her on many

[1] The order on reconsideration is appealable to this court under ORS 656.298(1) and *Tektronix Corp. v. Twist*, 62 Or App 602, 661 P2d 562, *rev den* 295 Or 259 (1983).

[2] ORS 656.245(1) provides:

"For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker."

[3] ORS 656.295(5) provides:

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

occasions for back, hip and leg pain. Initially, the pain was on her left side, but later she developed pain on her right side as well. In late 1981, she sustained a compensable low back injury while working for employer, and she began to experience low back and left leg pain. Dr. Berselli, an orthopedic surgeon, began treating her in early 1982. He diagnosed a herniated disc at L5-S1 and recommended surgery. He so informed the insurer and stated that the 1981 injury was responsible for claimant's condition. Dr. Silver agreed with Berselli's recommendation for surgery. At the insurer's request, Dr. Rosenbaum examined claimant. He ultimately stated that surgery was not advisable, because there was no objective evidence of any change in claimant's underlying condition and because of

her history of chronic pain. He also stated that her symptoms were not clearly attributable to the 1981 injury. The insurer subsequently denied claimant's request for authorization for surgery, and claimant requested a hearing on the denial.

At the hearing, Drs. Berselli, Rosenbaum and Bachhuber testified. Bachhuber was claimant's treating physician from the time of her 1969 surgery up to 1977, and he treated her once for back pain in 1980. Bachhuber and Rosenbaum testified that claimant should not undergo surgery, because there were no objective signs of any change in her condition. Neither would advise surgery based on her subjective complaints alone. Berselli essentially admitted that he had not reviewed claimant's entire medical file and that the history claimant had given him was inaccurate. He conceded that the 1981 injury had not caused a large herniated disc, but he maintained that it was possible that it had caused bleeding around the scar tissue surrounding the site of the 1969 surgery, additional scarring or a small disc herniation. He also stated that the 1981 injury was a material contributing cause of claimant's present condition.

The referee affirmed the insurer's denial. He found the testimony of Rosenbaum and Bachhuber more persuasive than that of Berselli and decided that the proposed surgery was not reasonable or necessary. He did not reach the causation issue. On review, the Board affirmed the insurer's denial but for a reason different from that of the referee. It found that the surgery was reasonable and necessary but that claimant had not proven that the need for surgery resulted from the 1981 injury rather than as a residual of her 1969 surgery. Because Berselli's theory was stated in terms of possibilities rather than probabilities and his testimony apparently was that the 1981 injury only caused claimant's condition to become symptomatic, the Board found his testimony insufficient to sustain claimant's burden of proof. The Board expressed frustration with the causation issue, noting that, if the second surgery were never performed, the cause of claimant's condition might remain unknown.

After the referee's opinion and the appeal to the Board, but before the Board issued its order, Berselli and Silver performed the disputed surgery. In a letter to claimant's attorney, Berselli stated that, based on what he discovered

during that surgery, he believed that the 1981 injury caused an increase in scarring and that the injury was a material contributing cause of claimant's need for further medical care. Claimant then moved the Board to withdraw its opinion and remand the case to the referee to take additional evidence. The Board refused to remand the case and adhered to its earlier opinion:

> "On the question which we found determinative on review — the causation question — the additional evidence proffered by claimant adds little or nothing. Having had the benefit of viewing the condition of claimant's spine on surgery, we would expect Dr. Berselli to be in a position to offer a better explanation of his findings and how those findings support his conclusion that the epidural scarring in claimant's spinal canal was caused in material part by her 1981 industrial injury, as opposed to her 1969 low back surgery. As we read Dr. Berselli's most recent report, it merely states the finding of epidural scarring in the spinal canal and his 'belief' that claimant's 1981 injury caused some increase, with no explanation in support of this belief. This was one of the two theories advanced by Dr. Berselli at the hearing, and his recent post-surgical report adds little in support of this theory."

On the facts of this case, we agree with claimant that the Board should have remanded the case to the referee. The dispositive issue for the Board was whether the 1981 injury was responsible for claimant's need for surgery. Berselli was able to testify only that it was possible that the injury had caused additional scarring. The surgery evidently vindicated his opinion. The evidence claimant seeks to have the referee consider fills the gap which the Board found in Berselli's opinion. The Board's statement that the additional evidence adds little or nothing to the record is puzzling in the light of its earlier statement that, without the second surgery, it was essentially impossible to determine the cause of claimant's condition. Admittedly, Berselli's statements in the letter to claimant's attorney are rather conclusory. However, it was submitted as a basis for a remand to the referee rather than as a complete medical report on the causation issue. Claimant should have an opportunity to explore fully the medical opinions following the surgery. The proffered evidence completes the otherwise incomplete record, and the Board abused its discretion by not remanding the case to the referee. *See Muffett v. SAIF*, 58 Or App 684, 687, 650 P2d 139 (1982).

Remanded to referee to take additional evidence.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
CHARLES R. WRIGHT, Claimant.

WRIGHT,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION,
Respondent.

(WCB No. 80-1147C; CA A32668)

Judicial Review from Workers Compensation Board.

Argued and submitted July 26, 1985.

Bradford J. Aspell, Klamath Falls, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Affirmed.

WARREN, J.

Claimant seeks review of a Workers' Compensation Board order which held that the Evaluation Division had no jurisdiction to determine the extent of disability due to his pulmonary condition.

Claimant, a firefighter, filed a claim for compensation due to chest pains which prevented him from working. There apparently arose a question as to whether his condition was physical or psychological in origin. SAIF denied the claim; the referee determined that it was compensable and that he qualified under the "fireman's presumption."

Pending SAIF's appeal to the Board on the compensability question, the Workers' Compensation Department issued a determination order awarding 25 percent permanent partial disability for psychological illness. The Board upheld the referee's order as to compensability. On SAIF's petition for review, we reversed, holding that the "fireman's presumption" had been overcome by the evidence. *Wright v. SAIF,* 43 Or App 279, 602 P2d 1082 (1979). Our decision was reversed by the Supreme Court, *Wright v. SAIF,* 289 Or 323, 613 P2d 755 (1980), and on remand we affirmed the Board. 48 Or App 867, 618 P2d 18 (1980). Shortly thereafter, claimant filed a request for a hearing on the issue of the extent of physical disability due to the pulmonary condition. The referee held

that he was permanently and totally disabled but then vacated her order and remanded the claim to the Evaluation Division for the issuance of a determination order. On SAIF's and claimant's petitions for review, the Board held that the Evaluation Division had no jurisdiction to rate or to consider the extent of claimant's disability, because the department had already issued a determination order on extent of disability which was not timely appealed.[1] The Board relied on *SAIF v. Maddox*, 295 Or 448, 667 P2d 529 (1983).

Claimant asserts that there has been no determination of the extent of his physical disability, because, at the time the determination order was issued, the compensability of his condition was still under appeal. SAIF argues that the determination order awarding 25 percent disability for *psychological* illness also disposed of claimant's contention that he suffered from a *physical* disability. We agree. He has filed only one claim. While the compensability of that claim was under appeal, the department issued a determination order on extent of disability based on all the information it had before it, including medical records pertinent to the physical component of his disability. Although the determination order did not separately address the physical component, it necessarily determined that all of claimant's disability arising out of the claim was due to psychological illness. He is not entitled to a second determination order. *Day v. SAIF*, 63 Or App 722, 725, 665 P2d 1253 (1983).

In the alternative, claimant argues that he is entitled to a hearing on the determination order of May 3, 1979. He contends that the one-year limitation of ORS 656.268(6)[2] was tolled pending SAIF's appeal on the issue of compensability. In *SAIF v. Maddox, supra*, the Supreme Court held that the compensability of a claim need not be determined finally before the extent of disability may be litigated and that a determination of the extent of disability would not be stayed pending an appeal on compensability. The Board here relied on *Maddox* in holding that claimant was required to appeal the determination order. Although we do not agree that *Maddox* is directly applicable, we hold that by virtue of ORS 656.268(6) claimant was required to seek a hearing on the determination order within one year of its issuance. He did not do so.[3]

Affirmed.

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[1] In addition to holding that claimant was not entitled to a second determination order, the Board remanded the case for consideration of the merits of an aggravation claim for the alleged physical component of his injury. That claim is not before us, and that portion of the order is not affected by our decision. The Board's order appealed here is subject to judicial review only on the separate issue of claimant's right to a determination order on the original claim. *Price v. SAIF*, 296 Or 311, 675 P2d 479 (1984).

[2] ORS 656.268(6) provides, in part:

"* * * Any such party may request a hearing under ORS 656.283 on the determination made under subsection (4) of this section within one year after copies of the determination are mailed."

[3] We reject claimant's contention that SAIF should be estopped from asserting the Statute of Limitations defense because it had a policy of resisting appeals on extent of disability while the issue of compensability was on appeal. Claimant and SAIF were adversaries in the proceeding, and he had no reason to rely upon SAIF's erroneous policy as to his right to pursue his claim.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Herschel R. Pitts (Deceased),
FARMERS INSURANCE GROUP,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND
CORPORATION et al,
Respondents.
(80-03994, 82-05466, 82-00902; CA A34131)

Judicial review from Workers' Compensation Board.

Argued and submitted July 17, 1985.

Jerald P. Keene, Portland, argued the cause for petitioner. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent State Accident Insurance Fund. With him on the brief were Dave Frohnmayer, Attorney General and James E. Mountain, Jr., Solicitor General, Salem.

Allen T. Murphy, Jr., Portland, argued the cause for respondent Dolly Pitts. With him on the brief was Richardson & Murphy, Portland.

No appearance by respondents Kaiser Cement and Gypsum and Firtex.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

YOUNG, J.

Affirmed.

YOUNG, J.

Farmers Insurance Group (petitioner) seeks review of a Workers' Compensation Board order holding it responsible to respondent Dolly Pitts (claimant) for survivor's benefits related to the death of her husband, Herschel. Herschel died of lung cancer caused in part by his exposure to asbestos while working for respondents Kaiser Cement & Gypsum and its predecessor, Firtex. Petitioner asserts that SAIF did not request board review of an adverse referee's decision within the proper time, that claimant filed her claim too late and, on the merits, that SAIF rather than petitioner is responsible. We affirm.

Herschel began working for Firtex in the 1930's and continued, with a break from 1947 through 1952, until he retired in early 1975. He worked both as a production worker and, in the later years, as a foreman, with responsibility for all of the plant's operations on his shift. The plant used asbestos for much of the period, primarily as an ingredient in an

insulating plaster for its retorts, but also as a constituent of some of its products. At one time, the company used large amounts of asbestos while experimenting with new compositions for mineral fiber boards. It apparently stopped using asbestos in the early 1970's when it shut down the retorts. The asbestos came in large bags or sacks, which the workers would open and pour into vats for mixing. The asbestos was dry and produced considerable dust. The workers were supposed to wear respirators but did not always do so; there is no suggestion that others in the vicinity were even expected to protect themselves. The greater part of Herschel's exposure occurred before January 1, 1966, when petitioner replaced SAIF as the insurer, but he had at least minimal exposure after that date.

In early 1980, about five years after his retirement, he developed a persistent cough. His physicians diagnosed his problem as an adenocarcinoma of the right lung; he also had pleural calcifications, which indicate asbestos exposure. That exposure, combined with his smoking, made him sixty times more likely to get lung cancer than a non-exposed non-smoker and five times more likely than a non-exposed smoker. The parties essentially concede that the diseases were work related. The tumor in his lung was originally inoperable, but

radiation treatments shrank it sufficiently so that in May, 1980, it was possible to remove his right lung. However, by that time the cancer had reached his spine; it reappeared a few months after the lung operation, and he died on November 18, 1980.

Claimant filed her claim on November 11, 1981, which was more than 180 days after her husband's death. We first decide whether the failure to file timely is fatal to her claim. ORS 656.807(2) and (5) provide:

> "(2) If the occupational disease results in death, a claim may be filed within 180 days after the date of the death; and the provisions of subsection (1) of this section do not limit the filing of a claim in fatal cases to less than 180 days from the date of death.
>
> "* * * * *
>
> "(5) The procedure for processing occupational disease claims shall be the same as provided for accidental injuries under ORS 656.001 to 656.794."

The Supreme Court and this court have previously held that ORS 656.807(5) incorporates ORS 656.265(4)(a), which excuses a late filing if "the insurer or self-insured employer has not been prejudiced by failure to receive the notice * * *." *Inkley v. Forest Fiber Products Co.*, 288 Or 337, 605 P2d 1175 (1980); *Robinson v. SAIF*, 69 Or App 534, 686 P2d 1053 (1984); *Gronquist v. SAIF*, 25 Or App 27, 547 P2d 1374 (1976). Petitioner asks us to reconsider this position, pointing out that at the time of the first decisions the statute provided that the procedure "for allowing, denying, processing or closing" occupational disease claims should be the same as that for other claims. It asserts that the removal of the terms other than "processing" eliminated the basis for applying ORS 656.265(4)(a) to excuse the late filing of occupational disease claims. We disagree. The "processing" of a workers'

compensation claim includes allowing or denying and closing it; the legislature simply eliminated unnecessary words. *See Hayes-Godt v. Scott Wetzel Services,* 71 Or App 175, 179 n 2, 691 P2d 919 (1984), *rev den* 299 Or 118 (1985). We also decline to apply a different rule to survivor's claims, as petitioner suggests. Finally, we agree with the Board that petitioner did not show prejudice from the late filing in this case.

The referee issued his opinion finding SAIF responsible on March 14, 1983. He did not rule on claimant's attorney fees' request at that time. Instead, on the same date, he wrote claimant's and SAIF's attorneys, stating that he would issue a supplemental order on the attorneys fee question and that SAIF's appeal time would run from the date of the supplemental order. He issued the supplemental order on April 5, 1983, but it was not mailed to all parties and their attorneys. On June 1, 1983, the referee issued another order, stating that review would run from that date; this order was properly mailed. SAIF sought Board review on June 3, 1983. The Board held that the referee's letter of March 14 was the functional equivalent of an own motion to reconsider the March 14 order and an order abating it. Thus, the March 14 order was not final until the April 5 order was, and that order was not final until it was properly mailed on June 1. *See Armstrong v. SAIF,* 67 Or App 498, 678 P2d 777 (1984) (Board's order is not final until it is properly mailed). We agree with the Board that SAIF timely requested Board review of the referee's decision.

We turn to the merits. The decisive issue is whether Herschel received an injurious exposure to asbestos after January 1, 1966, when petitioner's coverage began.[1] *Boise Cascade Corp. v. Starbuck,* 296 Or 238, 675 P2d 1044 (1984); *Fossum v. SAIF,* 293 Or 252, 646 P2d 1337 (1982); *Meyer v.SAIF,* 71 Or App 371, 692 P2d 656 (1984), *rev den* 299 Or 203 (1985). Although the evidence is not completely clear, we find that the exposure to asbestos continued after that date, although at a lower level than it had been some years previously. Dr. Lawyer, a lung specialist, testified that exposure ten or more years before a diagnosis of lung cancer could contribute to the increased risk of cancer. He estimated that the post-1966 exposure may have contributed five to seven percent of the increased risk. Although Lawyer assumed that the post-1966 exposure was much higher than we find it to have been, that exposure was not negligible. Lawyer testified that there are no data showing a threshold below which exposure is harmless. We therefore find that Herschel's exposure when Farmers was on the risk was in fact an injurious exposure and that, under the last injurious exposure

rule, petitioner is responsible for the claim. *See FMC Corp. v. Liberty Mutual Ins. Co.,* 70 Or App 370, 374, 689 P2d 1046 (1984); *modified* 73 Or App 223, 698 P2d 551, *rev den* 299 Or 203 (1985).

Affirmed.

[1] Kaiser became self-insured on January 1, 1974. There is no evidence that it used asbestos in this plant after that date.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Dennis D. Grace, Claimant.

GRACE,
Petitioner,
v.
SAIF CORPORATION,
Respondent.

(WCB No. 83-01053; CA A31584)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 2, 1985.

William Schultz, Portland, argued the cause for petitioner. With him on the brief were Robert K. Udziela, David A. Hytowitz, and Pozzi, Wilson, Atchison, O'Leary & Conboy, 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.

ROSSMAN, J.

Reversed and remanded.

ROSSMAN, J.

Claimant seeks compensation for treatment and temporary total disability for a disabling psychological condition. The Workers' Compensation Board held that his psychological condition was not related to his industrial injury and that he was otherwise medically stationary. On *de novo* review, we reverse and remand.

Claimant suffered a compensable back injury on June 19, 1980. His claim was closed in September, 1980, with an award of temporary total disability, but it was reopened in 1982 for additional treatment, including back surgery. He was thereafter determined to be physically medically stationary, and that determination is not challenged. Claimant has a history of psychological problems and treatment. In August, 1982, he told a doctor that he was severely depressed. A vocational counselor referred claimant to Dr. Colistro, a psychologist, who, on November 15, 1982, diagnosed severe depressive reaction, exacerbated by excessive alcohol use, family problems and a preexisting psychological disorder known as "avoidant personality."

Claimant stated that he has a fear of people; in his present condition he would prefer to work alone, and he envisions himself suitable for employment as a shepherd or lighthouse keeper. He told Colistro that he was having prob-

lems with his teen-aged daughter, because he was home all the time, in pain and unable to control her. Colistro originally believed, based on what claimant told him, that his psychological condition was 50 percent due to the injury and 50 percent due to other conditions. He authorized 60 days of treatment and time loss for the purpose of allowing himself to get to know claimant. As he treated claimant, his perception changed, based on claimant's unwillingness to reduce his alcohol consumption. Additionally, Colistro became aware that claimant's family problems were "dominating his whole life." On December 22, 1982, after seven or eight therapy sessions, Colistro met with claimant and his rehabilitation counselor. Colistro stated in his report:

> "* * * We confronted Mr. Grace with the fact that he must make a decision to overcome his fear of being with other people. That if he does not then no psychological or vocational rehabilitation assistance would be feasible. * * *"

At the same meeting, Colistro was apparently pleased with claimant's success in abstaining from drinking beer. Colistro reported:

> "*Analysis:* Progress satisfactory; patient is making a concerted effort to benefit from treatment. He is taking antabuse as prescribed and thus has not been drinking for the past two weeks. His commitment today is also impressive, provided he sticks by it.
>
> "*Plan:* See him early in January."

One week later, at the end of the 60-day authorized treatment time, Colistro changed his mind and decided to stop treatment. He testified that, in his opinion, claimant did not wish to solve his own problems and that continued treatment would prolong, rather than resolve, them. On December 30, 1982, he reported that claimant was unwilling to participate in vocational rehabilitation. He stated that claimant's psychological problems were not related to his injury, but were preexisting, and found him to be psychologically medically stationary. Claimant continued to receive counseling from his rehabilitation counselor. Colistro's report regarding claimant's unwillingness to cooperate with the vocational counselor was contradicted by a January 19, 1983, report from the counselor, who indicated that, in spite of continued drinking, claimant could benefit from vocational assistance and that he had demonstrated motivation to work with her. He had, in fact, accepted a job offer in late December, although it later fell through.

On January 27, 1983, a determination order awarded 15 percent unscheduled permanent partial disability for the back injury but nothing for the psychological condition. In February, 1983, claimant, at his own expense, began seeing Dr. Johnson, a psychiatrist, who expressed the opinion that claimant was not psychologically medically stationary and that his condition was due, in material part, to the back injury.

In his report of May 14, 1983, Johnson stated:

> "Because of the low acceptance of his self and the little self-esteem he had as a child, the loss of ability to work was more threatening to him than it would have been to another person. As his self-esteem was threatened by his disability, other relationships became threatened and he began to have more difficulty in the home, relating to his wife and children.

"* * * * *

"It is my opinion that had he not had the back injury, his feeling of self-worth and his acceptance would have gone on in a more positive way as he would have continued working and providing sufficient income to give his family a good standard of living."

The referee concluded that claimant was not medically stationary and that his claim should be reopened for further treatment of the psychological condition and the payment of time loss benefits. He therefore did not consider the question of the extent of permanent disability. Employer sought review, and the Board, persuaded by Colistro's opinion, held that claimant no longer suffers from any residual psychological effects of his injury and that his present psychological condition is not related to his injury. The Board remanded the case to the referee for a determination of the extent of disability, and claimant sought review here.

SAIF moved to dismiss this review on the ground that the Board's decision was not a final order. That would be true if the Board had only made a determination as to whether claimant was medically stationary. *See Dean v. SAIF,* 72 Or App 16, 695 P2d 90 (1985). However, the Board has also held that claimant's psychological condition was not compensably related to his industrial injury and that there was no remaining psychological disability from the injury. Such a decision is final and subject to review. *Price v. SAIF,* 296 Or 311, 675 P2d 479 (1984).

On the merits of the claim, we conclude that claimant was not medically stationary on the date of closure. The parties agree that, from a psychological standpoint, he is in need of further treatment; in the medical sense, he is not "stationary." SAIF contends, however, that claimant's psychological problem is not the result of his injury and that, for the purposes of workers' compensation, he is stationary. Thus, the case comes down to causation: Was claimant's work injury a material cause of his psychological disability? *Jeld-Wen, Inc. v. Page,* 73 Or App 136, 698 P2d 61 (1985).

In determining whether claimant is entitled to medical services and time loss, SAIF would have us apply the rule of *Wheeler v. Boise Cascade,* 298 Or 452, 693 P2d 632 (1984), *Hutcheson v. Weyerhaeuser,* 288 Or 51, 602 P2d 268 (1979),

and *Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979), that the underlying condition must have been worsened to be compensable. Those cases dealt with the compensability, in the first instance, of a preexisting disease. This case is different in that, as in *Partridge v. SAIF,* 57 Or App 163, 643 P2d 1358, *rev den* 293 Or 394 (1982), and *Jameson v. SAIF,* 63 Or App 553, 665 P2d 379 (1983), a compensable injury has intervened.

Of what effect, if any, is the intervening compensable injury on claimant's burden of proof? In *Partridge,* the claimant had a preexisting psychiatric condition which she alleged was related to a compensable knee injury. We cited *Hutcheson* for the proposition that the claimant must show that the preexisting condition was "worsened" by the compensable

injury. *Hutcheson* stated the rule that, if work conditions "caused temporary exacerbation" of the preexisting condition "so as to require medical services that would not have otherwise been necessary," the condition was compensable. In *Wheeler*, the Supreme Court explained *Hutcheson* to hold that the claimant, in seeking compensation for the worsening of a preexisting noncompensable disease, must show, as stated in *Weller*, that the *underlying condition*, and not just the symptoms, had worsened.

It is not clear whether our decision in *Partridge* gave the same interpretation to *Hutcheson;* however, we purported to apply it. We held that the need for psychological treatment was only circumstantial evidence of a worsened condition and that the more persuasive evidence indicated that there was *no causal connection* between the claimant's compensable injury and her psychological problems. Our reliance on *Hutcheson* was not truly essential to our decision in *Partridge*, because we found no causal relationship between the claimant's *psychological symptoms* and her injury.

In *Jameson*, a work-related injury caused the claimant's preexisting noncompensable lipoma to increase pressure on the nerve root, thereby causing symptoms of low back pain requiring treatment. The medical evidence was ambiguous as to whether the accident aggravated the lipoma or merely aggravated the symptoms. We first reasoned that, because the case involved an injury rather than an occupational disease, the rule in *Weller* was not applicable. We held that, because

the compensable injury had caused increased symptoms of the lipoma, the treatment of the symptoms was compensable. We conclude that the same analysis applies here and that *Wheeler* and *Weller* are not controlling, because of the intervening compensable injury.

Colistro's testimony indicates that he concluded that claimant's condition was chronic and that it had not been materially or permanently "worsened" by the injury. He agreed that the source of claimant's current bout of depression was his preexisting condition, coupled with alcohol and family problems. On cross-examination, he expressly stated that he made no effort to determine whether claimant's family and drinking problems were exacerbated by his injury: "I guess I kind of don't care where they came from, I care about changing them." Johnson, on the other hand, specifically reported that claimant's work injury in June, 1980, created greater difficulty at home. In his opinion, the injury was a material contributing factor to the psychological disability.

Here, as in *Jameson*, we find by a preponderance of the evidence that claimant's current disability was brought on by his compensable injury. His family and drinking problems are tightly related to his psychological problem, and the injury has adversely affected them. Although the injury may not have worsened his underlying psychological condition, it did precipitate the symptoms which he now experiences. That is sufficient to make his condition compensable.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Howard H. Hurst, Claimant.

HURST,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(83-01616; CA A32726)

Judicial Review from the Workers' Compensation Board.

Argued and submitted March 25, 1985.

Alan M. Scott, Portland, argued the cause for petitioner. With him on the brief were Jill Backes and Galton, Popick & Scott, Portland.

Robert M. Atkinson, 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.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed and remanded with instructions to accept claim.

NEWMAN, J.

Claimant petitions for review of an order of the Workers' Compensation Board that found his heart attack not compensable. He was a 49-year-old business agent for a Teamster's Union local. He organized union representation at new companies, negotiated contracts, handled grievances and policed his jurisdiction for contract violations. For six months before his heart attack, he had worked long hours under serious stress. He faced a disgruntled union constituency, an impending union election, major contract negotiations, employer contract violations and a "running battle" with the president of the local union. He had frequently lost sleep at night during that time because of his worry over his job.

On October 4, 1982, claimant arose between 4:30 a.m. and 5 a.m. to travel about 75 miles from Portland to Parkdale. He left Portland at 6 a.m., stopped to pick up another union business agent in Hood River and arrived in Parkdale around 8 a.m. He went to a job site that employed non-union drivers and had a bitter confrontation with a former union member that lasted until about 11 a.m. The meeting almost turned into a fistfight. Claimant had concern for his own safety and was very tense. He felt "drained" when he left Parkdale.

After lunch on the trip back to Portland, claimant "had a lot of—it felt like indigestion or heartburn * * *." He arrived in Portland around 3 p.m. and met with a group of

shop stewards at 4 p.m. to discuss an employer's contract offer. He got into "a hell of an argument" with one steward and "exploded." He again felt drained and thought he had heartburn as he left the meeting. Without eating, claimant went to his evening bowling league. He did not feel well, bowled poorly and became irate.

Claimant went home around 9 p.m. He did not feel well and felt "stuffed up here." He ate, stayed up for a while and then went to bed. He awoke at 4 or 4:30 a.m. on October 5 and felt "like there was a steam roller rolling over my chest." His wife drove him to the hospital. He was suffering an acute myocardial infarction.

We analyze claimant's heart attack as an accidental injury. *Adams v. Gilbert Tow Service,* 69 Or App 318, 684 P2d 1254 (1984); *Bush v. SAIF,* 68 Or App 230, 680 P2d 1010

(1984); *Harris v. Farmers' Co-op Creamery,* 53 Or App 618, 632 P2d 1299, *rev den* 291 Or 893 (1981). Claimant established legal causation—that he suffered stress on his job. He must also prove medical causation by a preponderance of the evidence—that the stress of his job was, "within the range of reasonable medical probability, a material contributing cause of his myocardial infarction." *Adams v. Gilbert Tow Service, supra,* 69 Or App at 321. The opinions of four doctors are pertinent.

Dr. Hamilton, a cardiologist, treated claimant on his admission to the hospital on October 5, 1982, and performed a coronary angiography on October 19, 1982. The angiogram confirmed that claimant also suffered from arteriosclerotic heart disease that pre-existed the infarction. SAIF wrote the following request to Hamilton:

> "May we have your opinion as to the relationship of Mr. Hurst's recent heart attack to his work activities with General Teamster Local 162. It appears that Mr. Hurst has had a long standing problem and treatment for his heart. Do you believe that Mr. Hurst's work activities with General Teamster 162 was the primary contributing factor in his recent heart attack or do you think it was more due to the natural progression of disease process?"

He responded:

> "In answer to the above question. No, I do not feel that Mr. Hurst's work activities were *the* contributing factor in his recent heart attack." (Emphasis supplied.)

The issue here, however, is not whether claimant's work stress was "the primary contributing factor," but whether claimant's work was a material contributing cause of his infarction. Hamilton's response does not state that claimant's work was not a *material* cause of the attack. Moreover, Hamilton's admission history does not indicate that he was aware of claimant's work on or before October 4.

Dr. Kremkau reviewed claimant's files for SAIF, which asked:

> "Considering the past history of this patient, the risk factors involved, the nature of the incident reported and the diagnosis established we ask that you answer the following question. In your opinion were the work activities described a material contributing cause of the condition that has been diagnosed or

was this condition the result of the natural progress of disease?"

Kremkau responded:

"In my opinion Mr. Hurst's myocardial infarction likely occurred as the result of natural progression of his atherosclerotic vascular disease which was related to the multiple risk factors listed. I do not think his work activites were a material contributing factor of the atherosclerosis nor of the occurrence of the myocardial infarction."

She identifed a clot as the probable trigger of claimant's attack. She had reported:

"The myocardial infarction occurred with blockage of blood flow in the right coronary artery. The blockage probably occurred as a result of blood clot formation at a site that had been narrowed by atherosclerotic plaque. The exact cause of formation of the blood clot is unknown."

It is not clear from the record whether Kremkau was fully advised of the nature of claimant's work on or before October 4.

Dr. Girod, a witness for employer, graduated from medical school in 1976 and was board certified in internal medicine in 1979. His practice is internal medicine. Several months of his residency were devoted to cardiology. Since 1982, he has treated a number of cardiac patients. He testified on the basis of claimant's medical records and the testimony at the hearing. He testified that psychological stress can be a triggering or precipitating factor in a heart attack. He further stated that, when that is the case, the stress is ordinarily accompanied by severe, persistent chest pain over a long period of time and that the attack would likely occur then and not later. Given claimant's description of his day on October 4, Girod testified that in his opinion the role of stress in the attack was "debatable" and that he could not form an opinion within a reasonable degree of medical certainty as to what role stress played. He also testified:

"Q. Can you come to an opinion within a reasonable degree of medical probability what would be *the* major contributing cause of his heart attack on that day?

"A. The atherosclerotic disease in his right coronary artery * * *. That's the process, the process of atherosclerosis,

that was certainly *the* main factor that caused the heart attack." (Emphasis supplied.)

His answer does not address the question whether the job stress was a material contributing cause of claimant's heart attack.

Dr. Griswold submitted a report that was based on claimant's medical records and a meeting with claimant. He also testified at the hearing. Griswold's career includes 35 years as a professor of medicine at the University of Oregon Health Sciences Center, work at the National Heart Institute in London, a fellowship at Johns Hopkins Hospital and board certification in internal medicine. Griswold unequivocally asserted that claimant's job stress was a material contributing cause of the heart attack.

Griswold related claimant's experiences of October 4 and concluded that he was under considerable stress at work, that his chest sensations were "persistent, not simply angina" and that those pains were "symptoms of acute coronary insufficiency or pre-infarction syndrome precipitated by his work activities." He then described how the stress could precipitate an attack:

> "Well, one of several things or a combination of them was probably occurring. One, with this meeting, which he says it was a rather heated meeting; during such a period, blood pressure can become elevated, heart rate goes up, adrenalin is being liberated by the adrenal medulla, the portion of the adrenal gland which produces adrenalin. All this can increase the heart rate, blood pressure, workload on the heart.
>
> "In addition, in this environment we know the blood lipids can change; platelet stickiness can increase; development of a small clot, which can propagate later on, can begin to occur under such stress; as well as the matter of having coronary spasm which we know does occur in people — may occur in people under this type of environmental situation. All this could lead to the final culmination of a frank heart attack and death of heart muscle tissue."

Griswold testified that claimant's attack followed a common pattern:

> "[A] specific episode of emotional stress at noon, later on in the afternoon, with symptoms, with a feeling or unwellness

> continuing, and finally a heart attack for him the next morning. This is a common story in my experience."

He further stated:

> "More important is the work activity on the 4th of * * * October of last year, 1982, was the immediate precipitating episode which resulted in his heart attack."

On cross-examination, Griswold testified:

> "Q. Isn't that what your opinion is as to a job stress, as to what impact that had on his heart attack?
>
> "A. I think that's the most significant, important fact in Mr. Hurst's case.
>
> "Q. But, you're just speculating as to what impact that has, aren't you, Doctor?
>
> "A. I think it's significant.
>
> "Q. How significant?
>
> "A. Major contributing factor — 80 percent, 90 percent, 75 percent."

Hamilton and Kremkau noted that claimant's family history, smoking, mildly increased blood pressure and elevated cholesterol were "risk factors" in the development of arteriosclerotic heart disease. Kremkau also mentioned claimant's obesity. Neither doctor stated whether these factors also increased the risk of a heart attack. Girod noted the potentialities of the same risk factors, as well as that claimant was male, in development of the disease and in the increased risk of heart attack. He testified that claimant's cholesterol level and smoking were very important risk factors but that claimant's weight and blood pressure were not risk factors.

Griswold acknowledged the relationship of the risk factors to development of heart disease and incidence of heart attacks. He did not discuss their particular application to claimant, except that he believed that claimant's weight was not great enough to be a risk factor. He testified:

> "I think that these risk factors would establish the milieu of an individual who would be more coronary prone. But I think that they were not the immediate precipitating cause of this heart attack. In other words, I think the—to me, the specific work history that Mr. Hurst detailed to me in person—I spent a considerable amount of time with him—was the thing which you might say broke the camel's back."

Although claimant suffered an infarction after he had left work, he was under severe stress while at work. As a result of that stress, according to Griswold's testimony, claimant showed symptoms at work of the approaching infarction. The attack he suffered during the night following that stress and those symptoms was, in Griswold's view, a "common story." We find Griswold's testimony persuasive. Accordingly, we hold that claimant proved by a preponderance of the evidence that his job stress was a material contributing cause of his myocardial infarction. Claimant's injury is compensable.

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 Danny C. King, Claimant.

KING,
Petitioner,

v.

GEORGIA-PACIFIC CORPORATION,
Respondent.

(83-07284; CA A33137)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 31, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. On the brief were Peter W. Preston and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Jerry K. Brown, McMinnville, argued the cause for respondent. With him on the brief were Cummins, Cummins, Brown & Goodman, P.C., McMinnville.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

PER CURIAM

Order modified to award claimant 30 degrees permanent partial disability for loss of use of right leg.

PER CURIAM

In this workers' compensation case the referee modified the determination order by deleting an award of permanent partial disability on the basis that a complicated medical question was involved requiring expert testimony of impairment, which the referee found to be lacking. The Board affirmed. We disagree. A physician's report is not indispensable, nor is it required in an "extent of disability" claim. *Garbutt v. SAIF,* 297 Or 148, 151, 681 P2d 1149 (1984). Neither the referee nor the Board found that claimant was not credible. We find that claimant's testimony and the medical records introduced were sufficient to carry his burden of proof.

An extended opinion would not aid the Board or the bar. *See Hoag v. Duraflake,* 37 Or App 103, 105, 585 P2d 1149, *rev den,* 284 Or 521 (1978). Therefore, we simply state that, on *de novo* review of the record, we find claimant to be permanently partially disabled to the extent of 30 degrees, for loss equal to 20 percent of function of his right leg.

Order modified to award permanent partial disability of 30 degrees for loss of use of claimant's right leg.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of David R. Petshow, Claimant.

PETSHOW,
Petitioner,

v.

FARM BUREAU INSURANCE CO.,
Respondent.

(80-08903 & 81-00263; CA A33571)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 24, 1985.

Gary M. Galton, Portland, argued the cause for petitioner. With him on the brief were Jill Backes, and Galton, Popick & Scott, Portland.

Larry Dawson, Portland, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Claimant seeks review of an order of the Workers' Compensation Board denying his request for an additional award of attorney fees against Farm Bureau Insurance Co. We affirm.

This case is before us for the second time. The facts are set forth in our previous opinion, *Petshow v. Ptld. Bottling Co.*, 62 Or App 614, 616-17, 661 P2d 1369 (1983), *rev den* 296 Or 350 (1984):

> "Claimant injured his left hand on September 7, 1976, while working for Portland Bottling Company. [Liberty Mutual Insurance Company], the insurer, accepted the claim. In October, 1977, medical treatment involved the removal of a nerve from claimant's left ankle area and grafting of the nerve into the injured hand. Claimant experienced difficulty with his leg following the nerve transplant. Another surgery was performed on the leg in December, 1979, but some problems persisted. On July 17, 1980, while working for a new employer, J. D. Petshow (claimant's brother), claimant was helping herd a bull when his Achilles tendon ruptured.
>
> "Claimant sought compensation from each employer on the basis that his condition was either a new injury or an aggravation of the original injury. Liberty commenced payment of temporary total disability (TTD). Farm Bureau Insurance Co. (Farm Bureau), the insurer for J. D. Petshow, did not accept or deny the claim and made no TTD payments. *See* ORS 656.262(6) (60 days to accept or deny); 656.262(4) (14 days to begin paying compensation after notice or knowledge of claim). On September 30, 1980, claimant requested a hearing concerning Farm Bureau's failure and sought compensation, penalties and attorney fees.
>
> "On November 6, 1980, Farm Bureau made its first payment for TTD or 'interim compensation' covering the period roughly from the time of the injury to that date. Farm Bureau then sought a designation pursuant to ORS 656.307 as to which insurer should pay compensation. On January 5, 1981, the Compliance Division of the Workers' Compensation Department designated Farm Bureau the 'interim' paying party and 'referred * * * the issue of responsibility, including any necessary and monetary adjustments between the parties,' to the Hearings Division of the Board. On January 9, 1981, claimant filed a request for hearing on his aggravation claim against Liberty. On January 26, Liberty denied the

> claim, and on February 26, Farm Bureau denied the new injury claim.
>
> "The referee found claimant's condition to be an aggravation for which Liberty was responsible. He also found that Farm Bureau had neglected its statutory duty to pay 'interim compensation,' ordered that Farm Bureau pay compensation for the period of July 17 through December 26, 1980, and assessed a 25 percent penalty. He ordered that Liberty receive an offset of the amount of TTD that Liberty had paid between July 17 and December 26 against any eventual award of permanent partial disability. On July 17, 1981, the referee issued an order on reconsideration declaring that he had jurisdiction to order the TTD offset against claimant's future disability award. On review, the Board affirmed the referee. (Footnote omitted.)

There are additional facts pertinent to the issue of attorney fees. At the hearing, claimant requested an award of attorney fees from Farm Bureau on the basis of (1) numerous improprieties in its processing of the claim, (2) its failure to pay medical expenses, (3) its unreasonable denial of the claim and (4) its unreasonable resistance and delay in the payment of compensation. He also sought attorney fees from Liberty

for its (1) failure to pay interim compensation, (2) failure to pay medical expenses and (3) unreasonable resistance, delay and refusal to pay compensation. The reimbursement for medical expenses claimant sought concerned his purchase of a pair of special shoes and travel expenses related to medical treatment.

The referee awarded claimant attorney fees of $250 against Farm Bureau "for litigation of this claim." He ordered Liberty to reimburse claimant for the shoes but not for the travel expenses. He also found that claimant was entitled to attorney fees from Liberty:

> "Claimant's attorney is entitled to payment of attorney's fees on the respective denials issued by the carriers. I specifically conclude that claimant's role in this matter was not passive as might be implied in a .307 proceeding. Rather the nature of Liberty Mutual's denial raised the necessity for claimant and his attorney to take an active role in these proceedings which in fact was done. Therefore, I assess attorney's fees against Liberty Mutual Insurance Co. on the aggravation claim."

Liberty had stated in its denial that it was denying claimant's aggravation claim on the ground that he had sustained a new injury and had also stated that it had made an overpayment which it would seek to recoup. The referee ordered Liberty to pay $1,200 attorney fees for litigating the issues of "the denial and reimbursement for shoe expense and the question of temporary total benefits."

Claimant then petitioned for reconsideration, arguing that the referee lacked jurisdiction to allow Liberty to offset its overpayment against any future award of permanent partial disability and that he had erred in not ordering Liberty to reimburse him for his travel expenses. On reconsideration, the referee decided that he did have jurisdiction to order the offset. He also changed his earlier opinion and ordered that Liberty reimburse claimant for his medically related travel expenses. He awarded claimant an additional $200 in attorney fees for overcoming Liberty's denial of his claim for travel expenses.

Claimant petitioned for review by the Board, raising the issues of the offset and additional attorney fees from Farm Bureau. Liberty cross-petitioned and raised the issues of responsibility and the amount of attorney fees assessed against it. The Board affirmed the referee's opinion in all respects.

Claimant's petition for review by this court resulted in our decision in *Petshow v. Ptld. Bottling Co., supra.* We held that the referee and the Board had jurisdiction to order the offset and that the offset was proper. On Liberty's cross-petition for review, we held that claimant had suffered a new injury rather than an aggravation and that Farm Bureau was therefore the responsible insurer. In the light of that determination, we reversed the award of attorney fees against Liberty and remanded the case to the Board.

On remand, the parties litigated only the issue of attorney fees. Claimant requested that the Board order Farm Bureau to pay the $1,400 in attorney fees that Liberty for-

merly had been ordered to pay. Liberty conceded that it should pay the $200 fee awarded on the issue of travel expenses. Farm Bureau had already paid the $250 fee it had been ordered to pay as a result of its improper processing of claimant's claim. Thus, the question was whether claimant was entitled to

attorney fees against Farm Bureau for litigating the issue of responsibility between Farm Bureau and Liberty. The Board decided that he was not so entitled. Citing OAR 438-47-090(1),[1] the Board decided that no additional fees were justified, because claimant's attorney had not "actively and meaningfully participated" at the hearing on the responsibility issue. It cited earlier decisions in which it had interpreted that rule as requiring that the attorney take a position adverse to one of the potentially responsible insurers. *See, e.g., Robert Heilman,* 34 Van Natta 1487 (1982). Finding that claimant had not taken a position as to which of the two insurers was responsible, the Board concluded that he was not entitled to any additional attorney fees. Claimant seeks review of that decision.

We agree with the Board that claimant is not entitled to additional attorney fees from Farm Bureau. However, our analysis differs from the Board's.

An award of attorney fees in a workers' compensation case is proper only when expressly authorized by statute. *Forney v. Western States Plywood,* 297 Or 628, 686 P2d 1027 (1984); *Brown v. EBI Companies,* 289 Or 905, 618 P2d 959 (1980); *Uris v. Compensation Department,* 247 Or 420, 427 P2d 753, 430 P2d 861 (1967). Claimant contends that he is entitled to attorney fees under ORS 656.386(1), because he finally prevailed on Farm Bureau's denied claim. ORS 656.386 provides:

> "(1) In all cases involving accidental injuries where a claimant finally prevails in an appeal to the Court of Appeals or petition for review to the Supreme Court from an order or decision denying the claim for compensation, the court shall

> allow a reasonable attorney fee to the claimant's attorney. In such rejected cases where the claimant prevails finally in a hearing before the referee or in a review by the board itself, then the referee or board shall allow a reasonable attorney fee.
> * * *
>
> "(2) In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.382."

Ordinarily, a proceeding pursuant to ORS 656.307 to determine which of two or more insurers is responsible for an

[1] OAR 438-47-090(1) provides:

"(1) If a claimant hires an attorney after being advised by both carriers that:

"(a) the sole issue before the referee at a hearing is which of two carriers is responsible for the payment of compensation to claimant; and

"(b) an order has been issued pursuant to the provisions of ORS 656.307 designating one as the paying agent pending determination of the responsible party; and "(c) the dispute is solely between them, that there is no question of the compensability of claimant's injury or illness, that any involvement of claimant would be solely as a witness, and that therefore it is not necessary that claimant be represented by an attorney,

"then the attorney will receive no fee unless he/she actively and meaningfully participates at the hearing in behalf and in defense of claimant's rights."

otherwise compensable injury does not involve a denied claim entitling the claimant to attorney fees. *Nat. Farm. Ins. v. Scofield,* 56 Or App 130, 132, 641 P2d 1131 (1982). The rationale for an award of attorney fees is to compensate the claimant partially for the expense of obtaining compensation, *Bentley v. SAIF,* 38 Or App 473, 481-82, 590 P2d 746 (1979), especially when the claimant must overcome the insurer's wrongful denial of compensability. That rationale does not apply in the simple ".307 hearing," when the insurers concede that the claim is compensable. There is no question but that the claimant will receive compensation; the only issue is which insurer will pay. Although the claimant is a necessary party, he may elect to be, and usually is, merely a nominal party. *See* ORS 656.307(3). Unless the claimant takes a position concerning which of the insurers is responsible and actively litigates that point, his role in the hearing is merely that of a witness. An award of attorney fees in such a case would generally be inappropriate.

However, as this case demonstrates, not all .307 hearings are so simple. In appropriate situations, a claimant may be entitled to attorney fees for partcipation in such a hearing. For example, in *Hanna v. McGrew Bros. Sawmill,* 44 Or App 189, 605 P2d 724, *modified* 45 Or App 757, 609 P2d 422 (1980), we upheld an award of attorney fees under ORS 656.386(1) when the claimant was required to appear at the hearing to contest the insurer's contention that his claim was not enforceable, because he had not appealed that insurer's denial. Similarly, in *Nat. Farm. Ins. v. Scofield, supra,* we upheld a fee award under ORS 656.382(2),[2] when an insurer contended

that the claimant's claim was barred by his failure to file it timely or because he had not proven a compensable aggravation. In neither case was the claimant a nominal party. In both cases, an insurer took a position which threatened the claimant's right to compensation. An award of attorney fees was appropriate in both cases, because the claimants were required to appear to protect their rights to compensation.

The hearing in the instant case cannot accurately be described as a simple ORS 656.307 proceeding. Nevertheless, claimant is not entitled to additional attorney fees from Farm Bureau. Initially, the hearing was set to resolve the issues of responsibility and Liberty's right to recoup its overpayment. However, claimant requested that the issues surrounding the processing of his claim by both insurers be heard at the same time. Thus, responsibility was not the sole issue. The parties also litigated the issues of Liberty's right to recoup its overpayment and each insurer's improper processing of the claim. Farm Bureau has paid the fee awarded for its improper processing of the claim. The only other issue litigated with respect to Farm Bureau, for which claimant now seeks an additional fee, is the responsibility issue. However, claimant's attorney did not play a significant role in resolving that issue.

[2] ORS 656.382(2) provides:

"If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney's fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

Neither insurer contested compensability. Unlike the claimants in *Hanna* and *Scofield,* claimant was assured that he would receive compensation regardless of the outcome of the hearing. Indeed, claimant did not take a position as to which insurer was responsible. Furthermore, the transcript of the hearing reveals that the majority of his attorney's effort was directed toward the issues of Liberty's overpayment and each insurer's improper processing of the claim. Although he asked claimant some questions relevant to the responsibility issue, it was not necessary for him to do so, because the insurers' attorneys were present to develop the facts surrounding that issue.

Although it is literally true that claimant ultimately

prevailed on a denied claim, he is not entitled to attorney fees for overcoming that denial. When, as here, the insurers concede compensability and only deny the claim on the basis of responsibility, the claimant will always prevail on one of the denied claims. We doubt that the legislature intended claimants to receive attorney fees in every .307 hearing, regardless of their attorneys' efforts on the responsibility issue. We conclude that claimant's participation at the hearing with respect to the responsiblity issue was nominal and that he is therefore not entitled to any additional attorney fees against Farm Bureau under ORS 656.386(1). Instead, this is one of the "all other cases" under ORS 656.386(2) in which a claimant must pay the attorney from the award of compensation.

Because we hold that claimant is not entitled to additional attorney fees under any statute, we need not address the issue of whether the Board incorrectly applied OAR 438-47-090(1) to the facts of this case.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Daniel P. Miville, Claimant.

MIVILLE,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(83-06440; CA A33679)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 12, 1985.

Patrick L. Hadlock, Corvallis, argued the cause for petitioner. On the brief were S. David Eves and Ringo, Walton, Eves & Stuber, P.C., Corvallis.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded to determine whether claimant filed claim in Indiana and, if so, whether his condition has been finally determined compensable in that state, and for further proceedings not inconsistent with this opinion.

BUTTLER, P. J.

In this workers' compensation case, claimant seeks review of a Board order that reversed the referee's determination that his worsened back condition was the responsibility of a previous employer. On *de novo* review, we reverse and remand.

Claimant suffered a compensable back injury on November 8, 1980, while working for SAIF's insured, Good Samaritan Hospital, in Corvallis. He also suffered off-the-job injuries on May 31 and November 11, 1981, which required medical treatment. On December 11, 1981, he was awarded 5 percent unscheduled permanent partial disability. In October, 1982, he suffered a back injury while working for J. C. Penney, in Washington, for which he was compensated in Washington for an aggravation.[1] In January, 1983, he moved to Indiana and suffered two back injuries while working for a hospital. It is not clear whether he filed a claim in Indiana. In April of that year, he returned to Oregon and saw an Oregon chiropractor because of increased back pain. He sought compensation from SAIF for treatment of his condition as an aggravation of the November, 1980, injury. SAIF denied the request. The referee held that the treatment was SAIF's responsibility; the Board reversed.

The issue is whether claimant should be compensated in Oregon, by SAIF, for his present condition, which all agree has worsened since the 1980 injury. The Board found, and SAIF agrees, that the out-of-state injuries contributed independently to the present worsened condition, thereby relieving SAIF of liability. *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). Claimant argues that the out-of-state injuries did not independently contribute to his present disability and, therefore, his claim is for an aggravation for which the original employer is responsible.

In the alternative, claimant argues that it is irrelevant whether the out-of-state injuries independently contributed to his worsened condition, because the compensable 1980 injury was a material contributing cause of his present disability, making SAIF responsible. He relies on *Grable v.*

Weyerhaeuser Co., 291 Or 387, 631 P2d 768 (1982), in which the court held that, if a compensable on-the-job injury and a subsequent *off-the-job* injury both materially contribute to the

[1] Washington's compensation laws apparently differ from those of Oregon in this respect.

claimant's worsened condition, the employer remains responsible. Here, however, the subsequent injuries were *on the job,* even though they were beyond the jurisdiction of the Oregon workers' compensation system.

The question is how far the policy decision adopted in *Grable* goes. That policy appears to be that a worker who suffers what would ordinarily be a noncompensable off-the-job injury should not go uncompensated if an earlier compensable on-the-job injury remains a material contributing cause of the disability. If, in such a case, the compensable injury is a "material contributory cause" of the disability, the worker has established that the worsened condition is not the result of an "independent intervening" nonindustrial cause. That policy is distinct from the rule of *Smith v. Ed's Pancake House, supra,* which held that, in the case of successive injuries and successive employers, the second employer will be held responsible for a new injury that independently contributes to a disability, even if the earlier injury remains a material or major cause of the disability. The two cases would seem to be in conflict but for the fact that *Smith* involved successive on-the-job injuries while the claimant was employed by different employers. 291 Or at 401. The rule announced in *Grable* is, in a sense, analogous to the last injurious exposure rule for occupational diseases. Each is primarily a claimant's rule, because it assigns responsibility in a way that provides compensation under circumstances when it might not otherwise be available, either because of problems of proof or because the disability-causing event was not job related.

Here, if claimant's injuries had occurred on the job in Oregon, the rule in *Smith* would assign liability to the later employer if the injuries contributed independently to the disability. If, on the other hand, those injuries had occurred off the job, *Grable* would apply and we would hold the first employer responsible.

The rules in *Grable* and *Smith* arose in a context in which Oregon has "control" over the assignment of responsibility either to a subsequent employer, if there is one, regardless of whether that employer is a noncomplying one, or

to the original employer, if there is not. Oregon can apply its own rules consistently between Oregon employers. Here, however, Oregon does not have that control, because three of the later injuries occurred out of the state. If, for example, we were to hold here that the Indiana incidents were new injuries, rather than aggravations of the Oregon injury, and were to apply the rule in *Smith,* claimant would have no means of enforcing that result against the Indiana employer. Similarly, if claimant had filed a claim in Indiana, and Indiana had determined that the incidents were aggravations of the Oregon injury and, unlike Washington, had a rule which required the first employer to remain responsible, claimant would have no means of enforcing that result against the Oregon employer. In either case, he would remain uncompensated for injuries which were clearly work related. That would be contrary to the policy of the workers' compensation system.

For this reason, we conclude that the rationale of *Grable* should apply when a claimant has suffered an on-the-job injury in another state for which he has claimed, but has

not been awarded, compensation, and the medical evidence is that the original Oregon injury materially contributed to the claimant's present disability, even though the out-of-state injuries contributed independently to the present disability.

Here, the medical evidence shows that claimant would not be in his present condition if it were not for the three out-of-state injuries, that they were discrete events and that they contributed independently to his present condition. The medical evidence also shows, and all agree, that the November, 1980, Oregon injury materially contributed to his present disability. Accordingly, SAIF remains responsible, if claimant has filed a claim in Indiana that has resulted in a final determination that his condition is not compensable in that state. If claimant has not filed a claim in Indiana, or if he has done so and has been awarded compensation, SAIF is not responsible for claimant's present condition.

Reversed and remanded to determine whether claimant has filed a claim in Indiana and, if so, whether his condition has been finally determined to be compensable in that state, and for further proceedings not inconsistent with this opinion.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Charles E. Fischer, Claimant.

FISCHER,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB No. 83-06763; CA A 33877)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 31, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, 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, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Affirmed.

WARREN, J.

Claimant injured his wrist at work in April, 1982. After returning to work, he injured his foot on July 27, 1982. A

determination order on January 5, 1983, closed the wrist claim with an award of temporary total disability (TTD) from April 26 to October 21, 1982. A determination order on July 11, 1983, closed the foot claim with an award of TTD from July 29, 1982, to June 10, 1983, "less amount paid in [the wrist claim]." This appeal concerns only the foot claim.

SAIF paid TTD on the foot claim, in the amount of 100% of the "average weekly wage," ORS 656.211, from July 29 to August 11, 1982. SAIF also paid TTD on the wrist claim from August 11 to October 22, 1982. SAIF resumed paying TTD on the foot claim on October 22, 1982, and made payments through July 13, 1983.

Claimant challenged the July 11, 1983, determination order on the foot claim, and the parties raised three issues. First, claimant sought an award of permanent partial disability, which the referee granted. Second, SAIF argued that it was entitled to an offset for the overpayment of TTD beyond the time when claimant was determined to be medically stationary; the referee agreed that SAIF was entitled to an offset. The third issue was the propriety of SAIF's suspending payment of TTD on the foot claim for the period from August 11 to October 22, 1982, during which it paid TTD on the wrist claim. The referee characterized this as a "crossover offset" and ruled that it was improper for SAIF to refuse to pay TTD on the foot claim for the period during which it was also paying TTD on the wrist claim. He ordered SAIF to reimburse claimant for the "offset" it had made for TTD due on the foot claim for July 29 to October 21, 1982.

SAIF appealed the referee's order to the Board, challenging only his third ruling, which the Board characterized as having "the effect of requiring separate temporary total disability payments for overlapping periods of time loss caused by separate injuries." By order dated October 16, 1984, the Board reversed that part of the referee's order, ruling that claimant is not entitled to receive or retain double benefits for the period between July 29 and October 21, 1982. On October 31, 1984, the Board issued an order granting SAIF's request for reconsideration and modifying the October 16 order to

apply only to the period between August 11 and October 21, 1982.

SAIF requested further reconsideration on November 6, 1984. On November 7, claimant filed a petition for judicial review of the October 16 and 31 orders. On November 28, the Board issued an order granting SAIF's second request for reconsideration, but adhered to its former orders. Claimant did not file an amended petition for judicial review.

SAIF first contends that this court lacks jurisdiction to review the orders in this case, because claimant did not file an amended petition for review within 30 days after the November 28 order. ORS 656.295(8) provides that the Board's order is final unless a party petitions for judicial review within 30 days of mailing the order to the parties. ORS 656.298(1) reiterates that review must be sought within 30 days. The November 28 order notified the parties of this requirement.

ORS 183.482(6)[1] provides that, if an agency withdraws an order for reconsideration after a petition for judicial review is filed, a petitioner may file an amended petition for review of the revised order if the petitioner is dissatisfied with the agency action after reconsideration. This statute applies to the Workers' Compensation Department, because its application is not excluded by ORS 183.315(1). *Tektronix Corp. v. Twist,* 62 Or App 602, 661 P2d 562, *rev den* 295 Or 259 (1983).

In *Knapp v. Employment Division,* 67 Or App 231, 677 P2d 738 (1984), the agency withdrew its order for reconsideration while a petition for review was pending in this court and issued an order on reconsideration which affirmed the earlier decision. We dismissed the petition for judicial review, because the petitioner did not file an amended petition for review after the agency issued the order on reconsideration. In

this case, the Board did not expressly withdraw the October 31 order nor did the Board's order granting SAIF's request for reconsideration have the effect of impliedly withdrawing its previous order, because it did not modify the prior order in any way. Because the Board neither expressly withdrew the October 31 order nor modified it, we hold that ORS 183.482(6) did not require claimant to file an amended petition for review after the November 28 order. We have jurisdiction of the case.

On appeal, claimant argues that the Board erred in ordering " 'cross-over offsets' of overpaid compensation on one claim from another claim involving a totally different injury." He also argues that SAIF could not unilaterally decide to "allocate" temporary total disability between two separate claims, relying on *Forney v. Western States Plywood,* 66 Or App 155, 672 P2d 1376 (1983), *aff'd* 297 Or 628, 686 P2d 1027 (1984). He claims that SAIF should have paid TTD on both claims and then sought to recover the overpayment of double benefits as an offset against future permanent partial disability payments.

Claimant relies on *former* OAR 436-54-320[2] and cases decided under it. The rule provided, in pertinent part:

> "Insurers and self-insured employers may recover overpayment of benefits paid to a worker on an accepted claim from benefits which are or may become payable on *that* claim." (Emphasis supplied.)

Cascade Steel Rolling Mills v. Madril, 62 Or App 598, 661 P2d 564, *rev den* 295 Or 541 (1983), applied the rule in holding that previous overpayments on a prior claim could not be offset in a later claim. *Forney v. Western States Plywood, supra,* also

[1] ORS 183.482(6) provides:

> "At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, it shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, he may file an amended petition for review and the review shall proceed upon the revised order."

[2] This version of OAR 436-54-320 was effective through April 3, 1984, and would apply to SAIF's action in this case. The rule was changed effective April 4, 1984. Its successor is currently codified at OAR 436-60-170.

interpreted the rule and statutory law to hold that an employer or insurer cannot unilaterally recover an overpayment as an offset.

The rule and those cases are not relevant to this case because SAIF, by suspending payments of TTD on the foot claim for the period which overlapped payments of TTD in the wrist claim, *avoided* making an overpayment in the foot

claim. It did not seek to offset an overpayment for the overlapping period. Rather, it properly paid all the compensation due under ORS 656.210(1):

> "When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, *but not more than 100 percent of the average weekly wage* * * *." (Emphasis supplied).

Claimant is not entitled to receive double the statutory sum for the same period of time loss because he has two separate disabling injuries. *See Petshow v. Ptld. Bottling Co.*, 62 Or App 614, 661 P2d 1369 (1983), *rev den* 296 Or 350 (1984). Even though it suspended payments on the foot claim during the period in which it was paying TTD on the wrist claim, SAIF compensated claimant for 100% of his time loss. The workers' compensation law does not require greater compensation, nor does it prohibit SAIF from arranging payments as it did.

Affirmed.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Candelario A. Reynaga, Claimant.

REYNAGA,
Petitioner on Review,

v.

NORTHWEST FARM BUREAU,
Respondent on Review.

(WCB 82-10833; CA A31941; SC S31955)

In Banc

On review from the Court of Appeals.*

Argued and submitted October 1, 1985.

Kenneth D. Peterson, Jr., Hermiston, argued the cause and filed the petition for petitioner on review.

Larry A. Dawson, Portland, argued the cause and filed the brief for respondent on review.

James L. Edmunson, Eugene, filed an amicus curiae brief on behalf of Oregon Trial Lawyers Association. With him on the brief was Malagon & Associates, Eugene.

CAMPBELL, J.

Decision reversed and remanded to the Workers' Compensation Board for further proceedings not inconsistent with this opinion.

* On appeal from Workers' Compensation Board Order date May 18, 1984. 74 Or App 151, 704 P2d 552 (1985).

CAMPBELL, J.

The issue in this case is whether ORS 656.245, a provision of Oregon's Workers' Compensation Laws, permits a compensation insurer to deny payment for treatment by all out-of-state chiropractors. We hold that it does not.

Claimant, Candelario Reynaga, suffered a compensable injury to his shoulder, neck and back in 1980 and was awarded permanent partial disability. As a migrant farm laborer, he travels from one location to another and has been treated by chiropractic physicians in Oregon, Washington and California. In October 1982, the insurer, Northwest Farm Bureau Insurance Co., wrote claimant stating that payments for any further out-of-state medical care would be made only if the care were provided by an orthopedist.[1] When claimant

[1] The insurer's letter did not provide a reason for denying payment for treatment by all out-of-state chiropractors.

In its brief in the Court of Appeals, the insurer asserted that its letter did not deny all chiropractic services, but indicated only that the insurer would only pay for an orthopedist. The insurer argues the claimant could have selected a "chiropractic orthopedist." Even under insurer's line of reasoning, however, claimant was denied services from an entire health care area since he was denied services of all non-orthopedic chiropractors.

nevertheless obtained treatment by a California chiropractor, the insurer refused to pay the bill. Claimant has also been examined by an orthopedist at the insurer's request, but prefers to be treated by a chiropractor.

A hearings officer affirmed the insurer's denial of payment. The Workers' Compensation Board affirmed and the Court of Appeals affirmed without opinion. 74 Or App 151, 704 P2d 552 (1985).

In affirming the insurer's denial of payment, the hearings officer and the Board relied on *Rivers v. SAIF*, 45 Or App1105, 610 P2d 288 (1980), which presented a similar factual situation. In *Rivers*, the insurer, the State Accident Insurance Fund, informed the claimant that chiropractic treatment being provided in Washington would not be covered and insisted that any further medical care be by a medical doctor, preferably an orthopedist.

The applicable statute in this case, ORS 656.245,

identical in relevant part to that in force at the time *Rivers* was decided,[2] provides:

> "(1) For every compensable injury, *the insurer or the self-insured employer shall cause to be provided* medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. * * *. The duty to provide such medical services continues for the life of the worker".
>
> "* * * * *.
>
> "(3) The worker may choose an attending doctor or physician *within the State of Oregon.* The worker may choose the initial attending physician and may subsequently change attending physicians four times without approval from the director * * *." [Emphasis added.]

According to the Court of Appeals in *Rivers*, the statute limits workers' choices of out-of-state doctors although it "in no way diminishes their right to receive medical care * * * wherever they are." 45 Or App at 1108. The court ruled that: "By specifically giving workers a choice of doctors within the state of Oregon, the legislature withheld the choice outside the state." 45 Or App at 1108. The court asserted that the distinction was rational because the Workers' Compensation Board can only subpoena doctors who are within its jurisdiction. A doctor who resides in another state cannot be compelled to travel to Oregon to testify in determining a claim's compensability and the degree of the worker's disability.

The asserted state interest in guaranteeing full cooperation of doctors may have some merit, although it is not mentioned in the statute or legislative history. That interest, however, does not provide a satisfactory rationale for a rule excluding an entire category of health service providers outside Oregon, while paying for their services when provided in the state.[3]

[2] The current subsection (3) was formerly designated subsection (2) and provided, in its entirety: "The workman may choose his own attending doctor or physician within the State of Oregon."

Any state concern for availability of reports and testimony from out-of-state medical service providers would be satisfied by granting insurers a right to veto individual doctors who have demonstrated that they are unlikely to fully cooperate with reporting requirements. There is no evidence that one entire category of out-of-state health service providers, such as chiropractors, is less likely to cooperate with reporting requirements than other entire categories.

The statutory interpretation asserted by the insurer could produce the following result in this case: The insurer must allow the claimant to select any orthopedist in Oregon or any chiropractor in Oregon. The insurer may also allow the claimant to select any orthopedist outside of Oregon, but may flatly prohibit selection of any chiropractor outside of Oregon, even if the chosen individual poses no risk of non-cooperation in providing reports and testimony.

"In the construction of a statute, the intention of the legislature is to be pursued if possible * * *." ORS 174.020. "To do so, the court may examine the language used, the statutory objective, and other evidence of the intended meaning." *State v. Parker,* 299 Or 534, 540, 704 P2d 1144 (1985), *citing Curly's Dairy Inc. v. State Dept. of Agriculture,* 244 Or 15, 21, 415 P2d 740 (1966). ORS 656.245(3) provides, in relevant part, that: "The worker may choose an attending doctor or physician within the State of Oregon." On the question of whether a worker may also choose a physician outside the state, the statute is completely silent. This court must construe that silence.

The inclusion of the words "within the State of Oregon" in ORS 656.245(3) suggests an intention to differentiate between in-state and out-of-state physicians insofar as the worker's freedom of choice is concerned. The exact nature of such differentiation, however, is not clear. The question before this court is whether the legislature intended to imply that insurers were to have control over the choice of individual out-of-state doctors or whether they also have control over the choice of medical specialty.

Neither legislative history nor prior caselaw provides

useful guidance on the issue presented in this case. ORS 656.245 was added during the major revision of the Workers' Compensation Act in 1965. Although the subsection allowing a worker the right to select a physician in Oregon was new, it received no significant discussion by the legislators.[4]

This court has considered a similar issue only once, in 1922. *Smith v. State Industrial Acc. Com.,* 104 Or 640, 208 P 746 (1922).[5] That decision, however, involved a section of a

predecessor statute at a time when Workers' Compensation was structured differently from the current system and, therefore, is not instructive in the case at bar.[6]

[3] A worker may choose a chiropractor within Oregon. ORS 656.245(3) provides in part that "the worker may choose an attending doctor or physician within the State of Oregon." OAR 436-10-050(1) provides that: "physicians licensed by * * * the Board of Chiropractic Examiners * * * may be designated as attending physicians."

ORS 656.245(1) requires insurers to provide reasonable medical services without regard to the injured worker's geographic location. According to the statute, "medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services." Although the statutory list does not mention chiropractors, there is no suggestion that the list was meant to be exclusive. In fact, chiropractic services have been included among the services afforded a workers' compensation claimant. *See Orman v. SAIF,* 68 Or App 260, 680 P2d 1024 (1984); *Milbradt v. SAIF,* 62 Or App 530, 661 P2d 584 (1983); *Wetzel v. Goodwin Brothers,* 50 Or App 101, 622 P2d 750 (1981). In addition, rules promulgated by the Workers' Compensation Department spe-

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[4] Only two references in the legislative history of the subsection relate to choice of physician.

(1) An unidentified legislator noted in addressing the Senate Labor and Industries Committee that:

> "Section 23 [proposed ORS 656.245] statutorily gives the workman the freedom of choice of doctor and spells out medical services. I don't think there's any real issue on that one and it's not a monetary benefit so it's not a problem area." Tape recording, Senate Labor and Industries Committee, February 22, 1965, Side I at 127.

(2) An exchange between Senator Willner and Dr. Forrest Rieke who testified to the Senate Labor and Industries Committee on March 11, 1965:

> "*Senator Willner:* Suppose the workman lives in Vancouver, works in Portland, which is not infrequent, and his family physician is a practitioner in the State of Washington. Or suppose after his industrial accident he moves outside the State, why shouldn't he be allowed to choose his own attending doctor or physician wherever that attending doctor or physician is?
>
> "*Doctor Rieke:* I didn't write that particular phraseology. I think I understand why it's worded as it is. Within the State of Oregon is not entirely just local bias. It presents a problem if an injured workman goes to visit the relatives in Minnesota and never comes back, you completely lose track of him. There is an attempt made, and I think with merit, to suggest to people who have injuries that they either not leave the State without notifying the insurance carrier or the Accident Commission, Compensation Board, the Department, or if they do that they try to get some consultative arrangements as to where they're going to take care of them.
>
> "Now across the State lines, the thing has not been a problem simply because everybody sort of ignores the State line. The doctor over in White Salmon takes care of the fellow in Hood River and vice versa.
>
> "*Senator Willner:* The law is no problem because nobody follows it.
>
> "*Doctor Rieke:* Right."
>
> Tape recording, Senate Labor and Industries Committee, March 11, 1965, Side I at 300.

The paucity of legislative history of ORS 656.245 relating to choice of physician is remarkable in light of the substantial controversy on the subject in some other states. *See* Comment *Initial Choice of Physician Under Workmen's Compensation: Is California Ripe for the Panel Approach?* 8 USFL Rev 149 (1973).

[5] *In Smith,* this court concluded that the State Industrial Accident Commission had the authority to select the physician. 104 Or at 649. That conclusion, however, was based on a statute enacted in 1913 which gave the Commission the authority "to provide, under uniform rules and regulations, first aid * * * medical and surgical attendance * * * and to contract therefor in its discretion * * *." Or Laws 1913, ch 112, sm23. In addition, the court's opinion was largely grounded on a paternalistic concern for both the worker's health and the cost of treatment:

> "[I]gnorant workmen, if allowed to select at will a surgeon to attend them, might fall into the clutches if unskilled quacks whose ministrations would prolong their disability and thereby inflict unnecessary suffering upon them and an increased financial burden upon the compensation fund." 104 at 649.

[6] Under the legislation in force in 1922, the State Industrial Accident Commission operated the State Fund and administered the entire law. Its functions included insurance, claims, hearings, safety and overall administration. Skelton, *Workmen's Compensation in Oregon,* Supplemental Studies for the National Commission on State Workmen's Compensation Laws, Vol III (1973). In 1965, the legislature abolished the State Industrial Accident Commission and created two new agencies — the Workers' Compensation Board and the State Compensation Department (now the State Accident Insurance Fund Corporation).

cifically include chiropractic services within the definition of medical services.[7] OAR 436-10-005(16).

The insurer does not claim that chiropractic services are not encompassed by the term "medical services," but rather contends that ORS 656.245(1) only obliges the insurer to provide medical services required by the nature of the

injury. The provision of all medical services, whether in-state or out, is tempered by this language, but does not explain a differentiation in available treatments along state lines.

The insurer further argues that the statute does not specify that a *claimant* has a right to dictate the field of health care provider. This observation is correct, but it is equally true that nothing in the statute specifies that the *insurer* has the right to dictate the health field. The statute merely states that "for every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services * * *."[8] ORS 565.245(1).

The Workers' Compensation Act is remedial in character and should be liberally construed in favor of the injured worker, although, of course, this court cannot depart from the language of the statute. *Pruett v. Lininger*, 224 Or 614, 625, 356 P2d 547 (1960). The language of ORS 656.245 does not compel the interpretation proposed by the insurer, that it can exclude an entire category of health service providers located outside Oregon while paying for the same health service when provided in Oregon. We interpret ORS 656.245 as not denying the worker a choice of treatments and hold that a compensation insurer may not deny an entire category of otherwise reasonable out-of-state medical services. Thus, an insurer may not deny payment for treatment by all out-of-state chiropractors if that treatment, as specified in ORS 656.245, is for "conditions resulting from the injury * * * as the nature of the injury or the process of recovery requires."

Claimant further argues that if ORS 656.245 allows an insurer to unilaterally deny payment for entire classes of medical services to out-of-state claimants while granting free

[7] OAR 436-10-005(16) provides:

" 'Medical Service' means any medical, surgical, chiropractic, dental, hospital, nursing, ambulance, or other related services; also any drugs, medicines, crutch, prosthesis, brace, support or physical restorative device."

[8] Workers' compensation statutes in many states do not specify who is to choose the physician. Like ORS 656.245(1), the statutes merely specify that all medical care be either "provided," "rendered," "furnished," or "paid for" by the employer. The courts have construed these words to mean employer choice in some states, *e.g.*, *Benson v. Coca Cola Co.*, 120 NJ Super 60, 293 A2d 395 (1972), and employee choice in others, *e.g.*, *Kinsey v. Travelers Ins. Co.*, Inc., 402 So2d 226 (La App 1981).

In *Kinsey*, the Lousiana court construed a statue, similar to ORS 656.245, which provided in part that "the employer shall furnish all necessary medical, surgical and hospital services * * *." The statute was silent on the issue of who had the right to choose the doctor. The court concluded that the employee should have the right because success of treatment may depend upon the patient's confidence in the physician chosen.

Thus, the fact that ORS 656.245(1) is silent regarding choice of physician does not necessarily indicate, as the insurer argues, that the insurer's out-of-state choice is limited only by the obligation of providing medical services such as are required by the nature of the injury or the process of the recovery.

choice of medical care to residents of Oregon, then the statute is unconstitutional. "It is, of course, a commonplace that statutes will not be construed to violate constitutional prohibitions unless no other construction is possible." *State v. Smyth*, 286 Or 293, 296, 593 P2d 1166 (1979). In this case, the constitutional issues, to the extent there are any, *see State v. Clark*, 291 Or 231, 240-41, 630 P2d 810 (1981), need not be reached. The statute itself provides an adequate basis for our decision.

This case is reversed and remanded to the Workers' Compensation Board for further proceedings not inconsistent with this opinion.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Betty L. Williams, Claimant.

WILLIAMS,
Petitioner on Review,

v.

GATES, McDONALD & COMPANY,
Respondent on Review.

(WCB 80-10620; CA A32940; SC S31896)

In Banc

On review from the Court of Appeals.*

Argued and submitted October 1, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner on review. With him on the petition was Malagon & Associates, Eugene.

Cynthia S. C. Shanahan, Portland, argued the cause for respondent on review. With her on the response were Schwabe, Williamson, Wyatt, Moore & Roberts, and William H. Replogle, Portland.

Kevin L. Mannix, Portland, filed an Amicus Curiae brief on behalf of Association of Workers' Compensation Defense Attorneys. With him on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Robert K. Udziela, Portland, filed an Amicus Curiae brief on behalf of Oregon Trial Lawyers Association. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

ROBERTS, J.

The decision of the Court of Appeals is reversed. The case is remanded to the Workers' Compensation Board.

* Judicial Review from Workers' Compensation Board. 73 Or App 638, 700 P2d 270 (1985).

ROBERTS, J.

Claimant seeks review of a Court of Appeals' decision holding that the long-term consequences resulting from an operation that was required as a preliminary procedure to the operation necessitated by the industrial injury were not compensable. We hold that the consequences are compensable, and therefore, reverse.

The following is taken from the Court of Appeals opinion:

> "Claimant was injured in March, 1978, while working for Owens Illinois Corporation in a job which required repetitive lifting. She saw a series of physicians after the injury. They prescribed conservative treatment, but she continued to have severe pain in her right shoulder and arm. She was ultimately referred to Dr. Misko, a neurosurgeon, who recommended a discectomy and spinal fusion at the C5-6 level. In his preoperative examination he noticed a bruit[1] in her right carotid artery. He also learned that she had had an incident of amaurosis, or temporary blindness, in her right eye. He attributed that incident to the carotid artery defect. It would be necessary to retract, or move, the right carotid artery in the course of the spinal fusion surgery. The condition which Misko found indicated that there might be unreasonable dangers in doing so with the artery in its current condition. Misko therefore first performed a right carotid endarterectomy, removing the plaque buildup from inside the artery, in September, 1979. He then performed the discectomy and fusion in October, 1979.
>
> "Soon after the endarterectomy, claimant began noticing a loss in her short-term memory; she also experienced other symptoms, which were ultimately diagnosed as mild dementia.[2] The medical evidence on the cause of claimant's mental problems is not wholly satisfactory. We conclude, however, on the basis of our review of the evidence, that the most probable explanation is that claimant suffered either a mild stroke or a temporary loss of oxygen to her brain in the course of or as a result of the endarterectomy. We therefore find that claimant's memory loss and dementia were caused by that operation.

> "[2]These problems do not clearly appear in claimant's medical and psychological records until about two years after the operation. However, she and her family testified at the hearing that she first exhibited the symptoms soon after the endarterectomy. The referee accepted that testimony as credible; the Board did not reverse those findings. We have no basis for disagreeing with the referee on this point." *Williams v. Gates, McDonald & Co.*, 73 Or App 638, 640-41, 700 P2d 270 (1985).

In summary, the Court of Appeals found that the endarterectomy was necessarily performed to permit the discectomy, which all parties agree was necessary to treat the injury, and that the endarterectomy caused the "mental problems" identified in the Court of Appeals' decision. We accept those findings. *Wheeler v. Boise Cascade*, 298 Or 452, 457, 693

"[1]A bruit is an unusual sound caused by the turbulent flow of blood through the artery at a point where it is constricted.

P2d 632 (1984); *Sahnow v. Fireman's Fund Ins. Co.*, 260 Or 564, 491 P2d 997 (1971).

The Court of Appeals then found that there was no causal connection between the compensable injury and the endarterectomy, apparently because of a statement by Dr. Misko that "it is also true that, independent of her industrial injury, this patient should have had a right carotid endarterectomy." 73 Or App at 641. This, said the Court of Appeals, showed that there was "only a purely fortuitous chronological connection" between the industrial injury and the need for an endarterectomy. *Id.* That court then affirmed the denial of the claim for compensation for disability resulting from the mental problems.

We do not question that the claimant "should" have had an endarterectomy independent of her industrial injury. That is immaterial. There is absolutely no evidence in this record that claimant *would* have submitted to that operation then or ever, had it not been a necessary prelude to the required discectomy. There is no evidence to contradict Dr. Misko's original report that both operative procedures were integral parts of the planned surgery to claimant's neck; without the endarterectomy the discectomy could not take place.

Both operations were required for total medical treatment. Treatment was necessitated by the injury. The insurer is liable for the consequences flowing from the injury and treatment, even where such consequences are damaging rather than curative. *McDonough v. National Hosp. Assn.* 134 Or 451, 461, 294 P 351 (1930).[1]

For these reasons the decision of the Court of Appeals is reversed and the case is remanded to the Workers' Compensation Board for further proceedings consistent with this opinion.

[1] The record in this case does not indicate the presence of malpractice and we do not mean to imply that there may have been malpractice.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
David F. Barrett, Claimant.

BARRETT,
Petitioner on review,
v.

D & H DRYWALL et al,
Respondents on review.

(WCB 81-02757; CA A29349; SC S31782)

On review from the Court of Appeals.*

Argued and submitted October 1, 1985.

James L. Edmunson, of Malagon & Associates, Eugene, argued the cause for petitioner on review. On the petition was Merrill Schneider, Sandy.

Scott H. Terrall, of Meyers & Terrall, Portland, argued the cause for respondent on review.

Robert K. Udziela, of Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, filed a brief on behalf of amicus curiae Oregon Workers' Compensation Attorneys Association.

* Judicial review of order of Workers' Compensation Board. 70 Or App 123, 688 P2d 130 (1984), 73 Or App 184, 698 P2d 498 (1985).

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

JONES, J.

The Court of Appeals is reversed and the claim is remanded to the Workers' Compensation Board.

JONES, J.

Claimant contends that his preexisting asymptomatic osteoarthritis became symptomatic because of his compensable injury and, therefore, the symptoms, insofar as they produce loss of bodily function and consequent loss of earning capacity, are compensable as being "due to" his compensable injury under ORS 656.214(5). Claimant petitioned for judicial review of the order of the Workers' Compensation Board, claiming that the Board erred in failing to consider his preexisting osteoarthritis in determining the extent of his permanent disability. The Court of Appeals first reversed the Board and then, on reconsideration, affirmed the Board. 70 Or App 123, 688 P2d 130 (1984), 73 Or App 184, 698 P2d 498 (1985).

The Court of Appeals found that claimant, a 42-year-old man, had worked for 19 years as a sheetrock taper and that:

> "* * * In 1960, while [claimant] was in the service, he injured his low back in a jeep accident and has had occasional difficulties with his back since then. However, he was asymptomatic for some time before the accident in this case.
>
> "On June 5, 1980, he fell four feet from a ladder onto a concrete floor, landing on his feet and hitting his back on a brick wall. He suffered pain and sought immediate medical attention. The claim was accepted, and benefits were paid for a substantial period of time. A determination order was issued on March 4, 1981, which awarded temporary total disability and 25 percent unscheduled permanent disability. Claimant requested a hearing. On September 14, 1981, he filed an amended request for hearing alleging that his underlying arthritic condition arose out of and in the scope of his employment. On February 23, 1982, the employer denied liability for the underlying arthritic condition but continued to accept responsibility for the June 5 accident. The referee upheld the denial and, after eliminating any disability caused by the arthritis, awarded claimant an additional 10 percent unscheduled disability. The Board affirmed." 70 Or App at 125.

The Court of Appeals then found that

> "It is undisputed that claimant has an underlying degenerative intervertebral disc disease. Further, we agree with the referee's conclusion that claimant failed to establish a worsening of his underlying disease attributable to the accident. * * *" 70 Or App at 125-26.

and concluded its first opinion, holding

> "* * * that a claimant is entitled to full compensation if a preexisting condition contributes to the permanent loss of earning capacity in combination with a compensable injury, ORS 656.215(5), even if the loss of earning capacity would have been minimal but for the preexisting injury." 70 Or App at 126.

The Court of Appeals then remanded the claim to the referee to determine the claimant's total loss of earning capacity, which would include consideration of any preexisting condition contributing to the worker's present disability and claim for loss of earning capacity.

On reconsideration, the Court of Appeals held:

> "* * * In determining loss of earning capacity attributable to an industrial injury, impairments not related to the injury are not considered. This is in contrast with a determination of permanent total disability, which requires the consideration of preexisting disability. ORS 656.206(1)(a)." 73 Or App at 186 (footnote omitted).

The Court of Appeals was in error in making this statement. The oft-expressed maxim still applies: An employer takes the worker as he finds him.[1] Whether the worker suffers greater permanent partial disability (measured by loss of earning capacity) because of a preexisting condition is irrelevant in deciding the amount of loss of earning capacity caused by a new injury superimposed on a preexisting condition.

The employer relies on the rationale of *Weller v. Union Carbide*, 288 Or 27, 602 P2d 259 (1979), in its assertion that the underlying condition must be proven to be worsened in order for the referee to consider it. *Weller* was an occupational disease case and does not apply to an industrial injury claim.[2] Under the *Weller* holding, an employer must compensate a diseased worker if the worker proves by a preponderance of the evidence that "(1) his work activity and conditions (2) caused a worsening of his underlying disease (3) resulting in an increase in pain (4) to the extent that it produces disability or requires medical services." 288 Or at 35. In *Weller* we said that an occupational disease award requires proof that the underlying disease has worsened in order for a worker to establish compensability of a claim.

Weller involved a claimed gradual worsening of pain over a period of years—an occupational *disease* case as defined in ORS 656.802(1)(a). That standard is not the same standard as for occupational *injury*, defined by ORS 656.005(8)(a).

ORS 656.802(1)(a) defines an occupational disease as:

> "Any disease or infection which arises out of and in the scope of the employment, *and* to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." (Emphasis added.)

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[1] *Surratt v. Gunderson Bros.*, 259 Or 65, 74, 485 P2d 410 (1971); *Keefer v. State Ind. Acc. Commission*, 171 Or 405, 412, 135 P2d 806 (1943).

[2] We note that the Court of Appeals decision in *Cochell v. SAIF*, 59 Or App 391, 650 P2d 1088 (1982), an industrial injury case, incorrectly applied the occupational disease test of *Weller v. Union Carbide*, 288 Or 27, 602 P2d 259 (1979). *Compare Florence v. SAIF*, 55 Or App 467, 638 P2d 1161 (1982) (correctly holding that *Weller* did not apply to injury cases); *see also Harris v. Albertson's, Inc.*, 65 Or App 254, 670 P2d 1059 (1983); *Jameson v. SAIF*, 63 Or App 553, 665 P2d 379 (1983). *Weller* does state that "[f]or the purposes of this case an occupational disease is to be considered an injury under the Workers' Compensation Law (ORS 656.001 to 656.794). ORS 656.804." 288 Or at 31. An occupational disease is considered as an injury for procedural reasons. *See, e.g., Beaudry v. Winchester Plywood Co.*, 255 Or 503, 512, 469 P2d 25 (1970). We did not say that an industrial injury is compensated as an occupational disease.

[3] The Court of Appeals found that the injury had not worsened claimant's underlying osteoarthritis, and we are bound by the factual findings of the Court of Appeals. *Wheeler v. Boise Cascade*, 298 Or 452, 457, 693 P2d 632 (1984); *Weller v. Union Carbide, supra*, 288 Or at 29; *Sahnow v. Fireman's Fund Ins. Co.*, 260 Or 564, 491 P2d 997 (1971).

ORS 656.005(8)(a) defines an occupational injury as:

> "* * * [A]n accidental injury * * * arising out of and in the course of employment, requiring medical services or resulting in death; an injury is accidental if the result is an accident, whether or not due to accidental means."

The award to be made here is not for increased compensation due to worsening of the worker's underlying disease of osteoarthritis,[3] but for disability resulting from

injuries when the worker fell off a ladder, landing on his feet and hitting his back on a brick wall. The injuries were superimposed upon his preexisting condition.

ORS 656.214(5), relating to permanent partial disability, reads:

> "In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) to (4) of this section, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. The number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability. For the purpose of this subsection, the value of each degree of disability is $100."

No words in that statute prohibit the referee or the Board from considering a worker's preexisting condition. The definition of permanent total disability in ORS 656.206(1)(a)[4] that specifically includes consideration of preexisting disabilities does not justify the Court of Appeals' conclusion that permanent partial disability determinations may not include consideration of preexisting conditions or diseases. The legislature's failure to add those specific words of inclusion does not justify a negative implication that it intended to exclude consideration of a preexisting condition when the worker sustains an industrial injury resulting in permanent partial disability.[5]

The Court of Appeals is reversed and this claim is remanded to the Board to determine the extent of disability to the worker, measured by loss of earning capacity, caused by the industrial accident of June 5, 1980, taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury.

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[4] ORS 656.206(1)(a) defines "permanent total disability" to mean

> "* * * 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."

[5] In 1979, the Workers' Compensation Department's amendments to ORS 656.214(5) included the phrase "the criteria for rating of disability shall be the permanent loss of earning capacity due to the industrial injury," which was adopted in substantially the same form. Or Laws 1979, ch 839, § 27. In presenting the amendment to the legislature, the department wrote:

> "* * * Since 1971, the Supreme Court of the State of Oregon has stated that the sole criteria *[sic]* for rating unscheduled disability shall be the permanent loss of earning capacity due to the industrial injury. We believe that these criteria should be codified by amending ORS 656.214."

There is no legislative history that indicates anyone intended to eliminate consideration of a worker's preexisting condition in determining the extent of permanent partial disability.

INDEX CONTENTS

COURT CITATIONS

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

COURT CITATIONS

Court Case, Citation-----Page(s)

COURT CITATIONS

Court Case, Citation-----Page(s)

COURT CITATIONS

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

COURT CITATIONS

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

VAN NATTA CITATIONS

Name	Citation	Pages
Joyce F. Adair	35 Van Natta 203 (1982)	227
Robert L. Akins	35 Van Natta 231 (1983)	706
Claude Allen	34 Van Natta 769 (1982)	194
Juan Alonzo	37 Van Natta 57 (1985)	1160
Robert E. Alvarez	35 Van Natta 1822 (1983)	202
Patricia A. Anderson	35 Van Natta 1057 (1983)	1146
Carl W. Andrews	35 Van Natta 1685 (1983)	998
Earl W. Andrews	35 Van Natta 1582 (1983)	256
Arnold Androes	35 Van Natta 1619 (1983)	3,39,641
Juan Anfilofieff	37 Van Natta 257 (1985)	552
James B. Arndt	36 Van Natta 4 (1984)	1160
Willi Arndt	36 Van Natta 135 (1984)	1573
Kenneth E. Awmiller	34 Van Natta 1123 (1982)	1275
Dick L. Babcock	35 Van Natta 325 (1983)	1102
Erwin L. Bacon	37 Van Natta 205 (1985)	981
Warren C. Bacon	35 Van Natta 1694 (1983)	39
Anita A. Bade	36 Van Natta 1093 (1984)	501,641,937,1052
Zelda M. Bahler	33 Van Natta 478 (1981)	84,458,508,544,692,973,1600
Catherine C. Bailey	36 Van Natta 280 (1984)	1291
Elmer W. Baird	34 Van Natta 965 (1982)	30
Raymond L. Baldwin	36 Van Natta 1626 (1984)	1450
Faye L. Ballweber	36 Van Natta 303 (1984)	440,1704
Rasool Bambechi	35 Van Natta 1060 (1983)	964
Clarice Banks	34 Van Natta 689 (1982)	484,1192
John M. Barbour	36 Van Natta 304 (1984)	65
Jeffrey Barnett	36 Van Natta 1636 (1984)	115,194,218
Robert A. Barnett	31 Van Natta 172 (1981)	164,767,956,1073,1291,1468
Merle Barry	37 Van Natta 1492 (1985)	1562,1626,1692,1698
Gloria J. Bas	36 Van Natta 175 (1984)	427,1478
Martha A. Baustian	35 Van Natta 1287 (1983)	1600
Robert E. Becker	36 Van Natta 782 (1984)	501
George Bedsaul	35 Van Natta 695 (1983)	711
Dewey R. Begley	36 Van Natta 1078 (1984)	769
Ralph Bencoach	36 Van Natta 681 (1984)	1282,1628
Kevin Bethel	36 Van Natta 1060 (1984)	29,556
Roy L. Bier	35 Van Natta 1825 (1983)	276,1595
William M. Bird	36 Van Natta 1571 (1984)	3
Thomas Black	35 Van Natta 1193 (1983)	1162
Arnold C. Blondell	36 Van Natta 818 (1984)	1134
Derry D. Blouin	35 Van Natta 570 (1983)	483
Darryl W. Bodle	37 Van Natta 751 (1985)	1055
Teresa L. Bogle	37 Van Natta 615 (1985)	1522,1580
Anthony A. Bono	37 Van Natta 956 (1985)	1134,1658
Anthony A. Bono	35 Van Natta 1 (1983)	756,1564
Thomas H. Bowen	37 Van Natta 434 (1985)	729
Leighton J. Bowman	37 Van Natta 420 (1985)	1102
William V. Bredvold	35 Van Natta 1393 (1983)	1450
Neva W. Brehmer	36 Van Natta 1603 (1984)	942
Ronald R. Brenneman	36 Van Natta 965 (1982)	29
John R. Brenner	37 Van Natta 1201 (1985)	1577
Eldon Britt	31 Van Natta 141 (1981)	256
Robert W. Brown	36 Van Natta 1627 (1984)	749

VAN NATTA CITATIONS

Name	Citation	Pages
Theodore P. Brown	36 Van Natta 51 (1984)	1205
Van M. Brown	36 Van Natta 1109 (1984)	115
John B. Bruce	37 Van Natta 135 (1985)	745,927,1211,1437,1450,1671
Clyde V. Brummel	34 Van Natta 1183 (1982)	1607
Wilma Kim Buhman	34 Van Natta 252 (1982)	526,1547
William Bunce	33 Van Natta 546 (1981)	692
Royce J. Burian	37 Van Natta 1602 (1985)	1609,1621
Steve W. Burke	37 Van Natta 1018 (1985)	1055
Milton O. Burson	36 Van Natta 282 (1984)	163,415,547
Joe E. Cain	37 Van Natta 9 (1985)	1012
Pirfil Cam (Employer	34 Van Natta 676 (1982)	257
Donald T. Campbell	35 Van Natta 1622 (1983)	3,39
Robin L. Campbell	37 Van Natta 61 (1985)	75
Larry Campuzano	34 Van Natta 734 (1982)	124
Daniel J. Cannon	35 Van Natta 1181 & 1623	248,284
Edwin R. Cantrell	36 Van Natta 312 (1984)	21,65
Darrel W. Carr	36 Van Natta 16,164	42,475,522,652,923,956,1460,1553
Gracia A. Carter	36 Van Natta 1604 (1984)	743
Dwayne G. Cary	36 Van Natta 265 (1984)	694
Linda L. Cates	36 Van Natta 1696 (1984)	1042
Donald K. Chambers	37 Van Natta 148 (1985)	729
Sharon C. Chase	37 Van Natta 415 (1985)	1171,1485,1527
David Cheney	35 Van Natta 21 (1983)	62,284,427
Kenneth E. Choquette	37 Van Natta 927 (1985)	1041,1455,1589
Gary L. Clark	35 Van Natta 117 (1983)	522,715,1686
Mary Lou Claypool	34 Van Natta 943 (1982)	1018,1055,1564
Charlotte A. Clemmer	36 Van Natta 753 (1984)	1012,1614
Michael Cochran	35 Van Natta 1726 (1983)	460,1692
Leslie Colvin	36 Van Natta 315 (1984)	964
Garland Combs	37 Van Natta 756 (1985)	982,1021,1051,1229,1460,1564,1708
Ralph W. Compton	36 Van Natta 1707 (1984)	767
Ora M. Conley	34 Van Natta 1698 (1982)	767
Deborah M. Cook	37 Van Natta 542 (1985)	1251
Betty L. Counts	35 Van Natta 1356 (1983)	581
Richard N. Couturier	36 Van Natta 59 (1984)	688,1548
Thomas D. Craft	36 Van Natta 1649 (1984)	681,1242,1527
Bruce D. Craig	37 Van Natta 1143 (1985)	1699
Robert D. Craig	36 Van Natta 355 (1984)	494
Kenneth N. Crocker	36 Van Natta 1505 (1984)	3
Nancy E. Cudaback	37 Van Natta 1522 (1985)	1541
Dennis P. Cummings	36 Van Natta 260, 590	501,552,1178,1189
Goldie M. Dallman	36 Van Natta 696 (1984)	282
Bill B. Dameron	36 Van Natta 592 (1984)	90,205,460,939
John R. Daniel	34 Van Natta 1020 (1982)	639
Bonnie M. Danton	37 Van Natta 561 (1985)	1482
Dale R. David	36 Van Natta 1531 (1984)	63,1272
Ivan W. Davidson	2 Van Natta 106 (1969)	12
Lorri K. Day	36 Van Natta 1096 (1984)	1286
John R. Dayton	37 Van Natta 210 (1985)	675,1224
Patricia M. Dees	35 Van Natta 120 (1983)	1663
Mark J. Deller	37 Van Natta 558 (1985)	1052
Robert R. Delugach	37 Van Natta 63 (1985)	762,1514,1642
John Denton	34 Van Natta 1598 (1982)	39
Charlene Devereaux	36 Van Natta 911 (1984)	118,494,715
Tom E. Dobbs	35 Van Natta 1332 (1983)	605
Ozetta Domitrovich	37 Van Natta 1553 (1985)	1628

VAN NATTA CITATIONS

Name	Citation	Pages
Dale Donaldson	34 Van Natta 1154 (1982)	210,675
Douglas Dooley	35 Van Natta 125 (1983)	181,243,515,1500,1600
Vanessa Dortch	37 Van Natta 1207 (1985)	1209,1210,1211,1490,1502
Harold L. Dotson	37 Van Natta 759 (1985)	776,951,982,1674
Michael R. Douglas	37 Van Natta 65 (1985)	1450
Mary A. Downey	37 Van Natta 455 (1985)	642,1088
James R. Drew	37 Van Natta 570 (1985)	1431
Lloyd C. Dykstra	36 Van Natta 26 (1984)	425,1339
Hettie M. Eagle	33 Van Natta 671 (1981)	1649
Kenneth L. Elliott	36 Van Natta 1141 (1984)	115,218,415,446,1033
C.D. English	37 Van Natta 572 (1985)	1465,1591
Richard F. Erzen	36 Van Natta 218 (1984)	501,552
Billy J. Eubanks	35 Van Natta 131 (1983)	466,556,600,688,1030,1649
Keith K. Evans	34 Van Natta 1035 (1982)	78
Jafer M. Farzana	36 Van Natta 1630 (1984)	542
Herb Ferris	34 Van Natta 470 (1982)	1245
Charles E. Fischer	36 Van Natta 1500 (1984)	652
Michael R. Fischer	35 Van Natta 2028 (1983)	1119
James W. Foushee	36 Van Natta 901 (1984)	598,728,1002,1033,1064,1502,1589,1614 1646,1671,1689
Robert L. Fowler	36 Van Natta 1222 (1984)	1088,1189
Dennis Fraser	35 Van Natta 271 (1983)	466,526,674,748,822
Earl Freeman	34 Van Natta 1284 (1982)	1042
Gary A. Freier	34 Van Natta 543 (1982)	154,194,1527
Judy M. Friedrich	36 Van Natta 1210 (1984)	481,605,729,759
Kenneth L. Frisby	37 Van Natta 280 (1985)	1521,1692
Martin A. Fulfer	36 Van Natta 61 (1984)	1160
Adam J. Gabel	36 Van Natta 575 (1984)	205
Jill M. Gabriel	35 Van Natta 1224 (1983)	1097
Jeffrey D. Ganieany	36 Van Natta 166 (1984)	451
Ronald J. Gazely	36 Van Natta 212 (1984)	1042
Robert T. Gerlach	36 Van Natta 293 (1984)	419
Stephen P. Gese	37 Van Natta 718 (1985)	1468
Norman J. Gibson	34 Van Natta 1583 (1982)	785
Barbara A. Gilbert	36 Van Natta 1485 (1984)	1102,1460
Walter E. Ginn	36 Van Natta 1 (1984)	3,39
Tony Giuriolo	34 Van Natta 1615 (1982)	1174
William E. Glass	36 Van Natta 816 (1984)	67,76
Jesse Gomez	36 Van Natta 320 (1984)	616
Sharon M. Gow	36 Van Natta 1156 (1984)	701
John A. Graham	37 Van Natta 574 (1985)	933
Margaret L. Gray	35 Van Natta 1706 (1983)	248
Deborah L. Greene	37 Van Natta 575 (1985)	756,1021,1229,1564,1628,1708
Brad T. Gribble	37 Van Natta 92 (1985)	762,947,1105,1617
Jeanne M. Grimes	36 Van Natta 372 (1984)	641,1102
Edith Grimshaw	36 Van Natta 63 (1984)	1042
S. Grimsley-Bruni	36 Van Natta 437 (1985)	1171,1522,1547,1580
Joyce Groshong	36 Van Natta 323 (1984)	282
Ralph W. Gurwell	35 Van Natta 1310 (1983)	1169
Donald A. Hacker	37 Van Natta 706 (1985)	1028
Glenn O. Hall	35 Van Natta 275 (1983)	146,623,706
Mary Ann Hall	31 Van Natta 56 (1981)	526
Gerald I. Halle	37 Van Natta 515 (1985)	694,1500,1600
William J. Hamilton	36 Van Natta 576 (1984)	3
Richard O. Hampton	36 Van Natta 230, 626	501,552
William G. Hamrick	37 Van Natta 70 (1985)	1278

VAN NATTA CITATIONS

Name	Citation	Pages
Patrick Hannum	36 Van Natta 1680 (1984)	21,164
Donald W. Hardiman	35 Van Natta 664 (1983)	210,280,675,1521
Thomas E. Harlow	37 Van Natta 1209 (1985)	1211
Michael R. Harman	37 Van Natta 418 (1985)	739,952,1573
Bert G. Harr	35 Van Natta 1236 (1983)	73
Robert Harral	35 Van Natta 1734 (1983)	636
Thomas C. Harrell	34 Van Natta 589 (1982)	427,1478
Joel I. Harris	36 Van Natta 829 (1984)	466,593,960,1275,1663
Paul G. Harvey	37 Van Natta 75 (1985)	61
Lavona Hatmaker	34 Van Natta 950 (1982)	92
Allen W. Hays, Jr.	37 Van Natta 1179 (1985)	1192,1491
Marjorie Hearn	36 Van Natta 1300 (1984)	227
Dan W. Hedrick	37 Van Natta 1200 (1985)	1207,1209,1211
Robert Heilman	34 Van Natta 1487 (1982)	130,205,236,420,482,615,776,927,981,991, 1041,1102,1155,1178,1189,1202,1498,1696,1762
Candy J. Hess	37 Van Natta 12 (1985)	271,951,1168
Julia I. Hicks	33 Van Natta 497 (1981)	960
Russell Hildebrandt	34 Van Natta 510 (1982)	446
Daniel R. Hill	35 Van Natta 1217 (1983)	928
Jimmy B. Hill	37 Van Natta 728 (1985)	1002,1033,1589,1646,1689
Ronald G. Hill	37 Van Natta 14 (1985)	194
Bernie Hinzman	35 Van Natta 1374 (1983)	667,1059
Hiroshi Hitomi	33 Van Natta 609 (1981)	1609
Richard L. Hoffee	36 Van Natta 1878 (1984)	248,1241
Roy M. Hoke	35 Van Natta 1756 (1983)	477,1183
Barbara Holder	32 Van Natta 205 (1981)	256
Barbara Holder	34 Van Natta 5 (1982)	256
Earl P. Houston	37 Van Natta 1210 (1985)	1211
Sandra J. Hubbard	35 Van Natta 1566 (1983)	443
Treva K. Hubbard	37 Van Natta 425 (1985)	1567
David Hunter	32 Van Natta 273 (1981)	506
Garold Hurley	34 Van Natta 124 (1982)	164
Carlos Iglesias	36 Van Natta 751 (1984)	496
Richard S. Ingram	36 Van Natta 776 (1984)	668
Charles R. Jackson	37 Van Natta 1609 (1985)	1602,1607,1621
Harris E. Jackson	35 Van Natta 1674 (1983)	1431
Sandra J. Jaeger	36 Van Natta 375 (1984)	112
Florine G. Johnson	35 Van Natta 572 (1983)	692
James B. Johnson	35 Van Natta 47 (1983)	194
William B. Johnson	36 Van Natta 98 (1984)	418,739,952,1573
Billy Joe Jones	36 Van Natta 1230 (1984)	115,218,415,598,728,731,958,972,1002,1033, 1160,1253,1485,1502,1527,1614,1617,1671, 1689
Eugene R. Jones	36 Van Natta 1517 (1984)	440
Laura Jones	34 Van Natta 196 (1982)	494,1541
Violet R. Jones	35 Van Natta 1765 (1983)	1507
Harry C. Jordan	35 Van Natta 282 (1983)	146,623
Duane Kearns	35 Van Natta 772 (1983)	1229
Blanche M. Keeney	36 Van Natta 1161 (1984)	636
Donna P. Kelley	30 Van Natta 715 (1981)	183
Roxanne D. Kennison	37 Van Natta 1051 (1985)	1513
Barbara Kessler	36 Van Natta 195 (1984)	282
Dwayne A. Kester	36 Van Natta 1236 (1984)	1160
Michael J. King	33 Van Natta 636 (1981)	30
Kenneth D. Kirkwood	37 Van Natta 43 (1985)	1507
Joseph R. Klinsky	35 Van Natta 332 (1983)	1183

VAN NATTA CITATIONS

Name	Citation	Pages
Francis Knoblauch	35 Van Natta 218 (1983)	1162
Joji Kobayashi	36 Van Natta 1558 (1984)	259,453,575,583,743,1675
Henry Kochen	9 Van Natta 95 (1972)	124
John D. Kreutzer	36 Van Natta 284 (1984)	255,1100,1146,1632,1683
James R. Kunst	36 Van Natta 861 (1984)	63
James R. Kunst	36 Van Natta 238,380 etc	47
Dennis Kurovsky	35 Van Natta 58 (1983)	92
Allan Kytola	37 Van Natta 15 (1985)	434
Walter R. LaChappell	36 Van Natta 1565 (1984)	1146
Forrest A. Laffin	36 Van Natta 1239 (1984)	1108
Morris G. Langsev	37 Van Natta 581 (1985)	1576
William T. Lattion	34 Van Natta 1518 (1982)	183
Jimmy C. Lay	37 Van Natta 583 (1985)	1031,1437
Rodney R. Leech	36 Van Natta 1301 (1984)	210
LeRoy Leep	27 Van Natta 451 (1979)	1614
LeRoy E. Leep	36 Van Natta 1345 (1984)	1614
Harold A. Lester	37 Van Natta 745 (1985)	956,958,1082,1134,1155,1169,1269,1275, 1553,1614,1628,1658,1686,1710
Patricia Lewis	34 Van Natta 202 (1982)	73
Dan Lingo	35 Van Natta 1261 (1983)	1719
Raynell A. Lobato	36 Van Natta 1271 (1984)	1671
Delfina P. Lopez	37 Van Natta 164 (1985)	598,767,956,1054,1183,1258,1262,1464, 1467,1468
Jeanne M. Lorenzen	37 Van Natta 1086 (1985)	1642
John Losinger	36 Van Natta 239 (1984)	115
Curtis A. Lowden	30 Van Natta 642 (1981)	1189
Duane E. Maddy	35 Van Natta 1629 (1983)	3,39
Wesley G. Marquis	36 Van Natta 742 (1984)	740
Frank Mason	34 Van Natta 568 (1982)	255,1121,1683
Gloria L. Mathieson	36 Van Natta 1346 (1984)	1256
R.L. Matthews	35 Van Natta 52 (1983)	83
Richard W. Mays	36 Van Natta 807 (1984)	1595
William H. McCall	35 Van Natta 1200 (1983)	963
Kevin McCallister	34 Van Natta 158 (1982)	115
Ace L. McElmurray	37 Van Natta 199 (1985)	1012
Roy McFerran, Jr.	34 Van Natta 621 (1982)	692,704,839
Michael N. McGarry	34 Van Natta 1520 (1982)	974
Dena G. McGehee	36 Van Natta 904 (1984)	1155
Carol McKenna	37 Van Natta 836 (1985)	1138,1272
Ronald Meacham	36 Van Natta 386 (1984)	1632,1670
Sandra J. Meddock	36 Van Natta 1699 (1984)	1450
Jose Mendoza	8 Van Natta 97 (1972)	12
Jerry J. Meola	36 Van Natta 565 (1984)	1183
Darrell Messinger	35 Van Natta 161 (1983)	652
Vernon Michael	34 Van Natta 1212 (1982)	549,726,1270
Dan M. Miller	36 Van Natta 245 (1984)	1108
Edward O. Miller	35 Van Natta 286 (1983)	174,549,1270
Lonnie G. Miller	31 Van Natta 103 (1981)	3
Jeffrey A. Mills	36 Van Natta 714 (1984)	239
Mary G. Mischke	37 Van Natta 1155 (1985)	1437
Daniel P. Miville	36 Van Natta 1501 (1984)	645,1561,1578,1646,1671
Michael J. Mobley	37 Van Natta 963 (1985)	998
Olin D. Monks	37 Van Natta 481 (1985)	544
Edward Morgan	34 Van Natta 1590 (1982)	460,660,1291,1492,1698
Joyce A. Morgan	36 Van Natta 114 (1984)	137,645,1600
Gerald L. Morris	36 Van Natta 1684 (1984)	1431

VAN NATTA CITATIONS

Name	Citation	Pages
Martha Mount	35 Van Natta 557 (1983)	522
Patrick Murphy	37 Van Natta 667 (1985)	1069
Charles E. Murray	34 Van Natta 249 (1982)	998
Thomas Musgrove	33 Van Natta 616 (1981)	681
William C. Myers	36 Van Natta 851 (1984)	484,508,1025,1035,1171
Albert Nacoste	28 Van Natta 556 (1980)	76,671
Joseph Needham	32 Van Natta 63 (1981)	960
James E. Nelson	37 Van Natta 645 (1985)	1561
Patricia R. Nelson	34 Van Natta 1078 (1982)	720
William A. Newell	35 Van Natta 629 (1983)	612,694,1119
Robert Northey	28 Van Natta 599 (1980)	78
Robert W. Northey	35 Van Natta 1189 (1983)	78
Robert W. Northey	37 Van Natta 78 (1985)	1632
Jean F. Nylin	34 Van Natta 1193 (1982)	10
William H. O'Bryan	36 Van Natta 1272 (1984)	420,1498
John J. O'Halloran	34 Van Natta 1101 etc.	124,711
Bob G. O'Neal	37 Van Natta 255 (1985)	1683
Raymond Orsborn	34 Van Natta 574 (1982)	976
Carl R. Osborn	36 Van Natta 1648 (1984)	466
Donald O. Otnes	37 Van Natta 522 (1985)	1686
Charlie W. Owen	36 Van Natta 1216 (1984)	434
Leland D. Owens	36 Van Natta 1614 (1984)	1042
Dorotha Lorraine Oyl	34 Van Natta 1128 (1982)	1028
Eugene A. Page	36 Van Natta 288 (1984)	282
Terese L. Panecaldo	36 Van Natta 1353 (1984)	449
Thomas D. Parker	36 Van Natta 1165 (1984)	494
Jimmie Parkerson	35 Van Natta 1247 (1983)	148,481,506,572,715,755,930,936,1049
David R. Patterson	36 Van Natta 777 (1984)	1555
Clara M. Peoples	31 Van Natta 134 (1981)	649,945,1011
Jose G. Perez	36 Van Natta 720 (1984)	1507
Dock A. Perkins	31 Van Natta 180 (1981)	531,597,952,1146
Robert G. Perkins	36 Van Natta 1050 (1984)	12,271,759,951
Michael R. Petkovich	34 Van Natta 98 (1982)	121,248,706,726,937
David R. Petshow	36 Van Natta 1323 (1984)	539,982
Keith Phillips	35 Van Natta 388 (1983)	1146
Stella Phillips	35 Van Natta 1276 (1983)	1134
Richard Pick	34 Van Natta 957 (1982)	436,617
Leokadia W. Piwowar	37 Van Natta 21 (1985)	164,1591,1597
Leokadia W. Piwowar	37 Van Natta 1591 (1985)	1596
Wayland A. Porter	36 Van Natta 560 (1984)	939
Tillman E. Price	36 Van Natta 1076 (1984)	1018
Wanda M. Pruitt	36 Van Natta 1504 (1984)	1490,1502
Elfreda Puckett	8 Van Natta 158 (1972)	164
Wilfred Pultz	35 Van Natta 684 (1983)	482
Timothy J. Purdue	34 Van Natta 1175 (1982)	153
Frank Ramsey	36 Van Natta 877 (1984)	15,1558
Ollie Rater	34 Van Natta 739 (1982)	3
Michael A. Ratliff	35 Van Natta 83 (1983)	239
Bringfried Rattay	17 Van Natta 171 (1976)	164
Douglas N. Ray	36 Van Natta 1466 (1984)	124
Ronald L. Reedy	36 Van Natta 1633 (1984)	936
Richard T. Reilley	37 Van Natta 1192 (1985)	1179
Stephen L. Rennels	36 Van Natta 1360 (1984)	431
Nancy J. Rensing	37 Van Natta 3 (1985)	1207,1209,1211,1490,1502
Cleve A. Retchless	35 Van Natta 1788 (1983)	61,75,1155
Ronald A. Richard	35 Van Natta 1635 (1983)	539

VAN NATTA CITATIONS

Name	Citation	Pages
Herbert E. Richards	36 Van Natta 791 (1984)	508,561,1023,1482
Albert D. Richey	36 Van Natta 1580 (1984)	418,432,739,952,1573
Christopher M. Riddl	37 Van Natta 1224 (1985)	1242
Roger Riepe	37 Van Natta 3 (1985)	39
Carlos V. Rios	8 Van Natta 85 (1972)	12
Gleason V. Rippey	36 Van Natta 778 (1984)	148,506,729,1282
Lesley Robbins	31 Van Natta 208 (1981)	506
Frank R. Roberts	37 Van Natta 730 (1985)	1286
Peggie Roberts	15 Van Natta 76 (1975)	1086,1642
Sylvia J. Roberts	36 Van Natta 613 (1984)	482
Everett R. Robinson	36 Van Natta 1290 (1984)	526,1042
Maxine P. Robinson	35 Van Natta 1278 (1983)	50,642
Ramon Robledo	36 Van Natta 632 (1984)	639,1478
Bettie L. Rogers	36 Van Natta 615 (1984)	1512
Paul Rogers	37 Van Natta 949 (1985)	1531
John C. Roop	35 Van Natta 1652 (1983)	649,945
George N. Roth	14 Van Natta 202 (1975)	164
Wilma H. Ruff	34 Van Natta 1048 (1982)	581,1545
Thomas L. Runft	36 Van Natta 1660 (1984)	472,1578
Barbara Rupp	30 Van Natta 556 (1981)	30
Hilary Russell	37 Van Natta 470 (1985)	474
JoAnne E. Russell	35 Van Natta 821 & 1082	1028
John E. Russell	36 Van Natta 678 (1984)	164,452,1102,1171
Herbert D. Rustrum	37 Van Natta 1291 (1985)	1492,1691,1698
James L. Saleen	35 Van Natta 621 (1983)	437,1171
Zoi Sarantis	36 Van Natta 1634 (1984)	271,418,432
Laurence E. Saxton	37 Van Natta 692 (1985)	1078,1629
Lucine Schaffer	33 Van Natta 511 (1981)	1042,1171,1522,1580
Richard A. Scharbach	37 Van Natta 598 (1985)	1002,1033,1064,1202,1246,1614,1617
Anna M. Scheidemante	35 Van Natta 740 (1983)	958
Henry A. Schmidt	34 Van Natta 582 (1982)	1189,1192
Kenneth E. Schmidt	35 Van Natta 592 (1983)	263
Richard Schoennoehl	31 Van Natta 25 (1981)	92,280,547
Charles M. Schwab	36 Van Natta 333 (1984)	542
Russell D. Schweitz	37 Van Natta 1411 (1985)	1703
Paul Scott	35 Van Natta 1215 (1983)	581
Daryl W. Sell	37 Van Natta 649 (1985)	945,1071
Randal R. Senner	36 Van Natta 1126 (1984)	494,673
Lee E. Short	29 Van Natta 731 (1980)	137
Lee E. Short	37 Van Natta 137 (1985)	194
Stanley Siler	35 Van Natta 196 (1983)	1088
Steven D. Silva	37 Van Natta 1621 (1985)	1602,1609
Andrew Simer	37 Van Natta 118 (1985)	951,1242
Michael T. Simovic	36 Van Natta 1131 (1984)	1431
Irvin L. Slater	35 Van Natta 1368 (1983)	455
Robert Smeltzer	36 Van Natta 1364 (1984)	1145
Alaene R. Smith	35 Van Natta 310 (1983)	1663
Carl L. Smith	35 Van Natta 1294 (1983)	960
David A. Smith	35 Van Natta 1400 (1983)	1514
Gary L. Smith	34 Van Natta 522 (1982)	61,75
Gavin L. Smith	30 Van Natta 109 (1980)	694
Gary O. Soderstrom	35 Van Natta 1710 (1983)	1208
Michael D. Sorensen	37 Van Natta 292 (1985)	1507
Gerardo V. Soto, Jr.	35 Van Natta 1801 (1983)	497
Charles Sparkman	36 Van Natta 768 (1984)	1119
Mary J. Spontak	37 Van Natta 230 (1985)	934,1028,1030,1134

VAN NATTA CITATIONS

Name	Citation	Pages
Deloris J. Spores	37 Van Natta 1169 (1985)	1600
Guy E. Stephenson	36 Van Natta 1055 (1984)	1189
Ray A. Stern	36 Van Natta 1328 (1984)	982
Loren Stevens	34 Van Natta 448 (1982)	189
Clara E. Stewart	37 Van Natta 181 (1985)	998
Wesley Stiennon	35 Van Natta 365 (1983)	976
Warren F. Stier	36 Van Natta 334 (1984)	65,616
Thomas J. Stokes	37 Van Natta 134 (1985)	1146
Mary Stone	36 Van Natta 206 (1984)	998
Rodney C. Strauss	37 Van Natta 1212 (1985)	1431
Rodney C. Strauss	37 Van Natta 1212 (1985)	1208
Ervin M. Strickland	36 Van Natta 173 (1984)	1183
Mark T. Sturgis	37 Van Natta 715 (1985)	1052
Bill M. Sturtevant	37 Van Natta 294 (1985)	995,1275,1279
Margaret J. Sugden	35 Van Natta 1251 (1983)	1179,1192,1514
Lawrence M. Sullivan	35 Van Natta 1383 (1983)	202
Steven F. Taafe	36 Van Natta 1634 (1984)	221,715
Charles C. Tackett	31 Van Natta 61 (1981)	681
Timothy H. Tatom	36 Van Natta 1591 (1984)	1507
Charles H. Taylor	35 Van Natta 168 (1983)	1602,1609,1621
Frank L. Taylor	36 Van Natta 650 (1984)	280
Douglas E. Thomas	36 Van Natta 8 (1984)	1607
Eugene Thomas	35 Van Natta 16 (1983)	785
Raymond Thornsberry	35 Van Natta 1234 (1983)	612
Marvin Thornton	34 Van Natta 998 (1982)	39,419
J.T. Tims	36 Van Natta 340 (1984)	1632
Bonnie R. Tolladay	35 Van Natta 198 (1983)	181
Randy Townsend	37 Van Natta 58 (1985)	1247
Carolle J. Tucker	36 Van Natta 1374 (1984)	494
George M. Turner	37 Van Natta 531 (1985)	597,651,720,761,952,1632,1652
Mary K. Turner	37 Van Natta 956 (1985)	1490
Robert D. Tuttle	36 Van Natta 1687 (1984)	949
Lewis Twist	34 Van Natta 52 & 290	239,984,1663
William E. Urton	34 Van Natta 1263 (1982)	668
Donald M. Van Dinter	35 Van Natta 1574 (1983)	652
Wayne L. Vance	36 Van Natta 1254 (1984)	542
John Verhoef	37 Van Natta 1171 (1985)	1522,1580
Susan F. Vernon	37 Van Natta 1562 (1985)	1626,1692
Ramona A. Waits	36 Van Natta 1684 (1984)	1073
Waunita M. Walker	36 Van Natta 44 (1984)	1078
Beverly J. Watkins	36 Van Natta 1584 (1984)	1160
Junior L. Weatherfor	36 Van Natta 1705 (1984)	472,1456,1521
Sylvia A. Weaver	37 Van Natta 656 (1985)	1128,1700
Marion R. Webb	37 Van Natta 660 (1985)	1258,1291
Joseph F. Weckerle	35 Van Natta 1693 (1983)	667
Samuel Weimorts	32 Van Natta 198 (1981)	115,1649
Paul D. Weisenberger	37 Van Natta 1038 (1985)	1555
James C. Welch	35 Van Natta 1794 (1983)	271,1011
Theresa L. Welch	35 Van Natta 1724 (1984)	122
Barbara A. Wheeler	37 Van Natta 122 (1985)	638,927,945,995,1041,1071,1141,1183,1266, 1455,1596,1685
Ray A. Whitman	36 Van Natta 160 (1984)	82,745,923
Thomas C. Whittle	36 Van Natta 343 (1984)	660,674,822
Floyd L. Wiebe	37 Van Natta 1295 (1985)	1432,1555
Karl J. Wild	37 Van Natta 491 (1985)	539
Hazel M. Willis	35 Van Natta 1750 (1983)	694

VAN NATTA CITATIONS

Name	Citation	Pages
Don Winters	34 Van Natta 586 (1982)	1518
Donald C. Wischnofsk	32 Van Natta 136 (1981)	606,1035,1145
Casimir Witkowski	35 Van Natta 1661 (1983)	660,687,706,933,1042,1244,1291
Melvin J. Wood	36 Van Natta 1623 (1984)	590
Donald Woodman	34 Van Natta 178 (1982)	960
Walker A. Wright, Jr	34 Van Natta 1208 (1982)	101
Lawton R. Wroe	37 Van Natta 1239 (1985)	1231
Clyde C. Wyant	36 Van Natta 1067 (1984)	164,452,474,1171,1502,1541,1656
Eduardo Ybarra	36 Van Natta 1108 (1984)	194
Myrtle E. York	36 Van Natta 23 (1984)	956
Clarence Zwahlen	35 Van Natta 229 (1983)	194

ORS CITATIONS

	page(s)
ORS 19.026	861
ORS 19.028	861
ORS 19.033(1)	861
ORS 19.033(2)	861
ORS 19.035	861
ORS 19.190(1)	861
ORS 23.185(5)	300
ORS 30.265 (3) (c)	1300
ORS 30.275	1300
ORS 40.065	674
ORS 40.065(2)	822
ORS 40.135(m) & (q)	59
ORS 40.235	1179
ORS 82.010(2)(a)	360
ORS 109.070	326
ORS 109.070(2)	326
ORS 109.070(6)	326
ORS 109.125	326
ORS 147.005 to 147.365	1097
ORS 147.015(1)	1097
ORS 147.015(3)	1097
ORS 147.015(5)	1097
ORS 147.115	1433
ORS 147.155	1433
ORS 147.155(5)	1097
ORS 167.117 to 167.162	1318
ORS 174.010	319
ORS 174.020	1774
ORS 183.310 TO .550	1208,1357
ORS 183.315(1)	984,1770
ORS 183.400	1555
ORS 183.440	621
ORS 183.480	984

page(s)

page(s)

page(s)

page(s)

1 Larson, Workmen's Compensation Law, Section 19.00 (1984)-------189
1 Larson, WCL, Section 19.33 (1984)---------189
1A Larson, WCL, 5-82, Section 22.00 (1985)-------964
1C Larson, WCL, Section 47.51 (1982)-----1318
1C Larson, WCL, Section 48.40 (1982)------800
1C Larson, WCL 9-12, Section 49.11 (1980)--------829
3 Larson, WCL, Section 95.21 (1971)---------806
4 Larson, WCL, Section 95.12 (1976)-------1729
4 Larson, WCL, Section 95.27 (1984)-------656

The following Memorandum Opinions are not published in this volume. These decisions may be ordered from the Workers' Compensation Board using the numbers provided.

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Abrego, Manuela R., 83-04951 (3/85)
Adams, Kathy J., 83-07364 (2/85)
Adams, Michael, 84-07607 (11/85)
Adams, Patricia R., 83-10413 (2/85)
Adams, Robert B., 83-08441 (6/85)
Ahn, Jong J., 83-10027 (7/85)
Akers, Gordon M., 83-09984 (4/85)
Akins, Jean M., 83-07497 (6/85)
Albrich, Dan R., 84-01178 (5/85)
Alcala, Pedro G., 84-10720 (11/85)
Alexander, Ethridge, 83-07827 etc. (1/85)
Alexander, James N., 84-08284 (12/85)
Allen, George M., 84-03181 (4/85)
Allie, T.L., 83-07475 (3/85)
Alvarez, Paula G., 85-01905 (10/85)
Ames, Florence J., 84-10810 (11/85)
Andersen, Carol J., 83-10931 (1/85)
Anderson, Cathy B., 84-01694 (7/85)
Anderson, David A., 82-02326 (1/85)
Anderson, Patricia M., 83-07070 (4/85)
Anderson, William E., 82-08703 (1/85)
Anfilofieff, Samson, 84-07604 (6/85)
Anitok, Ken K., 84-08217 (11/85)
Anshen, Alan J., 84-00541 (1/85)
Anthony, Alberta S., 83-11300 (9/85)
Archuleta, Chris A., 84-07548 (6/85)
Arellano, Raphael, 84-13043 etc. (11/85)
Armstrong, Ray, 80-01476 (6/85)
Atkinson, Christine E., 84-03809 (7/85)
Avalon, Susan R. (Employer) (3/85)
Baker, Roy R., 83-10468 (5/85)
Barker, George W., 84-02695 (9/85)
Barnes, James A., 84-07269 (6/85)
Barnhardt, Bobbie E., 83-10989 (9/85)
Barr, Peter E., 84-00529 (2/85)
Bartlett, David L., 83-10604 etc. (8/85)
Baustian, Randall B., 82-07657 (8/85)
Beach, Leroy A., 84-09740 (9/85)
Bealey, David, 84-03941 (6/85)
Beard, Richard M., 83-06572 (3/85)
Beasley, John F., 81-09816 etc. (1/85)
Bedich, Anthony J., 84-12280 (10/85)
Benetti, Angelo L., 83-05401 (7/85)
Bennett, Ann M., 83-08379 (9/85)
Bennett, Paul D., 84-00664 (8/85)
Benson, Pattie J., 84-06437 (5/85)
Bernard Motor Supply, 84-03143 (8/85)
Bernard, William J., 84-03143 (8/85)
Betterton, Randy G., 84-10430 (6/85)
Biggs, Gary M., 84-05790 (9/85)
Biskeborn, Rodney A., 84-06902 (8/85)
Bivins, Janet M., 84-08953 etc. (10/85)
Blakley, Judy J., 82-04922 (2/85)
Bloomer, Greg E., 83-06727 (2/85)
Bloomfield, Michael I., 83-12121 (3/85)
Bodenhamer, Paul H., 82-10525 (4/85)
Bonney, Terry L., 84-04259 etc. (7/85)
Boshart, Joan M., 84-08651 (11/85)
Botefur, Ernest W., 85-00470 (12/85)
Bowen, Coy F., 83-11642 (8/85)
Boydston, Erma L., 84-06429 (3/85)
Brandenburg, Andrea, 84-08872 (11/85)
Branom, Samuel L., 83-09531 etc. (1/85)
Briggs, Michael R., 83-09701 (4/85)
Bright, Delores M., 84-03421 (3/85)
Brittle, Phyllis E., 84-08608 (11/85)
Britton, Paul W., 83-08680 (7/85)
Brothers, Ricky L., 84-12651 (10/85)
Brown (Church), Sherry, 83-06132 (5/85)
Brown, Darlene M., 84-00928 (6/85)
Brown, Evelyn Appel, 84-05843 (7/85)
Brown, Marvin L., 81-09489 etc. (2/85)
Brown, Rodney F., 83-05801 (5/85)
Brown, Thelma P., 85-00278 (11/85)
Brown, Tommy L., 84-12830 (10/85)
Brueckner, Anna, 84-10723 (9/85)
Buckmaster, Gerald J., 84-08735 (4/85)
Bunnell, Gary L., 85-00182 (11/85)
Burke, Kenneth, 83-08866 (10/85)
Burns, Robert T., 83-03151 etc. (5/85)
Burress, Doug, 84-03199 (11/85)
Bustamante, Joan, 84-00134 etc. (8/85)
Butler, Larry H., 84-09580 (7/85)
Butler, Linda, 83-12251 (4/85)
Butson, Robert C., 84-04319 (5/85)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Cahan, Shirley G., 83-03651 (2/85)
Calawa, Glenn T., 84-00006 etc. (8/85)
Calkins, Kathy K., 84-02419 (7/85)
Callahan, Tommie D., 84-00721 (8/85)
Carlson, Cheryl A., 84-05343 (10/85)
Carlson, James E., 84-02203 (2/85)
Carr, William E., 83-05764 etc. (8/85)
Carter, David J., 83-09917 (3/85)
Carter, Kelly J., 84-11543 (10/85)
Case, William H., 83-12174 (1/85)
Cave, Bonnie B., 84-07084 (7/85)
Cayo, Phillis, 82-09451 (4/85)
Chan, Sangauth, 84-06968 (7/85)
Chapman, Rosa (Gillette),80-10362 (2,4/85)
Chatterson, Arliss M., 84-02959 (3/85)
Choquette, Kenneth E., 83-07556 (6/85)
Christensen, Richard, 84-03279 etc. (8/85)
Chuprov, Abram, 84-10228 (12/85)
Claflin, Betty J., 83-11524 etc. (3/85)
Clark, Tommy E., 83-08836 (1/85)
Cleveland, Paula N., 83-12166 etc. (12/85)
Clifton, Joseph L., 84-08470 (12/85)
Cloney, Brenda, 84-03855 (5,7/85)
Cogburn, Sandra, 83-02287 etc. (2/85)
Colcleaser, Everette D., 84-00845 (8/85)
Cole, Donna M., 83-06975 (2/85)
Collins, Jean-Pierre B., 84-11577 (10/85)
Colombo, Richard J., 84-05050 (5/85)
Comstock, Dickie A., 84-04120 (9/85)
Comstock, Rory M., 84-10474 (12/85)
Conaway, James C., 82-01640 etc. (6/85)
Conley, Marjorie, 82-01906 (10/85)
Conn, Goodrich L., 84-10105 (12/85)
Cooper, Ray K., 84-02674 (3/85)
Copeland, Ernest M., 83-10623 (3/85)
Cornelius, Irene L., 83-06841 (4/85)
Costello, Guy L., 83-09435 etc. (1/85)
Couture, Judy K., 84-04547 etc. (12/85)
Cox, Fred A., 84-05161 (3/85)
Cox, Randall C., 84-02326 (5/85)
Coxey, Harry A., 83-08923 etc. (6/85)
Coy, James P., 83-03556 (1/85)
Craddock, Charles K., 84-09156 (10,12/85)
Craig, Clyde W., 84-10033 etc. (11/85)
Craig, Curtis E., 77-01874 (8/85)
Crain, Joyce I., 84-01120 (2/85)
Cross, Clarence E., 83-08906 (4/85)
Crowder, Hobert E., 83-09809 (1/85)
Crumble, Wendy R., 83-09104 (3/85)
Crump, Orson K., 84-06426 (5/85)
Culley, Timothy D., 83-11044 (4/85)
Cundiff, Lynn D., 84-08556 (10/85)
Cupps, Sandra K., 84-02908 etc. (4/85)
Curry, Kenneth D., 84-06095 etc. (5/85)
Curtis, Margaret J., 83-03641 (1/85)
Curtis, Wendy C., 83-11912 (2/85)
D'Lyn, Leia, 84-12050 (11/85)
Daly, James S., 84-07571 (9/85)
Daniels, Robin E., 83-11931 (1/85)
Dass, John J., 83-02753 (6/85)
Daugherty, Eldred D., 83-10075 etc. (7/85)
Davenport, Jack A., 83-08678 etc. (8/85)
Davila, Epifanio C., 85-00739 (8/85)
Davis, Anna R., 84-01911 (9/85)
Davis, Bobby L., 84-06494 (5/85)
Davis, Jefferson L., 84-01795 (7/85)
Davis, Jewell, 84-03395 etc. (7/85)
Davis, Raymond R., 84-03395 etc. (7/85)
Davison, Denise S., 84-01258 (12/85)
De La Rose, Simon, 84-04262 (5/85)
DeFoor, Astor W., 84-05730 (12/85)
Delfs, Rick L., 84-12431 (8/85)
DeLisle, Brian, 84-07022 (5/85)
Delucca, Anthony S., 84-11134 (10/85)
DeMarsh, Sandra K., 83-05806 (10/85)
Depew, Carmon L., 84-10377 (9/85)
Dickens, Douglas B., 84-03801 etc. (8/85)
Dickinson, Floyd T., 84-07259 etc. (7/85)
Dill, Jimmy H., 83-10170 (7/85)
Dimatteo, Joe W., 84-09381 (9/85)
Dime-In-Bull, Inc., 84-03416 (7/85)
Dittman, John R., 84-09010 (8/85)
Dolinar, Henry J., 82-11180 etc. (2/85)
Donovan, William A., 83-12093 (4/85)
Dorsey, Terry E., 84-04641 (9/85)
Drakeford, Edward J., 83-04387 (10/85)
Driggers, Roger A., 84-03514 (5/85)
Duckett, James E., 83-07023 etc. (9/85)
Duncan, Debra L., 84-04540 (4/85)
Durflinger, Rick L., 84-08799 (6/85)
Duval, Ronald K., 83-00739 etc. (5/85)
Eaggleston, Richard, 82-08904 (3/85)
Earley, Robert F., 84-10617 (8/85)
Ehlin, Norman E., 84-05571 (7/85)
Ellingson, Steve, 82-06605 (1/85)
Elmer, Roy L., 84-08965 etc. (10/85)
Erickson, Dee A., 84-13200 (12/85)
Estrada, Julian, 84-11418 (12/85)
Evans, Mary K., 84-01025 (7/85)
Fahlgren, Dorothy A., 84-01154 (3/85)
Ferguson, Tace C., 84-09189 (8/85)
Ferry, Barbara & Harlan (9/85)
Finley, Orin G., 83-10167 etc. (8/85)
Fisher, Deryl E., 80-07170 (1/85)
Flanary, Susanne, 83-05078 etc. (9/85)
Fleshman, Jamie L., 85-04178 (12/85)
Foltz, Doyle C., 84-04789 (11/85)
Folwick, Marty R., 85-02658 etc. (12/85)
Foss, Jerry H., 84-05731 etc. (9/85)
Foster, Barbara K., 84-00412 (2/85)
Fowke, Ernest H., 83-03357 etc. (7/85)
Fox, James E., 84-04174 (8/85)
Francis, Jesse J., 84-04825 etc. (7/85)
Franke, Donald M., 84-05947 (4/85)
Free, Sharon D., 84-03485 (6/85)
French, Sharon A., 83-10099 (4/85)
Funderburg, Gilbert, 83-04703 etc. (9/85)
Fuson, Darrell W., 83-08946 (3/85)

Name, WCB Number (Month/Year)

Gallegos, Margaret, 83-02336 (7/85)
Gallegos, Samuel, 83-02336 (7/85)
Garcia, Ruben M., 82-05143 (1/85)
Garcia, Victor M., 84-12370 (11/85)
Gardner, Robert J., 84-02617 (7/85)
Gheer, Walter G., 83-07891 (1/85)
Gibson, Rex D., 81-09211 (1/85)
Gilbert, David A., 83-07374 etc. (2/85)
Gillar, Bohuslav J., 84-10261 (9/85)
Gilliam, Bobby L., 83-05629 (2/85)
Ginther, Marjorie K., 84-10593 (11/85)
Glahn, Royce H., 83-11843 (11/85)
Glickert, George B., 84-00646 (1/85)
Gobble, Ernest S., 84-12704 (9/85)
Gonzales, Julio L., 84-08101 (9/85)
Gonzalez, Abran G., 84-01449 (6/85)
Gonzalez, Josefa N., 85-03507 etc. (10/85)
Goodpaster, Thomas W., 84-01290 (5/85)
Gordon, Don D., 84-10017 (10/85)
Gordon, Theodore C., 83-03961 (2/85)
Gosnell, Marilyn F., 84-09378 (12/85)
Gotchall, Karin K., 83-04581 (2/85)
Gould, Kathleen M., 84-12506 (12,12/85)
Graf, Albert, 83-05678 etc. (11/85)
Graves, Patsy J., 84-06069 (7/85)
Gray, Marie, 85-00989 (11/85)
Green, Danny R., 84-00841 (4/85)
Green, Teri A., 84-02535 (4/85)
Greenwell, Richard K., 84-01442 (6/85)
Gregg, Charles L., 84-10197 (6/85)
Gregory, Daniel G., 84-01066 (2/85)
Gribble, Brad T., 83-11370 (3/85)
Griffith, Lettie I., 84-10665 (8/85)
Grimes, Jeanne M., 84-08521 (10/85)
Grixgby, Annie L., 84-01903 etc. (2/85)
Gullatt, Reta D., 84-12007 (11/85)
Gullett, Betty J., 84-01785 (5/85)
Gurley, Rosalie, 84-08492 (12/85)
Guthrie, Matthew S., 84-08778 (12/85)
Haga, Catherine M., 84-05765 (3/85)
Hager, Walt N., 84-03939 (1/85)
Hagnas, John S., 84-08253 (7/85)
Haines, Garry L., 84-04950 (6/85)
Hall, Lynne A., 85-00633 (12/85)
Hall, Rodney W., 84-01737 (5/85)
Halseth, Diane L., 84-00948 (1/85)
Halverson, Jan T., 83-09826 (2/85)
Hancock, James E., 83-04285 etc. (1/85)
Hanks, Edith B., 83-10825 (11/85)
Hannum, Patrick M., 84-07520 (5/85)
Harding, Frederick W., 84-08495 (11/85)
Harrell, Sharon E., 84-03416 (7/85)
Harris, Ralph R., 83-06921 (4/85)
Harvey, Stanley, 84-09477 (11/85)
Harvey, Virginia M., 84-08662 (9/85)
Hatton, Yvonne M., 83-10917 (7/85)
Hawtry, Fred W., 83-10311 (9/85)
Hayes, Steven L., 84-11251 (12/85)
Hedlund, Robert K., 81-08777 (5/85)
Hedrick, Dan W., 84-10652 (12/85)
Helmick, Donald L., 84-07919 (4/85)
Hermann, Paul H., 85-02059 (9/85)
Hernandes, Francisco M., 84-10186 (9/85)
Hernandez, Francisco, 83-10029 etc. (6/85)
Herrington, Cecelia H., 84-05254 (9/85)
Herrington, Gerald, 82-08603 (3/85)
Hester, Harry V., 80-08473 (1/85)
Hileman, Bette J., 84-02697 (9/85)
Hilkey, Dana, 84-04157 (7/85)
Hill, Billy M., 84-01249 (2/85)
Hilts, Thomas F., 85-03205 etc. (11/85)
Hinkle, Lawrence W., 84-00690 (2/85)
Hobkirk, Elsie L., 84-10439 (12/85)
Hodges, Evelyn L., 84-09978 (10/85)
Hoeffer, Floyd K., Sr.,83-09837 etc.(5/85)
Holland, Judith, 83-10688 (3/85)
Hollenbeck, William E., 84-07329 (5/85)
Hollingsworth, Nettie R., 84-00173 (9/85)
Holt, Jody K., 84-02760 (12/85)
Hooker, Melvin J., 84-03754 (5/85)
Horner, Kenneth E., 83-05119 (6/85)
Horton, Warren C., 84-04793 (6/85)
Hovelsrud, Raymond A., 83-11712 (2/85)
Howard, David L., 83-07953 etc.(5/31)
Howard, Josh, 83-05853 (12/85)
Howe, Patricia A., 84-06633 (10/85)
Howland, Michael C., 84-01837 (12/85)
Huff, Michael P. (Emp.), 84-06095 (5/85)
Hume, Raymond S., 82-05533 (5/85)
Humes, Eugene E., 84-03138 (12/85)
Hunt, Evalee, 84-04003 (4/85)
Hurst, Gail L., 85-00275 (10/85)
Huston, Patricia M., 84-11405 etc. (10/85)
Hutcheson, Earl B., 83-01750 (6/85)
Hutson, Cari D., 84-01832 (6/85)
Hyde, James R., 85-00074 etc. (11/85)
Isabell, Tim W., 84-03078 (2/85)
Ivanoff, George S., 83-06862 (2/85)
Jackson, Shirley A., 84-07469 (9/85)
Jacobson, Gerald S., 85-01141 (10/85)
Jarrett, Bonnie J., 84-01893 (4/85)
Jaskoski, Michael R., 84-05033 etc. (9/85)
Jeffers, Leo D., 84-03342 etc. (10/85)
Jenkins, Richard H., 83-09211 (9/85)
Jensen, Anita R., 84-06246 etc. (5/85)
Jensen, Leonard J., 84-01121 (7/85)
Jensen, Leonard J., 85-01059 (12/85)
Jensen, Madeline, 83-04443 (3/85)
Jiminez, Celice J., 84-04892 (9/85)
Johnson, Fred D., 84-00194 (2/85)
Johnson, George A., 81-10507 etc. (3/85)
Johnson, Ingo R., 84-12019 (10/85)
Johnson, Joanne K., 84-01418 (4/85)
Johnson, Lorena G., 84-13381 (12/85)
Johnson, Margaret, 84-04567 etc. (3/85)
Johnston, Michael J., 84-01395 (6/85)
Johnston, Richard, 84-05789 (11/85)
Jones, Charles L., 83-02497 (6/85)

Name, WCB Number (Month/Year)

Jones, Charles R., 81-07141 (1/85)
Jones, Dennis J., 84-05603 etc. (11/85)
Jones, Richard L., 84-04781 (12/85)
Jones, Shirley K., 84-07097 (11/85)
Karr, William E., 84-07920 (6/85)
Kelley, Milton H., 80-04840 (2/85)
Kelly, Billie L., 83-08828 (2/85)
Kelly, Donald D., 84-02576 (1/85)
Kelly, Patrick J., 83-07200 (7/85)
Kelly, Robert L., 83-11281 (10/85)
Ketchum, James W., 84-11070 (10/85)
Kidd, Arthur W., 82-07593 (6/85)
King, Willie, 82-03810 (1/85)
Kirby, Nancy L., 84-01984 (2/85)
Kiser, Harold J., 83-08684 (2/85)
Kittel, Steven A., 85-01053 (12/85)
Knephoff, John J., 83-10609 (4/85)
Knodel, Lonnie R., 84-03685 (5/85)
Knotts, Richard C., 84-09930 (7/85)
Koch, William R., 83-07513 (2/85)
Koenig, Camilla S., 84-12923 (12/85)
Kohler, Gary L., 84-00984 (1/85)
Korbulic, Paul, 84-00668 (3/85)
Koronaois, George J., 83-08930 (5/85)
Kunst, James R., 82-10956 (9/85)
Lacy, George L., 83-07622 (2/85)
Lacy, George L., 84-09680 (9/85)
Laing, George J., 83-11024 (4/85)
Lakin, Richard R., 83-08083 (3/85)
Lambert Enterprises, 84-00134 etc. (8/85)
Lambert, Alan C., 84-00134 etc. (8/85)
Lamotte, Ronald G., 83-02836 (9/85)
Lamunyon, Cashius C., 84-08721 (9/85)
Lancaster, Vera M., 84-13577 (12/85)
Lane, Lynnda J., 83-06103 (2/85)
Lanpheare, Paul D., 84-08769 (7/85)
Larsen, Frances A., 84-02204 (2/85)
Larson, Fred A., 82-05819 (12/85)
Lavine, Jesse B., 84-03050 (3/85)
Lee, Albert N., 82-00045 (2/85)
Lee, James F., 83-07938 (11/85)
Lee, Standley A., 84-07399 (10/85)
Lee, Yvonnda M., 84-09449 (9/85)
Leigh, Doreen, 83-03919 (4/85)
Lendgren, Leland C., 84-03543 (6/85)
Lewis, Lisa M., 83-10390 (1/85)
Linday, Jeffrey L., 84-06636 (7/85)
Lindland, Barbara (Noble), 83-07474 (6/85)
Lizotte, Lawrence J., 84-10933 (10/85)
Lloyd, Chester M., 84-04091 (6/85)
Lloyd, Debbie K., 84-07577 (9/85)
Lockhart, Howard B., 83-03851 (2/85)
Lomax, Perry R., 85-00083 (10/85)
Long, Jere L., 83-08035 (3/85)
Longhenry, Judy A., 84-05600 etc. (8/85)
Loomis, Carolyn J., 81-08410 (5/85)
Lowery, John D., 83-02029 (5/85)
Lundberg, Neil E., 84-01733 (2/85)
Lunsford, Shirley D., 84-07566 (9/85)
Luthy, Mark R., 84-13075 (6/85)
Macaitis, Robert B., 84-04090 (4/85)
Mack, Jim L., 85-01776 (12/85)
Maddocks, Elmer H., 84-11238 (12/85)
Mahoney, Dennis W., 84-03593 (4/85)
Marlow, Philip, 85-04514 (12/85)
Marlow, Roylee W., 84-09584 (6/85)
Martin, Margie E., 82-06437 (12/85)
Martin, Melvin L., 84-12042 (11/85)
Martin, Stephen R., 83-05921 (3/85)
Martina, David A., 80-02691 (1/85)
Marvin, Leslie L., 84-09868 (10/85)
Mashia, Eric W., 83-10341 (1/85)
Mathis, Agnes J., 84-10361 (7/85)
Maughan, Rex D., 83-10885 (1/85)
Mayes-Kerns, Francis E., 84-00082 (7/85)
McAulay, Emmett T., 84-06806 (10/85)
McBride, Betty L., 84-08233 etc. (4/85)
McClendon, Bonnie J., 83-09074 (1/85)
McCoy, Jimmie D., 84-06658 (7/85)
McDonald, Donald J., 83-12170 (2/85)
McGougan, James A., 84-00639 etc. (4/85)
McKay, Chawn K., 84-02781 (5/85)
McKenzie, Clarence E., 84-00955 (5/85)
McLeod, Ronald P., 84-12372 (12/85)
McLoughlin, Carl M., 83-08697 (3/85)
McMurtry, Larry D., 83-11855 (2/85)
McNair, Dave W., 84-04280 (10/85)
McSwane, John E., 84-00392 (1/85)
Mealer, James A., 83-04725 (4/85)
Melies, Joseph R., 84-01502 etc. (10/85)
Meola, Jerry J., 80-09459 (1/85)
Metcalf, Leilia H., 84-03501 (5/85)
Mezick, Lilly C., 83-11668 (12/85)
Midwood, James D., 83-10915 (4/85)
Miles, James C., 83-11420 (5/85)
Miller, Michael R., 84-13479 (12/85)
Mingus, Melvin J., 84-00601 (7,8/85)
Mirich, Michael D., 84-00644 (7/85)
Mitchell, James R., 84-02037 (1/85)
Mitchell, Robin, 81-05553 (2/85)
Mock, Lawrence, 84-02097 (12/85)
Mona, Darrell A., 84-12249 (10/85)
Monroe, John P., 84-12464 (10/85)
Monroe, Nancy A., 83-06040 (9/85)
Moore, Debra A., 85-05761 (12/85)
Moore, Lorrena M., 84-07232 (7/85)
Moore, Monirah P., 84-02146 (12/85)
Morelatos, Vasiliki, 84-07965 (9/85)
Morgan, Glenellen D., 83-10846 (2/85)
Morgan, Howard D., 84-03645 (9/85)
Morgan, Jimmie L., 84-08428 (10/85)
Morris, John W., 84-02591 (6/85)
Morris, Thomas C., 84-06274 (10/85)
Mosley, Donald P., Jr., 84-06885 (6,6/85)
Mulkey, Frank A., 83-02226 (9/85)
Nasco, Douglas A., 83-02143 (12/85)
Nazari, Malek M., 84-07482 (10/85)
Nelson, Karen M., 83-11174 (10/85)
Nelson, Mary E., 85-00340 (12/85)

Name, WCB Number (Month/Year)

Nelson, Ronald A., 84-05256 (7/85)
Nelson, Timothy J., 84-01569 (10/85)
Nesbitt, Mara L., 83-08868 etc. (4/85)
Neth, Jack H., 84-02165 (7/85)
Netterwald, John D., 84-02941 etc. (4/85)
Nichols, Diana J., 84-09283 (12/85)
Nida, Donald L., 84-05815 (12/85)
Ninneman, Elmer A., 84-02469 (7/85)
Noffsinger, Marvin L., 84-05413 etc.(6/85)
Noffsinger, Marvin L., 84-12362 (12/85)
Nolan, Terry E., 84-06088 (6/85)
O'Brien, Janet F., 84-01045 (1/85)
O'Byrne, Penelope L., 84-01949 (12/85)
O'Harra, Muriel G., 84-05801 (12/85)
Offutt, Mary L., 84-02971 (5/85)
Olivera, William A., 84-01894 (12/85)
Olson, Paul, 82-00609 (1/85)
Olson, Robert E., 83-09719 (8/85)
Opoka, Arlene, 84-03416 (7/85)
Osorio, Martha O., 84-00858 (2/85)
Ostman, Craig L., 84-07196 (7/85)
Otten, Gene D., 83-04800 (3/85)
Owen, Willis R., 84-02580 (4/85)
Page, Eugene A., 84-01155 etc. (7/85)
Page, Janice L., 83-06167 (1/85)
Pantley, Richard L., 82-11501 (8/85)
Patrick, Anthony W., 85-02161 (12/85)
Paxson, Donald E., 84-04548 etc. (12/85)
Peacher, Hanni L., 83-11850 (1/85)
Penner, Thomas A., 84-05555 etc. (12/85)
Pepperling, Earl L., 84-01520 etc. (7/85)
Perisho, Zenas A., 83-10976 (12/85)
Perry, Edward C., Sr., 84-08260 (6/85)
Pinnell, James E., Jr., 84-03718 (12/85)
Pipkin, Jan M., 83-08899 (5/85)
Poelwijk, James A., 84-00300 (9/85)
Poole, Susan, 83-07452 (2/85)
Porras, Clemente, 84-03959 (10/85)
Porras, Maria R., 83-01780 (9/85)
Porter, Lenny C., 83-03584 (2/85)
Portillo, R.J., 84-06552 (8/85)
Post, Joseph C., 79-10059 (2/85)
Potter, Robert P., 83-07212 (2/85)
Powell, John T., 84-06293 (12/85)
Poynter, Luster H., 84-03444 (12/85)
Praegitzer, Michael B., 82-01622 (5/85)
Prater, Charlotte, 83-00227 (5/85)
Preuitt, Harry P., 84-06988 (9/85)
Priest, Billie R., Jr., 84-09079 (7/85)
Prindel, Robbie, 84-07680 etc. (5/85)
Propst, Ronald D., 84-02806 (11/85)
Pruitt, Larry R., 84-01670 (10/85)
Pulliam, Howard E., 84-01878 (10/85)
Qualls, Elbert E., 84-07846 etc. (9/85)
Quinn, E.H., 84-04984 etc. (5/85)
Radu, Pauline, 83-12188 (9/85)
Ramarido, Nick, 84-10224 (10/85)
Ramberg, Rhea A., 83-00575 (6/85)
Randall, Betty J., 84-12925 etc. (12/85)
Rasmussen, Paul D., 83-09373 (3/85)
Ree, Curtis J., 84-08882 (12/85)
Reed, Kenneth L., 83-06139 (3/85)
Reel, Edward J., 84-00293 (7/85)
Rencehausen, Myron, 84-00103 etc. (3/85)
Rensing, Nancy J., 82-09149 (7/85)
Reynolds, Beulah P., 84-03420 (2/85)
Reynolds, Karene C., 84-04732 (12/85)
Richesin, Jess W., 84-10576 (7/85)
Richter, Evelyne L., 83-04450 (1/85)
Rickard, Danny P., 84-00038 (2/85)
Rickerd, Melody A., 84-00136 (5/85)
Ries, Rachel M., 83-06141 (12/85)
Rightbower, Robert C., 84-10746 (9/85)
Riley, Edward W., 83-03918 (2/85)
Robertson, John A., 84-09450 (9/85)
Robinson, Barbara J., 83-11869 (8/85)
Robinson, Beatrice M., 84-11621 (10/85)
Robirts, George F., 84-08730 etc. (7/85)
Robledo, Ramon, 84-01985 (2/85)
Robles, Grace V., 84-07537 (9/85)
Rogers, Dorothy J., 84-02651 (5/85)
Rolfe, George M., 84-09436 (6/85)
Rose, William R., 83-03291 (3/85)
Rosenberg, Aloha J., 83-11817 (7,8/85)
Rosenberger, Margaret D., 84-08605 (6/85)
Row, Rayford E., 84-00291 (5/85)
Rudolfi, Thomas A., 83-11457 (6/85)
Ruhr, Rose M., 84-01642 (4/85)
Ruiz, Felix G., 83-01664 (7/85)
Rulison, Glennda H., 83-10339 (10/85)
Russell, James E., 83-10656 etc. (12/85)
Russell, James G., 84-01230 (2/85)
Russell, Macey R., 84-09023 (10/85)
Safstrom, Earl A., 84-07951 (11/85)
Salinas, Mario P., 84-07160 (7/85)
Salisbury, Jan L., 83-07169 etc. (9/85)
Sallee, Norman O., 84-11266 (11/85)
Scanlan, Florence I., 82-08430 (5/85)
Scholl, Mary V., 83-07840 (2/85)
Schroeder, Michael L., 83-08245 (4/85)
Schweitz, Russell D., 83-11543 (8/85)
Scott, Mary L., 84-06163 (10/85)
Seaton, Harold, 84-06171 (9/85)
Semonius, Robert F., 84-13644 (9/85)
Shaffer, Larry A., 84-02396 (9/85)
Shepherd, Donald P., 84-04127 (4/85)
Sherburne, Ruth A., 83-10495 (9/85)
Sherman, William L., 83-09890 (1/85)
Sherratt, Dorothy A., 84-08249 (12/85)
Sherwood, Steven H., 83-10203 (9/85)
Shipman, Orville D., 76-02789 (6/85)
Shipp, Joseph R., 84-02713 (4/85)
Shorb, Guy M., 83-04404 (9/85)
Shroyer, Susan M., 83-09002 (2/85)
Shults, Michael D., 83-10114 (5/85)
Siladic, Maria, 84-05252 (6/85)
Simi, Randy G., 84-10210 (8/85)
Sims, Verna L., 84-06206 (12/85)
Sisk, Gordon L., 83-09606 (8/85)

MEMORANDUM OPINIONS

Name, WCB Number (Month/Year)

Skinner, Johnny, 84-04923 etc. (2/85)
Skolaski, Velma R., 83-04921 (3/85)
Slater, Sharon K., 84-04081 (9/85)
Slocum, Kenneth A., 84-10169 (9/85)
Slocum, Myrle G., 84-10803 (11/85)
Smirnes, Henry, 83-07384 (6/85)
Smith, Adley O., 83-07321 (5/85)
Smith, Andrew K., 84-05491 (9/85)
Smith, Bonnie S., 84-09927 (12/85)
Smith, Carl H., 84-08070 etc. (5/85)
Smith, David A., 84-04331 (3/85)
Smith, David R., 84-07188 (9/85)
Smith, Don L., 84-08577 (9/85)
Smith, James L., 83-11976 (4/85)
Smith, Jay R., 83-07297 (9/85)
Smith, Kathryn D., 84-03578 etc. (4/85)
Smith, Louise, 84-08373 (12/85)
Smith, Russell E., 82-06363 (2/85)
Smith, William A., 84-03753 (3/85)
Smith, William R., 84-09649 etc. (5/85)
Snyder, William J., 84-03132 (12/85)
Southwood, William H., 84-10730 (12/85)
Spady, Bonnie M., 84-04882 (6/85)
Spalding, Rita M., 83-09642 (2/85)
Spangenberg-Krenzin, S., 84-04973 (12/85)
Spooner, Ronald A., 84-10419 (12/85)
Sproul, Loretta M., 84-13145 (10/85)
Staggs, Charles H., 84-04188 etc. (7/85)
Stallings, Russell I., 84-00207 (4/85)
Standley, Everett S., 84-06089 etc. (9/85)
Stanley, J.D., 81-11218 (10/85)
Steffens, Catherine L., 84-00596 (9/85)
Stephan, Herman E., 84-00046 (2/85)
Strange, Mark D., 84-08073 (4/85)
Stratton, Judy C., 83-12237 (6/85)
Swallow, Joe R., 84-08215 (10/85)
Swanberg, Max S., 83-10524 etc. (9/85)
Swanson, William K., 84-01546 (10/85)
Tadlock, Mary L., 84-07529 (12/85)
Taylor, Jeff D., 84-05990 (7/85)
Taylor, Terry A., 84-02068 (12/85)
Teague, Donnie R., 83-08658 (3/85)
Terry, Elva J., 83-06885 (1/85)
Tevepaugh, Marvin, 84-05351 (4/85)
Tevepaugh, Ruby, 84-05351 (4/85)
Thompson, Sylvester, 84-00960 (7/85)
Thornbrugh, John E., 83-09980 (2/85)
Tieger, Milton, 82-05441 (2/85)
Treskey, Melvin C., 84-09446 (12/85)
Truong, Nhah V., 84-02248 (4/85)
Turcott, Adele, 84-10196 (7/85)
Turner, Betty S., 83-08233 (2/85)
Turner, Herbert C., 84-04433 (9/85)
Turner, Joyce M., 82-01328 etc. (8/85)
Tuttle, Craig T., 81-08845 etc. (7/85)
Van Dinter, Donald M., 84-00265 etc.(8/85)
Van Horne, Douglas, 84-01116 (9/85)
Vandehey, Robert W., 84-10939 (12/85)
VanMeter, Richard H., 83-11939 (9/85)
Vaughn, David S., 83-04568 etc. (12/85)
Venegas, Johnnie, 84-01006 (3/85)
Villarreal, Eleuterio, 82-03025 etc.(3/85)
Vreeland, Roger W., 84-03391 (8/85)
Vuylsteke, Albert P., 84-01580 (10/85)
Waggener, Ronald L., 83-09471 (10/85)
Waibel Logging (Employer) (9/85)
Walton, Robert C., 84-01954 (5/85)
Ware, Herbert E., 84-06128 etc. (10/85)
Warren, Bennie L., 84-05323 (10/85)
Waters, Eugene E., 84-02946 (6/85)
Watson, Glen A., 84-06787 (1/85)
Wear, Ruth E., 84-11196 (10/85)
Weaver, Edward C., 83-10224 (2/85)
Webb, Carol A., 84-09268 (12/85)
Wehde, Clar, 84-04051 (9/85)
Welch, Jo Ann, 83-10600 (12/85)
Wells, Everett G., 84-12139 (12/85)
Weraska, Walter, 84-10818 (11/85)
West, Donald E., 83-10619 etc. (1/85)
West, Frederick G., 84-03171 (2/85)
Wheatley, William G., 84-02571 (7/85)
Whisenant, Sharon M., 84-05234 (5/85)
White, James B., 84-05171 (12/85)
Whitehurst, Aleen B., 84-04758 (7/85)
Wiedmaier, Heidi K., 83-10080 (4/85)
Wilde, Robert A., 84-07121 (8/85)
Wiley, Ricky L., 85-02025 (9/85)
Wilken, Sondra L., 84-00970 (2/85)
Wilkinson, Mary A., 84-08887 (7/85)
Wilks, Larry D., 84-13028 (11/85)
Williams, Robert B., 82-08105 etc. (2/85)
Williams, Robert M., 84-02001 etc. (10/85)
Willis, Bruce, 84-04896 (4/85)
Wilson, Michael D., 84-03143 (8/85)
Wilson, Rickey, 83-08495 (1/85)
Wilson, William M., 83-11250 etc. (3/85)
Wisely, Kyle T., 83-08118 (1/85)
Wolfe, Darrald K., 84-12853 etc. (12/85)
Wolford, Randy J., 83-05956 (2/85)
Womack, Charles W., 84-00895 etc. (6/85)
Woodard, Barbara A., 84-05670 (3/85)
Woodard, Kennard, 84-11421 (11/85)
Woods, Harold D., 83-09770 etc. (3/85)
Woodward, Thomas E., 82-10288 (1/85)
Woodward, Thomas E., 84-08962 (9/85)
Wright, Joanne M., 84-01840 etc. (7/85)
Wroe, Lawton W., 84-00779 (5,6/85)
Wurster, Judith K., 84-01068 (7/85)
Wyland, Colleen, 84-04772 (7/85)
Wynia, Wanda (Thrasher),82-06565 (5/85)
Yager, Marvin C., 84-00708 (9/85)
Yurkovich, Joseph K., 84-01537 (3/85)
Zacharias, Loyd M., 84-10229 (11/85)
Zakit, Patricia A., 84-07094 (5/85)
Zeulner, Roberta L., 84-05378 (5/85)
Zurbrugg, Clifford B., 84-04585 (9/85)
Zysett, Merle, 81-09902 (9/85)

The following decisions under Own Motion Jurisdiction are not published in this volume. They may be ordered from the Workers' Compensation Board using the numbers provided.

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Adams, Finis O., 85-0419M (8/85)
Adams, Logan A., 84-0487M (7/85)
Adams, Wayne D., Sr., 84-0565M (6/85)
Aderton, Frances L., 85-0400M (8/85)
Affleck, Virginia L., 85-0655M (12/85)
Alderson, James W., 85-0501M (9/85)
Aldous, Edward T., 85-0294M (5,10/85)
Alvarez, Richard C., 85-0366M (7/85)
Amend, Theodore S., 85-0485M (9/85)
Anderson, Dianna L., 85-0665M (12/85)
Anderson, Donald L., 85-0141M (3/85)
Anderson, Eldon G., 85-0276M (5/85)
Anderson, Esther M., 85-0098M (6,7/85)
Anderson, Joseph A., 83-0160M (8/85)
Anderson, Milton, 85-0599M (12/85)
Appling, Charles R., 85-0376M (8/85)
Arveson, Elmer S., 81-0293M (7,10/85)
Arvidson, George L., 84-0581M (1,3/85)
Bagett, Mark D., 85-0571M (10/85)
Bailey, Claude, 85-0030M (4/85)
Baker, Ben W., 85-0522M (9/85)
Baker, Clifford W., 85-0677M (12/85)
Baker, Janice M., 85-0414M (9/85)
Baldock, Jo Ann, 84-0069M (5,8/85)
Baldwin, Gerald A., 85-0433M (9/85)
Barber, Vivian I., 85-0116M (8/85)
Barkemeyer, Lloyd, 85-0046M (1/85)
Barnett, Jeffrey A., 82-0237M (10/85)
Barnett, Tom L., 85-0038M (2/85)
Barton, Kenneth, 85-0012M (1/85)
Bates, Harold W., 83-0200M (7/85)
Bates, Shirley A., 85-0514M (11/85)
Batori, Michael,85-0055M etc. (7,8,10/85)
Bautista, Barbara K., 84-0456M (6/85)
Bay, Richard J., 85-0484M (11/85)
Beadle, Charles R., 85-0492M (9/85)
Beaty, Howard V., 84-0182M (2,3/85)
Bechtold, Jacqueline, 85-0566M (10/85)
Becker, Dennis W., 84-0426M (6/85)
Beedle, David H., 85-0369M etc. (7/85)
Beman, Lawrence O., 85-0587M (11/85)
Benedict, Mitchell A., 84-0200M (6/85)
Benintendi, Cecil L., 84-0371M (2,5/85)
Bennett, Joseph M., 85-0483M (9/85)
Benson, Kathy L., 84-0612M (4,12/85)
Bentley, Wayne E., 85-0130M (5,11/85)
Berg, Dale V., 84-0234M (8/85)
Berg, Dale V., 85-0172M (4/85)
Berger, Carl P., 85-0273M (5/85)
Bernard, Ronald V., 84-0560M (4,5,6/85)
Bessich, Bruno, 85-0174M (4/85)
Bettin, Phillip L., 85-0546M (10,11/85)
Bidwell, Marilyn, 84-0480M (2,4/85)
Bigelow, Audrey J., 84-0520M (6/85)
Billups, Terry L., 85-0271M (6/85)
Bilyeu, Bertha B., 85-0049M (2/85)
Bird, Wesley E., 84-0549M (6/85)
Bishop, John R., 85-0541M (10/85)
Bishop, Monica M., 85-0222M (4/85)
Blair, Robert A., 85-0494M (10/85)
Blake, Myra L., 81-0200M (6/85)
Blake, Myron E., 85-0260M (7/85)
Blakely, Bobbie J., 85-0177M (8/85)
Blasier, Frank L., 85-0183M (4,8/85)
Bojarsky, Anton, 85-0351M (7/85)
Bolling, Douglas E., 85-0300M (5,10/85)
Booker, Arbon J., 83-0273M (3/85)
Borisoff, Henry T., 84-0482M (5,7/85)
Bostrom, Bradford L., 84-0108M (5/85)
Bostwick, Harry R., 84-0590M (5/85)
Bott, Katherine J., 84-0329M (5/85)
Bowers, George K., 85-0083M (2/85)
Bowers, James P., 83-0392M (3,7/85)
Boyce, Lloyd, Jr., 84-0242M (1/85)
Bozarth, John I., 85-0058M (2/85)
Bracht, Neil R., 85-0241M (5/85)
Brakefield, Juanita J., 85-0143M (7/85)
Bratton, John R., 85-0218M (4,12/85)
Bray, Bruce D., 84-0011M (5/85)
Breihof, Daniel P., 84-0617M (2/85)
Brenner, John R., 85-0090M (5/85)
Brieger, Donald N., 85-0252M (5/85)
Briggs, Arthur L., 85-0381M (7/85)
Briley, Carroll L., 85-0270M (7/85)
Brill, Guy A., 84-0073M (3/85)
Brooks, Clarence L., Sr.,84-0328M (5,8/85)
Brooks, Ida E., 85-0152M (6/85)
Brown, Charles E., 85-0545M (12/85)
Brown, Dale C., 85-0251M (6,10/85)
Brown, Gary O., 84-0266M (5/85)
Brown, James H., 85-0253M (5,5/85)
Brown, Lois R., 83-0276M (9/85)
Brown, Margaret I., 85-0099M (4/85)
Brown, Mark D., 85-0114M (3,8/85)
Brundage, Samuel C., 85-0062M (6,11/85)
Bryant, Kenneth E., 82-0143M (8/85)
Bugni, James, 84-0534M (1/85)
Bult, Richard A., 85-0373M (8/85)
Burch, Ruth A., 85-0588M (11/85)
Burke, Walter, 84-0327M (1/85)
Burrington, Rod L., 85-0448M (8/85)
Bush, Dale A., 85-0025M (1/85)
Caccamise, Chris D., 85-0487M (11/85)
Calawa, Glenn T., 84-0134M (8/85)
Calhoun, Emmett N., 85-0387M (8/85)
Calkins, Charles R., 85-0127M (7/85)
Calkins, Kenneth W., 85-0059M (6/85)
Calwhite, Robert G., 85-0436M (8/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)
Campbell, Betty J., 83-0235M (7/85)
Campbell, James M., 84-0468M (8/85)
Cansler, Bertram T., 85-0618M (12/85)
Cardoza, Linda E., 85-0520M (10/85)
Cardoza, Myrtle, 85-0557M (10/85)
Carey, Jane A., 85-0681M (12/85)
Carmien, James D., 84-0004M (1,5,6,8/85)
Carter, Roger A., 85-0237M (5/85)
Carter, Sandra L., 85-0610M (11/85)
Cason, James A., 84-0522M (12/85)
Catto, Dale E., 85-0636M (11/85)
Caul, Russell M., 85-0207M (5/85)
Cerkoney, Patricia, 85-0117M (5/85)
Chaffee, Ronald D., 84-0450M (6/85)
Charles, Ronald W., 84-0472M (5,12/85)
Chavez, Walter C., 84-0445M (6/85)
Childers, Larry L., 85-0180M (4/85)
Christian, Harry S., 84-0609M (1,10/85)
Chytka, Laurence H., 85-0573M (12/85)
Clark, Bryan J., 85-0278M (5/85)
Clark, Donald H., 85-0333M (7/85)
Clarno, George, Jr., 85-0605M (11/85)
Claussen, Karen L., 85-0529M (12/85)
Clevenger, Junior Ray, 85-0239M (5/85)
Clough, Robert L., 85-0329M (8,12/85)
Clouse, Ken J., 85-0163M (6/85)
Clover, Mary A., 85-0066M (2/85)
Cobb, Charles E., 85-0213M (7,8/85)
Coble, Steven, 84-0577M (1/85)
Collier, James D., Jr., 85-0245M (5/85)
Collins, Donna L., 85-0154M (6/85)
Collins-Roberts, Laura, 85-0115M (4/85)
Compton, Diana, 85-0411M (11/85)
Connery, Linda D., 85-0592M (11/85)
Coon, Emelie R., 84-0510M (1,6/85)
Cooper, Charles, 84-0338M (3/85)
Cooper, Edmund J., 85-0028M (6,11,12/85)
Cooper, Wayne D., 83-0387M (11/85)
Corbett, Gary Lee, 84-0031M (1,5/85)
Corry, David B., 85-0128M (3/85)
Corwin, Jack L., 85-0635M (12/85)
Cosgrove, Pamela I., 85-0499M (9/85)
Counts, Theodore W., 84-0055M (2/85)
Cowan, Ross E., 85-0550M (10/85)
Crawley, Danny W., 84-0409M (7,8/85)
Cremin, John J., 84-0325M (6/85)
Criswell, Clyde H., 85-0672M (12/85)
Crow, Lanny M., 85-0077M (6/85)
Crow, Virgil E., 85-0226M (6,8/85)
Croy, Doyle L., 85-0608M (11/85)
Daining, David C., 85-0122M (4/85)
Daly, Steve, 85-0068M (2,8,10/85)
Damon, Charles R., 85-0524M (10,12/85)
Daniel, Frederick G., 84-0312M (1/85)
Darlington, Michael W., 84-0270M (9/85)
Davenport, Jack A., 84-0226M (8/85)
David, Charlie E., 85-0170M (4/85)
Davidson, Richard C., 85-0612M (11/85)
Davis (Knowles), Denise, 85-0204M (5/85)
Davis, Maxine L., 85-0320M (6/85)
Davis, Phyllis J., 84-0594M (2,3,5/85)
Davis, Wallace J., 85-0449M (8/85)
Deaton, Orville, 85-00014M (1,6/85)
DeGraff, Clara J., 85-0372M (7/85)
Delacruz, Joe H., 85-0363M (7/85)
DeMarsh, Sandra K., 83-0336M (10/85)
Dennis, Daniel, 84-0289M etc. (5/85)
DeRoss, Willie, 83-0328M (6/85)
Desmarais, Dennis J., 85-0230M (5/85)
Dickerson, Ruby L., 85-0070M (8/85)
Dickson, Richard V., 84-0606M (1/85)
Dickson, Ronald V., 84-0584M (2,12/85)
Dilka, Richard E., 83-0141M (11/85)
Dilworth, William C., 85-0050M (4,6/85)
Dishner, Elwin D., 85-0103M (3/85)
Doane, Sara E., 85-0048M (6/85)
Dobranski, Michael, 85-0321M (6,10/85)
Dodge, Helen L., 85-0190M (4,11/85)
Dodrill, Donald L., 85-0410M (8,9/85)
Dodson, Earnest D., 85-0195M (4/85)
Donovan, Debra K., 84-0592M (6/85)
Dorgan, John F., 85-0403M (8/85)
Dorsey, Terry E., 84-0372M (3,6,10,12/85)
Doster, Milton, 85-0313M (7/85)
Douglas, Frank M., 85-0264M (5,7/85)
Dowell, Carol Ann, 85-0258M (5/85)
Downey, Thomas C., 85-0420M (8/85)
Downing, Robert D., 84-0316M (7/85)
Dragnoff, Michael R., 85-0265M (6/85)
Drew, Dorothy J., 84-0276M (5/85)
Drew, Roland F., 85-0322M (10/85)
Driggers, Roger A., 84-0248M (12/85)
Driscoll, Harry, 85-0543M (10/85)
Duke, Carl L., 85-0526M (10/85)
Dunn, Raymond, 85-0088M (5,11/85)
Durlam, Eugene D., 85-0124M (3/85)
Durlam, Eugene D., 85-0477M (10,10/85)
Durst, Leroy H., 85-0015M (1/85)
Duval, Roger A., 84-0042M (6/85)
Earl, Ronald C., 84-0550M (9/85)
Eckstein, Harold A., 85-0238M (6/85)
Ednie, Steven H., 84-0491M (5,8/85)
Edwell, William E., 85-0360M (7,8/85)
Eells, Dencel R., 85-0291M (9/85)
Ellis, Gary P., 84-0466M (5,7/85)
Elmore, Michael E., 85-0096M (2/85)
Elsey, James E., 84-0575M (1/85)
Elst, Frank, 85-0231M (11/85)
Endicott, Robert W., 85-0118M (3/85)
Ensminger, Harvey J., 85-0315M (6/85)
Enze, Edward, 84-0420M (6/85)
Erdahl, Charles L., 85-0456M (9/85)
Erlacher, Connie J., 84-0601M (4,9/85)
Essary, Thomas E., 85-0580M (12/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)
Essy, Frank M., 84-0508M (7/85)
Estep, Sharon A., 85-0651M (12/85)
Ezell, Ruth M., 84-0521M (1/85)
Faas, Eugene G., 84-0500M (3/85)
Fake, Theodore M., 85-0495M (11/85)
Fandrich, Frank S., 85-0153M (3/85)
Farley, Mary E., 84-0423M (1,3/85)
Farnsworth, Harold D., 85-0415M (8/85)
Feasel, Virgil M., 84-0049M (5/85)
Feldt, Darold J., 85-0135M (4/85)
Ferguson, Donald, 82-0248M (1/85)
Ficker, Joseph, 83-0367M (5/85)
Finley, John D., 85-0528M (9/85)
Finney, George E., 85-0101M (4,6/85)
Fischer, John T., 85-0200M (9/85)
Fisher, Loren, 85-0513M (10/85)
Fitch, Ronald M., 85-0444M (8/85)
Flannery, Michael T., 83-0242M (11/85)
Flescher, James A., 85-0166M (6,8/85)
Flory, Terry L., 84-0393M (6/85)
Forshee, Willie R., 84-0619M (10/85)
Fortenberry, Phillip G., 84-0492M (6/85)
Foster, Agnes, 85-0570M (10/85)
Foster, Blandyna, 84-0030M (10/85)
Fountain, Stanley T., 85-0506M (11/85)
Fowler, Charles O., 84-0053M (9,12/85)
Fraley, Lewis, 83-0381M (1/85)
France, Roger G., 85-0310M (8/85)
Freamon, Robbin K., 85-0176M (4/85)
Freeman, Nadine M., 84-0247M (3/85)
Fucci, Deborah C., 84-0481M (2,3/85)
Fuestman, Beatrice, 85-0024M (1/85)
Fuhrmann, Kyong S., 84-0411M (4,5/85)
Fuller, Gary E., 85-0132M (4/85)
Gairson, Mark, 84-0019M (7/85)
Galego, Arthur C., 85-0451M (8,10/85)
Garbe, Erna, 85-0086M (3,4/85)
Garcia, Jose A., 85-0340M (7,9/85)
Gardner, Leland R., 85-0140M (6/85)
Gaustad, Verona G., 84-0373M (2/85)
Gay, Walter A., 84-0136M (5/85)
Gentry, Alice M., 84-0210M (1/85)
Gentry, Wayne N., 85-0347M (7/85)
George, Donald G., 84-0517M (3,7/85)
Geving, Snowden A., 85-0311M (6/85)
Gilbert, Randy V., 84-0546M (1,6,9/85)
Gilcrist, Sharon W., 85-0319M (6,7,12/85)
Gilge, Kenneth, 84-0488M (1/85)
Gipson, DeWayne P., 85-0537M (10/85)
Goforth, Kenneth W., 85-0626M (11/85)
Goodman, Thomas J., 85-0281M (6/85)
Goodrich, Delmar R., 85-0047M (7,8/85)
Goodridge, David, 84-0195M (1/85)
Gordineer, Harley J., 85-0686M (12/85)
Gorecki, Thaddeus J., 85-0292M (5/85)
Gorringe, Philip, 85-0475M (9/85)
Grant, David D., 85-0293M (7/85)

Name, WCB Number (Month/Year)
Granville, Alton, 85-0582M (11/85)
Graves, Peggy J., 84-0518M (6/85)
Graves, Peggy J., 85-0683M (12/85)
Gray, Arthur W., 85-0586M (11/85)
Gray, Delbert D., 85-0039M (2,5/85)
Gray, Robert K., 85-0279M (5/85)
Greene, David R., 84-0543M (6,8/85)
Greer, Annie Jo, 85-0290M (6/85)
Gregor, Robert L., 84-0429M (3/85)
Gregory, Daniel G., 85-0407M (8/85)
Grenbemer, David L., 85-0244M (5,10/85)
Griffiths, Happy J., 85-0227M (4,5,12/85)
Griswold, Debra, 85-0579M (10/85)
Grizzle, Robert H., 85-0064M (2,2/85)
Groom, Roswitha A., 85-0094M (2/85)
Groth, Melvin L., 85-0107M (6/85)
Grove, Gerald E., 85-0361M (9/85)
Gunderson, Lenora L., 85-0314M (5/85)
Haas, Edward R., 84-0539M (7/85)
Hafdahl, Walter A., 85-0232M (8/85)
Hafemann, Diana M., 85-0005M (6/85)
Hagen, James D., 85-0201M (4/85)
Hagger, Danny G., 85-0515M (9/85)
Haley, Dolores F., 83-0359M (4,8/85)
Haley, Dolores F., 85-0391M (8/85)
Hall, Kenneth D., 85-0254M (6,7/85)
Hamilton, Lloyd L., 84-0582M (1,6,11/85)
Hamlett, Mark C., 85-0307M (5/85)
Hammons, Kenneth R., 85-0466M (10/85)
Hance, William J., 85-0389M (7/85)
Hanson, David A., 85-0457M (8/85)
Hargand, Charles H., 84-0260M (1/85)
Harris, Joann L., 85-0075M (2/85)
Harris, Thomas, 85-0211M (4/85)
Harrison, Donald E., 85-0503M (9/85)
Hartlerode, William A., 85-0468M (8/85)
Hartsock, Elaine M., 85-0053M (1,8/85)
Harvey, Loren R., 84-0614M (1/85)
Hawthorne, Charlotte D., 84-0191M (9/85)
Hay, Kenneth A., 84-0239M (6/85)
Hayes, Larry L., 85-0393M etc. (12/85)
Helmer, Hazel, 85-0431M (9/85)
Hendershott, Clifton H., 85-0286M (5/85)
Henderson, Arnold M., 85-0312M (7/85)
Hendrickson, Bob G., 84-0051M (10/85)
Hendrickson, Russell A., 85-0653M (12/85)
Hendrix, Melvin E., 84-0277M (1/85)
Henley, Ira Don, 85-0019M (1/85)
Hernandez, Isabel David, 84-0369M (4,5/85)
Hetrick, Gregory A., 85-0168M (3/85)
Hickey, Elmer N., 85-0337M (7/85)
Hidy, Jack A., 85-0072M (6/85)
Hight, Liddie B., 84-0265M (3,6/85)
Hiles, Charles E., 85-0338M (6/85)
Hill, Cynthia, 84-0504M (8/85)
Hilton, Alice L., 85-0051M (6/85)
Hilts, Thomas F., 85-0157M (3,12/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Hing, Leonard, 84-0593M (1/85)
Hinton, Larry, Jr., 85-0439M (8/85)
Hoiting, Lawrence H., 85-0594M (11/85)
Holaday, Merl A., 85-0121M (4/85)
Hollamon, Ezekial A., 85-0534M (10/85)
Hollenbeck, William E., 84-0218M (7/85)
Holloway, Nadine, 85-0613M (11/85)
Holly, Willard H., 84-0352M (5/85)
Holmes, Loren, 85-0013M (2,5/85)
Holt, Earnest P., 84-0545M (6/85)
Holub, Roy F., 85-0646M (12/85)
Hood, Ardis E., 85-0498M (10/85)
Hookland, Richard S., 85-0151M (3,8/85)
Hopkins, Mike A., 85-0447M (8/85)
Hornberger, Julia M., 85-0137M (3,5/85)
Howard, Gerald B., 84-0172M (4/85)
Howard, Wesley L., 84-0394M (6/85)
Howell, James C., 85-0609M (11/85)
Howell, Michael L., 85-0469M (8/85)
Howerton, Clifford D., 85-0196M (6,6/85)
Hudspeth, William R., 85-0150M (3/85)
Huffman, Milford W., 84-0461M (1,3/85)
Huffman, Robert D., 85-0388M (7/85)
Huggins, Weldon N., 85-0052M (1/85)
Hulbert, David, 85-0343M (8/85)
Hunter, George A., 85-0194M (6/85)
Huntsucker, Clifford, 84-0081M (9/85)
Huskey, Gordon E., 85-0619M (11/85)
Hutchens, Judith A., 85-0065M (2,5/85)
Hutcheson, Orvilla J., 85-0438M (8/85)
Hutchins, Francis, 83-0331M (1/85)
Hutchinson, James W., 84-0602M (6/85)
Hutchinson, Joseph O., 83-0393M (4,5,9/85)
Idlewine, James R., 85-0109M (5,7/85)
Imbler, George L., 85-0486M (9/85)
Ingram, Genevieve I., 84-0538M (12/85)
Ismert, Arthur J., 85-0384M (7/85)
Jackson, Billie G., 85-0138M (5,10/85)
Jackson, Rickey J., 84-0430M (2,6/85)
Jackson, Robert D., 83-0025M (4,6/85)
Jackson, Robert D., 85-0004M (6/85)
Jager, Norman E., 82-0209M (6/85)
James, Ronald L., 84-0341M (8/85)
Jensen, August M., 85-0538M (10/85)
Jewell, Alan B., 85-0518M (9/85)
Johnson, Allen E., 84-0516M (6/85)
Johnson, Cordy A., 84-0437M (12/85)
Johnson, Dorothy L., 84-0215M (6,6/85)
Johnson, Elroy B., 84-0559M (8/85)
Johnson, Leon, 84-0471M (8/85)
Johnson, Minnie B., 85-0289M (6/85)
Johnson, Robert G., 85-0564M (11/85)
Johnson, Stella, 85-0011M (4/85)
Johnstone, Michael C., 84-0571M (1,10/85)
Jones, Billy Joe, 85-0399M (7/85)
Jones, Dennis J., 84-0280M (11/85)
Jones, Dennis J., 84-05603 etc. (7/85)

Name, WCB Number (Month/Year)

Jones, Johnnie E., 83-0284M etc. (8/85)
Jones, Johnnie E., 85-0027M (2/85)
Jones, Kenneth T., 85-0614M (11/85)
Jones, Murl E., 85-0602M (11/85)
Jones, Tim L., 85-0462M (8/85)
Juhola, Eunice E., 84-0308M (6/85)
Karn, Ernest W., 85-0216M (6/85)
Karn, Henry C., 85-0424M (11/85)
Keen, Gwendolyn E., 85-0095M (2/85)
Keeney, Wayne W., 84-0528M (5/85)
Keeton, John W., 85-0474M (9/85)
Kelley, Charles, 84-0574M (1/85)
Kelley, James K., 85-0621M (11/85)
Kellogg, Lawrence L., 84-0615M (6,8/85)
Kemp, Joseph C., 85-0519M (9/85)
Kendell, Chris W., 85-0165M (3,6/85)
Kennedy, Dewey W., 85-0476M (10,11/85)
Kennison, Gerald L., 85-0574M (11/85)
Kent, Larry M., 85-0036M (1,3,6/85)
Kephart, Archie F., 81-0173M (1,4,8/85)
Keyser, John P., 82-0191M (5/85)
Kim, Thomas, 85-0426M (11/85)
Kinaman, Jerry W., 85-0078M (8/85)
King, Hazel J., 85-0284M (5,12/85)
King, Janice M., 84-0622M (1/85)
Kinney, Bert A., 84-0469M (6/85)
Kirchhoff, Rex S., 85-0235M (5/85)
Kitterman, Jane L., 85-0037M (6/85)
Kluchesky, Roy N., 84-0509M (9/85)
Knigge, Robert A., 85-0089M (2,3/85)
Knupp, Patricia M., 83-0304M (5/85)
Kociemba, LeRoy, 85-0324M (6/85)
Konschu, Delbert, 85-0678M (12/85)
Kraemer, Kenneth, 84-0433M (10/85)
Kreinheder, Terry, 84-0439M (6/85)
Krieger, Delton A., 85-0188M (4/85)
Kuehmichel, Richard, 84-0350M (3/85)
Kurtz, Judy E., 84-0012M (1/85)
Labahn, Arthur J., 85-0334M (6/85)
Laing, George J., 83-0219M (4/85)
Lakey, John, 85-0413M (8/85)
Lamb, Raymond L., 85-0093M (8/85)
Langley, Billey L., 84-0192M (8,9,10/85)
Langley, Sheri L., 85-0542M (11/85)
Larson, James L., 84-0620M (6,9/85)
Laukkanen, Mikko E., 85-0490M (9/85)
Layton, John G., 85-0233M (7/85)
Lee, Ralph R., 85-0354M (8/85)
Lemmon, Marvin L., 85-0368M (8/85)
Lengkeek, Violet, 85-0578M (11/85)
Lentz, Gordon L., 85-0637M (12/85)
Leslie, Fay, 85-0502M (10/85)
Lewis, Albert E., 85-0262M (5/85)
Lian, Leonard R., 85-0417M (9/85)
Lincoln, James F., 85-0377M (8/85)
Lind, Richard E., 85-0002M (1/85)
Lindsay, Mamie I., 85-0160M (6/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Little, Robert W., 81-0176M (12/85)
Littleton, Robert S., 85-0247M (5/85)
Lloyd, Audley, Jr., 83-0182M (1/85)
Lofton, Calvin, 85-0663M (12/85)
Logan, Eugene A., 84-0197M (3,12/85)
Lokan, Albert E., 85-0525M (10/85)
Long, Larry W., 85-0536M (10/85)
Long, Larry, 83-0115M (1/85)
Lovato, Richard H., 84-0099M (6/85)
Lowe, Perry D., 84-0131M (7/85)
Lozano, Antonio, 85-0280M (8/85)
Lund, DuWayne, 84-0390M (8,12/85)
Lunsford, Paul O., 84-0570M (7/85)
Lycett, Lori (Davis), 85-0018M (5,6/85)
Lynch, Christine, 85-0627M (11/85)
Lyon, Fred W., 85-0671M (12/85)
Macauley, Ayisha, 84-0598M (7,7/85)
Madarus, Henry, 84-0392M (10/85)
Maddox, Gary L., 85-0380M (7/85)
Mahler, Betty I., 85-0589M (11/85)
Maine, Keith M., 85-0304M (8/85)
Manchester, Earl E., 85-0189M (8,8,9/85)
Manes, Boyd E., 85-0008M (1,6/85)
Maples, Georgia, 85-0509M (9/85)
Marks, Norman, 84-0310M (1/85)
Marr, Gene A., 84-0547M (3,4/85)
Marrs, Charlotte, 84-0462M (1/85)
Martin, Melvin L., 84-0531M (1/85)
Martin, Ralph B., 85-0081M (6/85)
Martin, Ronald D., 85-0209M (5/85)
Martinez, Armando H., 84-0561M (5,7/85)
Martinez, Jose, 85-0221M (4/85)
Martushev, Daniel, 85-0306M (5,7,9/85)
Marvin, David M., 85-0473M (11/85)
Mast, Charles R., 85-0634M (11/85)
Mather, Donald W., 85-0256M (6/85)
Matott, Donald, 83-0279M (10/85)
Matthews, Billie G., 85-0214M (4/85)
Maynard, James W., 85-0325M (6/85)
McAllaster, John E., 85-0326M (7,10/85)
McArthur, Charles G., 85-0308M (5,10/85)
McCall, Cathy J., 85-0508M (11/85)
McClendon, William G., 83-0375M (1/85)
McConnell, Richard B., 85-0437M (8/85)
McElmurry, Dave S., 85-0649M (12/85)
McGrory, A. Brendan, 85-0551M (10/85)
McHugh, Russell, 85-0500M (10/85)
McKnight, Wayne C., 85-0148M (6/85)
McManus, A.B., 85-0136M (8/85)
McMullen, Flora, 84-0214M (6/85)
McUne, D. Stephen, 84-0587M (7,8,9/85)
Meade, Donna M., 85-0429M (8/85)
Meek, Stevan P., 85-0341M (6/85)
Melampy, Diane V., 85-0267M (6/85)
Melbye, Michael G., 85-0644M (12/85)
Melhorn, Thomas, 85-0441M (8/85)
Mercier, Darrel L., 85-0181M (4,6/85)

Name, WCB Number (Month/Year)

Meredith, Joseph W., 85-0149M (3/85)
Merz, Robert C., 84-0097M (12/85)
Messer, George R., 85-0179M (7/85)
Metcalf, William B., 85-0339M (6/85)
Meter, Charles, 85-0395M (7/85)
Mickelson, Roger M., 84-0208M (9/85)
Middleton, Paul L., 84-0389M (1,9/85)
Milich, Forrest D., 84-0386M (3,8/85)
Miller, Beverly L., 84-0281M (4/85)
Miller, Bruce A., 85-0378M (7/85)
Miller, Donald K., 85-0033M (3/85)
Miller, Grant M., 85-0412M (10/85)
Miller, Raymond I., 85-0301M (6/85)
Miller, Sheila A., 84-0618M (2/85)
Miller, Steven D., 85-0010M (3/85)
Mills, Chester L., 85-0198M (4/85)
Millsap, Lawrence, 85-0461M (8/85)
Mitchell, James R., 85-0142M (3,8/85)
Mitchell, Sharon, 84-0599M (1/85)
Mix, Anthony C., 84-0607M (8/85)
Mlasko, Rudolph R., 85-0406M (12/85)
Monroe, Dean C., 85-0375M (8/85)
Monroe, Jack G., 85-0155M (3/85)
Monteith, Norris, 84-0287M (5,10/85)
Moon, Carroll C., 85-0316M (12/85)
Mooney, Clarence T., 85-0003M (1/85)
Moore, Clyde, Jr., 83-0299M (1,6/85)
Moore, Gerald S., 83-0363M (11/85)
Moore, James E., 85-0169M (3/85)
Morris, Arthur R., 85-0073M (2/85)
Mortimore, Beverly J., 85-0162M (4/85)
Morton, William E., 85-0022M (2/85)
Mowry, Robert L., 85-0131M (6,8,8/85)
Muehlhauser, Eugene, 84-0331M (6/85)
Mullins, Michael P., 85-0408M (8/85)
Murphey, Charles E., 85-0217M (5/85)
Murphy, Loran R., 84-0512M (6/85)
Murphy, Susan C., 85-0356M (7,7/85)
Murray, Robert O., Jr., 84-0220M (3/85)
Myers, Lillian C., 85-0041M (1,8/85)
Myler, John A., Sr., 85-0191M (4/85)
Myrick, Michael J., 85-0261M (3,6/85)
Navarre, George D., 85-0295M (7/85)
Neault, Marji M., 83-0329M (2/85)
Neibert, William D., 85-0184M (4/85)
Neihart, Ward C., 85-0418M (8/85)
Nelson, Robert L., 85-0633M (12/85)
Nelson, Ronald A., 85-0020M (8/85)
Newson, Robert L., 85-0585M (11/85)
Nicholl, David, 85-0102M (6/85)
Nichols, Franklin A., 85-0119M (6/85)
Nicholson, Karen, 82-0285M (9/85)
Nicklin, Robert E., 85-0405M (7/85)
Nielsen, Gary L., 84-0542M (6,6/85)
Nixon, Dennis B., 85-0061M (5,11/85)
Nixon, Elmer O., 84-0621M (1,3,7/85)
Noah, Edward, 84-0408M (8/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Noel, Leon R., 85-0597M (11/85)
Norris, Charles E., 85-0392M (7/85)
Norton, James S., 85-0553M (12/85)
Nye, Gary L., 85-0470M (10/85)
O'Brien, Eugene D., 85-0624M (11/85)
Oja, Susan P., 85-0206M (5,9/85)
Oliver, Martin L., 85-0234M (6/85)
Olsen, Mary M., 85-0309M (8/85)
Olson, Alice, 85-0240M (11/85)
Olson, Robert O., 85-0297M (8/85)
Osborn, Rachel B., 85-0465M (8/85)
Otero, Fred, 85-0530M (12/85)
Owens, Gregory C., 85-0472M (9/85)
Page, Gary A., 84-0611M (1/85)
Palacios, Catalina S., 85-0134M (5/85)
Palaniuk, Bohdan J., 85-0080M (2,3/85)
Palmquist, Joann N., 84-0227M (4,7/85)
Parazoo, Marshall G., 85-0076M (2,2,8/85)
Park, Susan L., 84-0246M (6/85)
Parker, Gladys A., 85-0318M (5,8/85)
Parker, Steven E., 85-0455M (11,12/85)
Parnell, Chester W., 85-0544M (10/85)
Parr, David W., 85-0259M (6/85)
Parrish, Leonard L., 85-0367M (7/85)
Parrish, Ralph G., 84-0523M (2,5/85)
Parsley, Donald E., 85-0666M (12/85)
Payne, Wanda Mae, 84-0604M (1/85)
Peacore, Jerry J., 85-0187M (5,8/85)
Pearson, Victor M., 85-0401M (9/85)
Pell, Richard L., 85-0479M (9,10/85)
Pence, Rene L., 85-0110M (3/85)
Pender, John H., 84-0268M (5/85)
Pentkowski, Edward J., 85-0111M (3/85)
Perin, Dorothy E., 85-0006M (2/85)
Persad, Clarence B., 85-0100M (6/85)
Peterson, Duane L., 84-0088M (6/85)
Peterson, Patricia S., 85-0092M (4/85)
Petrie, Terry A., 84-0496M (4/85)
Petrie, Terry, 85-0482M (10,10/85)
Phillips, Richard, 85-0302M (5/85)
Pickett, Florence J., 85-0531M (12/85)
Pickett, Michael D., 85-0192M (4/85)
Pierce, Robert E., 85-0249M (6/85)
Pierson, Gene F., 85-0266M (7,8,8/85)
Pierson, Ronald D., 85-0450M (8/85)
Pinkham, Berkley Joe, 85-0342M (6/85)
Pinnell, Ruth E., 84-0454M (8,8,8/85)
Plourd, Joel A., 85-0296M (5,9/85)
Plummer, Charles L., 85-0009M (6,6,7/85)
Poelwijk, James A., 84-0340M (9,10/85)
Pond-Sutton, Gabriele, 85-0330M (7/85)
Poplin, James R., 84-0257M (1,2/85)
Potts, Robert D., 85-0491M (11/85)
Poulson, Bruce L., 84-0465M (6/85)
Powell, Edgar A., 85-0167M (3/85)
Presnell, Raymond L., 85-0385M (8/85)
Privatsky, Norman P., 85-0112M (4/85)

Name, WCB Number (Month/Year)

Puckett, Robert, 85-0567M (10/85)
Purifoy, Bordy, 84-0452M (2/85)
Putnam, Elson, 84-0425M (3/85)
Quiring, Henry, 85-0123M (6,7/85)
Rabe, Rick A., 84-0470M (3/85)
Ragland, Johnny B., 84-0440M (5/85)
Raines, Ivan L., 85-0185M (6/85)
Ramsay, Joseph W., Jr., 85-0246M (8,9/85)
Randahl, Keith D., 85-0445M (8,11/85)
Randall, Grace M., 85-0225M (7/85)
Randall, Nathan S., 85-0215M (5,6/85)
Rautenberg, Larry L., 85-0205M (5/85)
Ray, Donald W., 85-0497M (9/85)
Ray, James R., 85-0057M (7/85)
Raynor, Danny L., 85-0129M (4,5/85)
Raynor, Owen R., 85-0026M (1/85)
Rea, Boyd D., 85-0523M (10/85)
Redfield, Larry A., 85-0255M (5/85)
Reed, John M., 84-0572M (6/85)
Reed, Michael C., 84-0513M (1/85)
Reeves, Violet I., 85-0362M (7/85)
Rekow, Michael, 84-0399M (2/85)
Renken, Helen R., 84-0475M (6/85)
Repp, William A., 85-0085M (2/85)
Reust, Jerry J., 84-0301M (8/85)
Reyes, Anselmo, 85-0358M (8/85)
Richardson, Robert V., 85-0353M (8/85)
Riddle, Ronnie N., 84-0568M (3,9/85)
Rider, Kathleen D., 84-0201M (7/85)
Riggleman, Derald D., 85-0034M (2/85)
Riikula, Arvo g., 85-0044M (1/85)
Rimer, Robert L., 85-0069M (6/85)
Roark, James E., 85-0379M (7/85)
Roberts, Billy J., 85-0228M (4,6/85)
Roberts, Donald L., 85-0576M (11/85)
Robertson, Robert H., 85-0146M (3/85)
Robinson, Everett E., 85-0298M (7,7/85)
Robinson, Gary L., 85-0054M (2/85)
Robinson, Jack H., 85-0250M (5,8/85)
Robinson, Jack H., 85-0416M (8/85)
Rodgers, Raymond R., 85-0357M (7/85)
Rogers, Gayle Keith, 85-0654M (12/85)
Rogers, Ralph E., 81-0062M (4/85)
Romero, Oscar L., 85-0390M (7/85)
Roppe, Arthur D., 85-0106M (3/85)
Rose, Lonnie A., 85-0460M (9/85)
Rose, Tim A., 84-0415M (6/85)
Ross, Frank A., 84-0490M (1,12/85)
Ross, Wiley, 85-0454M (11/85)
Rost, Lou A., 85-0236M (6,7,7/85)
Roth, Vernon L., 83-0386M (6/85)
Rowlett, Raymond R., 85-0091M (2/85)
Royer, Richard S., 85-0421M (11/85)
Rumsey, Kenneth M., 85-0598M (11/85)
Runnels, Charles C., 85-0507M (9/85)
Salanti, Michael A., 84-0298M (6/85)
Salathe, Robert N., 85-0323M (6/85)

Name, WCB Number (Month/Year)
Salisbury, Jan L., 84-0025M (9/85)
Salsi, Dan J., 85-0349M (7/85)
Sampson, James R., 84-0563M (2/85)
Sanchez, Enrique M., 84-0435M (1/85)
Sandstrum, Jack H., 84-0343M (2/85)
Sattler, Richard J., 85-0359M (7/85)
Sause, Lealice L., 85-0272M (7/85)
Schaffer, Lucine, 84-0421M (6/85)
Schneider, Arthur, 84-0378M (4/85)
Schuerman, Allan R., 85-0120M (3,8/85)
Schuessler, Billie E.,85-0159M (6,8,10/85)
Schuessler, H. James (6/85)
Schultz, Sally, 85-0105M (2/85)
Schuster, Danny R., 85-0274M (5/85)
Schwary, Lillian L., 85-0145M (3/85)
Seaton, Richard L., 85-0029M (4,10/85)
Seeberger, Charles T., 85-0402M (8/85)
Seeger, Ethel M., 85-0203M (5,6/85)
Seehafer, Douglas, 85-0504M (9/85)
Selfridge, Charles, 85-0097M (6,7/85)
Setness, Frank L., 85-0031M (6/85)
Severson, Carl E., 85-0604M (11/85)
Sevey, Gene A., 85-0060M (2,9/85)
Sharman, Donald R., 84-0377M (6/85)
Short, Erle R., 85-0197M (6/85)
Shroy, Charles F., 85-0446M (11/85)
Sikes, Billie J., 81-0086M (6/85)
Simer, Frederick T., 85-0440M (10/85)
Simon, Gary, 85-0087M (2/85)
Simpson, Lee Roy, 84-0278M (1/85)
Singer, Donald R., 85-0045M (3/85)
Skinner, Catherine A., 85-0125M (3/85)
Skolfield, William R., 85-0569M (11/85)
Sloan, Kenneth L., 85-0248M (5/85)
Smets, Virginia D., 85-0512M (9,11/85)
Smith, Charles E., 85-0084M (2/85)
Smith, Edward G., 85-0352M (8/85)
Smith, Harold E., 84-0525M (1/85)
Smith, Janet Gayle, 85-0035M (6/85)
Smith, Leonard F., 85-0040M (5,10/85)
Smith, Richard R., 84-0444M (1/85)
Smith, Tony H., 85-0242M (6/85)
Snodgrass, Gene A., 84-0262M (7/85)
Snyder, Esther A., 85-0607M (11/85)
Socia, Michael W., 85-0199M (5,10/85)
Soderberg, Doreen E., 84-0576M (1,8/85)
Southard, Linda, 84-0608M (1,4/85)
Sowell, Raymond L., 84-0370M (1/85)
Spickelmier, Forest L., 85-0144M (3/85)
Spivey, Harvey F., 85-0615M (11/85)
Springs, Billy A., 84-0573M (1/85)
Spunaugle, Jeannie E., 85-0104M (4/85)
Squires, Montie B., 85-0346M (7,8,12/85)
St. John, Donald L., 85-0108M (4/85)
St. John, Donald L., 85-0396M (8,10/85)
St. Onge, Jim D., 85-0139M (4,12/85)
St. Onge, Jim, 84-0414M (1/85)

Name, WCB Number (Month/Year)
Starks, Roxana, 85-0638M (12/85)
Starr, Owen "Rudy", 85-0178M (6/85)
Stephens, Roy E., 85-0263M (5/85)
Stevens, Weldon, 84-0395M (11/85)
Stewart, William D., 84-0501M (11/85)
Stiegler, Robert H., 84-0583M (2,7/85)
Stillwell, Sharon E., 85-0427M (8/85)
Stone, Bert L., 85-0285M (5/85)
Stratton, Anita J., 84-0537M (10/85)
Stratton, Anna B., 85-0505M (10/85)
Stratton, Judy C., 84-0272M (12/85)
Strobeck, Craig A., 85-0327M (6/85)
Stubbs, Noel A., 85-0182M (4/85)
Supenia, Barry L., 85-0464M (8/85)
Swanberg, Max S., 83-0332M (11/85)
Swanson, Leonard R., 85-0336M (6,10,11/85)
Sweet, George E., 84-0586M (1,3/85)
Swenson, David H., 85-0202M (4,8/85)
Swinney, Jeff R., 85-0223M (4/85)
Syfert, Linda L., 85-0527M (10/85)
Tarpley, Gary O., 85-0620M (11/85)
Tarter, Darrel P., 85-0345M (6/85)
Taskinen, Florence E., 84-0596M (1/85)
Taskinen, Richard J., 85-0662M (12/85)
Taskinen, Toivo 81-0283M (2,2,3/85)
Taskinen, Toivo R., 85-0017M (7/85)
Tavernier, Michael G., 85-0425M (8,9/85)
Taylor, Donald R., 84-0541M (2/85)
Taylor, Gene R., 85-0282M (7/85)
Taylor, Gregory P., 85-0328M (6/85)
Taylor, Nancy A., 84-0417M (6/85)
Thennes, Dale, 85-0562M (10/85)
Thomas, John E., 85-0355M (10/85)
Thomas, Winnie M., 85-0481M (11/85)
Thompson, Leaton, 83-0346M (6/85)
Thompson, Sam, 85-0432M (10,10/85)
Thompson, Sam, Jr., 85-0516M (9/85)
Thurston, Arden D., 83-0249M (3/85)
Tibbetts, John M., 85-0063M (2/85)
Tila, Raimo K., 85-0489M (9/85)
Timpy, Charles, 84-0530M (1/85)
Trevett, Kenwood R., 85-0459M (8,11/85)
Tribur, Harold P., 85-0493M (10/85)
Trower, Shirley A., 85-0082M (2/85)
Trump, Robert L., 84-0505M etc.(3,8,11/85)
Trusty, Stonewall, Jr., 84-0168M (9/85)
Tuel, Michael J., 85-0007M etc. (7,11/85)
Turnbo, James R., 85-0042M (2,9/85)
Turpen, Charles E., 83-0016M (7/85)
Udey, Loran E., 85-0193M (10/85)
Ulman, Ray L., 85-0243M (5/85)
Valle, Salvador B., 85-0210M (4/85)
Van Dyke, Richard G., 85-0171M (5/85)
Van Sickle, James L., 84-0388M (12/85)
Vaughn, Wyndle E., 85-0652M (12/85)
Villafana, Francisco M., 85-0463M (10/85)
Villarreal, Tony, 85-0371M (9/85)

OWN MOTION JURISDICTION

Name, WCB Number (Month/Year)

Vincent, Claude L., 85-0275M (5,7/85)
Waasdorp, David L., 84-0342M (4,8/85)
Wadley, Edward C., 85-0382M (8/85)
Waggoner, Richard D., 84-0578M (2/85)
Wagner, Nicklos S., 85-0212M (4/85)
Walker, Douglas L., 85-0229M (5,6/85)
Walker, Gary L., 84-0484M (1,4/85)
Walker, Larry J., 85-0616M (11,12/85)
Walker, Virgil E., 85-0257M (6/85)
Walker, W. Craig, 84-0128M (6/85)
Wallis, Joyce K., 85-0147M (8/85)
Wantowski, John, 84-0562M (5/85)
Warf, Steven W., 85-0595M (12/85)
Warnock, Jack T., 85-0299M (5/85)
Watson, Lois G., 84-0485M (1,2/85)
Weddle, James D., 84-0554M (1,7/85)
Welfl, Darlene M., 85-0423M (8/85)
Wensenk, Clyde, 85-0332M (11/85)
White, Donna L., 85-0156M (5/85)
White, John M., 84-0459M (1,2/85)
White, Tiny L., 85-0305M (11/85)
White, William M., 84-0603M (6/85)
Whitman, Cecil C., 85-0374M (7/85)
Whitman, Larry A., 85-0224M (4/85)
Whitman, Larry A., 85-0647M (12/85)
Wik, George J., 84-0137M (2/85)
Wilde, Emilie M., 85-0458M (8,10/85)
Wilkerson, Robert, 85-0335M (6/85)
Wilkerson, William, 85-0032M (1/85)
Williams, Emma J., 85-0383M (8/85)
Williams, Robert H., 84-0044M (10/85)
Wilson, Debra L., 85-0453M (8,8/85)
Wilson, Gary L., 84-0314M (6/85)
Wilson, Marilyn, 85-0303M (5/85)
Wine, Richard L., 85-0548M (12,12/85)
Winona, Mary C., 85-0317M (6,6/85)
Wirges, Mark J., 85-0452M (10/85)
Withers, Treva E., 85-0067M (6/85)
Woelk, Arthur W., 85-0629M (11/85)
Wolfe, James D., 85-0283M (5,12/85)
Wolgamot, Terry V., 85-0583M (11/85)
Wood, B. Keith, 85-0074M (2/85)
Woodward, Brian C., 85-0287M (7/85)
Wright, Amos M., 85-0126M (6/85)
Wright, Dick H., 84-0155M (2,9/85)
Wright, John L., 85-0186M (6/85)
Wright, Ronald C., 81-0174M (5/85)
Xistras, George, 85-0650M (12/85)
Youtsey, James D., 85-0079M (2/85)
Zehner, Darrell, 84-0605M (1/85)
Zeller, Gerald A., 84-0544M (1/85)
Zullo, Judy L., 85-0404M (8/85)
Zwan, Stanley M., 85-0428M (8,10/85)

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMAN T INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX

CLAIMANT INDEX