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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ROD BURRINGTON, Claimant
Kenneth D. Peterson, Jr., Claimant's Attorney
Edward C. Olson, Defense Attorney

Own Motion 85-0448M
January 2, 1986
Own Motion Determination on Reconsideration

The Board issued an Own Motion Determination on August 16, 1985 closing claimant's claim. Claimant received temporary total disability compensation from January 23, 1984 through June 25, 1985. Claimant asks the Board to reconsider its order, allowing temporary total disability compensation through at least July 26, 1985 and granting an award for unscheduled permanent disability. Claimant has already received compensation for 100 percent loss of vision of the right eye. The insurer has requested that the Board dismiss claimant's request for reconsideration of the Board's order as the request was made after the 30-day appeal period had expired. We decline to grant this motion. Claimant has no right to appeal the Board's August 16 order and it is the Board's practice to honor all reasonable requests for reconsideration of its orders.

The Board closed claimant's claim on the basis of Dr. Simons' June 25, 1985 report in which he stated that claimant continued "to have symptoms of photophobia and discomfort, which are difficult to explain on a [sic] objective basis, and it may be neccessary [sic] to close this case with compensation, suffucient [sic] to consider some continuation of this problem for years." One month later, on July 16, Dr. Simons indicated that he wondered if closing the claimant's claim with "total loss of the eye" would result in subjective improvement of claimant's photophobia. He stated he had no further treatment for claimant at that time. Dr. Child, in July 1985, felt that claimant's condition was not medically stationary, that it was possible his symptoms would improve with more frequent use of eye drops. A reading of these reports together lead the Board to conclude that claimant's claim was not prematurely closed. It is apparent that curative treatment had not been provided to him for some time and there did not seem to be any change in his condition between June and July 1985. We are not persuaded by this record to change the date we terminated temporary total disability benefits.

Claimant, citing Russell v. SAIF, 281 Or 353 (1978), has asked that the Board allow him compensation for unscheduled disability for his alleged disability due to photophobia. Dr. Simons, in June 1985, felt that claimant might need to be compensated for his continuing symptoms of photophobia. In a July 5, 1985 report, Dr. Child indicated that claimant did not complain of light sensitivity during his examination and, in fact, the doctor utilized bright lights in his examination which claimant appeared to tolerate well. Dr. Simons, in a letter dated July 26, 1985, stated he was in general agreement with Dr. Child's report and suggested that factors other than medical treatment might cause some subjective improvement in claimant's condition.

After thorough review of the evidence, the Board concludes claimant has failed to show any loss of wage earning capacity due to factors other than his loss of vision for which he has been compensated fully. The request for further own motion relief is hereby denied.

IT IS SO ORDERED.

DELMAR R. GOODRICH, Claimant
Joseph C. Post, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-0047M
January 2, 1986
Own Motion Determination on Reconsideration

Claimant has requested reconsideration of our Own Motion Determination dated September 24, 1985. In the alternative, claimant requests that temporary disability compensation be resumed on the ground that he is not medically stationary, or that claimant be granted an increased award of permanent partial disability compensation. On July 8, 1985 we reopened claimant's January 3, 1975 industrial injury claim for payment of temporary disability compensation on account of worsened conditions from the industrial injury. Claimant's aggravation rights have expired.

We have reconsidered our previous determination. We remain persuaded that claimant was medically stationary as of July 16, 1985. We, therefore, adhere to our previous award of temporary total disability compensation from January 10, 1985 through July 16, 1985. On reconsideration we agree, however, that claimant's condition warrants an increased award for permanent disability.

We note that the medical opinions regarding claimant's current condition and prognosis strongly state that if claimant continues in his current occupation, it is highly probable that claimant will suffer increased disability in the future. While we do not consider this factor in rating claimant's present disability, we believe that this is certainly a case in which we would order vocational assistance, were we empowered to do so.

We conclude that the medical evidence establishes that claimant's condition has worsened since the last award or arrangement of compensation and that an increased award is justified. Considering claimant's physical impairment, which on the basis of the medical evidence we conclude is in the mid-range of moderate, and all of the relevant social and vocation factors, including claimant's difficulty in adjusting to his disabling pain, we conclude that claimant would be most appropriately compensated by a total award of 192 degrees for 60 percent unscheduled permanent partial disability for injury to his low back, this being an increase of 48 degrees (15 percent) over previous awards for claimant's low back injury.

ORDER

Claimant is determined to be medically stationary as of July 16, 1985. Claimant is awarded temporary total disability compensation from January 10, 1985 through July 16, 1985, less time worked. Claimant is awarded 48 degrees for 15 percent unscheduled permanent partial disability compensation for injury to his low back, in addition to all previous awards. Offset of overpaid temporary disability compensation, if any, out the increased permanent disability award granted by this order is authorized. Claimant's attorney is allowed a reasonable attorney fee of 25 percent of the increased unscheduled permanent partial disability award granted by this order, not to exceed $410.

ALFONSO ROGERS, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-07484
January 2, 1986
Order on Remand

This case is before the Board on remand from the Court of Appeals. Rogers v. TRI-MET, 75 Or App 470 (1985). The court concluded that claimant's claim was erroneously closed by the Determination Order that closed the claim as of January 8, 1983 and that claimant is entitled to compensation for temporary total disability from that date until the claim was reopened on January 4, 1984.

Therefore, the Determination Order dated February 9, 1983 is set aside and this matter is remanded to the self-insured employer for processing and payment of compensation according to law. The self-insured employer shall pay claimant compensation for temporary total disability for the period January 8, 1983 through January 4, 1984.

IT IS SO ORDERED.

ROBERT C. HARTMAN, Claimant
MacDonald, et al., Claimant's Attorneys
Liberty Northwest Ins., Defense Attorney

WCB 85-01164
January 9, 1986
Order on Reconsideration

The insurer requests that we reconsider our Order on Review dated December 11, 1985. In that order we reversed Referee Fink's order that affirmed the insurer's denial of claimant's right knee industrial injury claim. We found that although the mechanics of claimant's injury were difficult to understand from a layman's point of view, the record favored compensability. The insurer's request for reconsideration is granted. We adhere to our prior order.

In its request for reconsideration, the insurer asks that we reconsider three of our findings: (1) that claimant immediately reported his work injury to his supervisor; (2) that the Referee found claimant credible based on demeanor; and (3) that claimant's testimony regarding the events pertinent to the claim was uncontroverted.

With regard to the first finding, the insurer points to claimant's supervisor's testimony that claimant never reported an injury of the kind to which claimant testified at hearing. We acknowledge the supervisor's testimony in that regard. We remain satisfied, however, that claimant did report his injury to his supervisor. Claimant's testimony to that effect does not stand alone; it is buttressed by the testimony of the owner of the company with whom claimant filed his claim. It was the owner's testimony that claimant's supervisor related to the owner that claimant had in fact reported an accident of the kind at issue.

With regard to the Referee's findings on credibility, we adhere to our prior finding, although on reconsideration we note that our finding was somewhat ambiguous. We stated: "The Referee found claimant credible based on demeanor." We then went on to note that the Referee apparently did not believe claimant's version of the facts, for he was not convinced that the incident described by claimant could have occurred as described.

The insurer takes issue with our statement that the Referee found claimant credible based on demeanor, apparently reading our finding to suggest that claimant was in fact found to be credible by the Referee. We believe that when the entire paragraph of our order dealing with the Referee's finding on credibility is read, it is clear we were acknowledging that the Referee did not find claimant's factual recitation believeable, but that he had no reason to doubt claimant's credibility based on his demeanor at hearing. We also acknowledge, however, that our statement that the Referee "found claimant credible based on demeanor" was somewhat ambiguous and that a clarification is in order.

Finally, the insurer takes issue with our finding that claimant's testimony regarding the events pertinent to the claim was uncontroverted. The insurer notes that claimant's supervisor found the circumstances surrounding the injury to be highly improbable. In retrospect, perhaps the use of the word "uncontroverted" was inappropriate and a better designation would have been "more persuasive."

Now, therefore, having granted the insurer's request for reconsideration, we adhere to and republish our previous order dated December 11, 1985.

IT IS SO ORDERED.

ROBERT O. BORDERS, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07199
January 13, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee Leahy's order that upheld the SAIF Corporation's denial of his claim for medical services under ORS 656.245 for treatment of his right knee condition and headaches as a consequence of his 1972 left knee industrial injury. The issue is medical services.

We agree with the Referee that the evidence does not support any causal connection between claimant's left knee injury and his 1984 headaches. Apparently, claimant has abandoned any contention to the contrary on Board review.

Claimant injured his left knee in 1972. Although claimant is an admittedly poor historian, the medical record establishes that claimant had three surgeries to his left knee between 1972 and 1974 and a fourth arthroscopic procedure in September 1983. The Referee based his decision upon his findings: (1) that claimant's treating physician, Dr. Eilers, agreed with an Orthopaedic Consultants' report that concluded that the right knee difficulties in 1984 were not related to the 1972 left knee injury; and (2) that some 13 years had elapsed before claimant reported any right-sided symptoms.

On our de novo review of the record as a whole, we differ with the Referee as to the factual findings. First, we conclude that Dr. Eilers' comments on his feelings about the Orthopaedic Consultants' report were equivocal, at best. Our own examination of the Orthopaedic Consultants' report in light of this entire record persuades us that the Consultants' report

suffers significantly from the omission of material pieces of claimant's medical history. We are not persuaded that these omissions were intentional on anyone's part; however, we find that the Consultants' opinions are not persuasive because of the incomplete and inaccurate history upon which they are based. Dr. Norton's conclusions reached after his records review are similarly flawed.

On the other hand, Dr. Eilers, a knee specialist who has treated claimant since 1972, unequivocally relates claimant's current right knee difficulties to an altered gait brought about by the 1972 left knee injury and its residuals. Also contrary to the Referee's finding that over 13 years elapsed before claimant began reporting symptoms, we find that Dr. Eilers reported right-sided symptoms, which he related to the left knee injury, as early as 1977. We are persuaded by the evidence as a whole that claimant's current right knee condition is a direct and natural consequence of his original 1972 left knee injury and its sequelae. See Florence v. SAIF, 55 Or App 467 (1982); Eber v. Royal Globe Ins. Co., 54 Or App 940 (1981).

SAIF's denial also denied treatment for claimant's low back condition. SAIF conceded the compensability of that condition at the hearing.

ORDER

The Referee's order dated August 26, 1985 is modified. The SAIF Corporation's formal denial dated June 15, 1984 is approved to the extent that it denies medical services for claimant's headaches. The denial is otherwise disapproved and claimant is entitled to medical services pursuant to ORS 656.245 for his right knee and low back conditions. Claimant's attorney is awarded $1,200 as a reasonable attorney fee for services at hearing in lieu of the attorney fee awarded by the Referee and $550 as a reasonable attorney fee for services on Board review, both fees to be paid by the SAIF Corporation in addition to compensation.

JOUSIE M. McINTYRE, Claimant
Hoffman, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-11650
January 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Seymour's order that granted claimant an award of permanent total disability. The issue on review is whether claimant has proved entitlement to that award.

Claimant is a former housekeeper who compensably injured her right knee in November 1980. The injury consisted of a torn medial meniscus. Claimant's knee problems resulted in three surgeries. She ultimately received an award of 30 percent scheduled permanent partial disability for the right leg by way of a December 17, 1982 Determination Order. Claimant also suffers from preexisting neck, right hand and left arm disabilities.

Claimant was 63 years of age at the time of the hearing, had a fifth grade education and poor academic skills. All of claimant's work activities have involved manual labor. She is now

precluded from work requiring climbing, squatting, kneeling or extensive use of the legs. The record reveals, however, that claimant has functional use of her arms and hands and can do a sit-down job without limitations. She can also stand and walk for between one and three hours, and can occasionally lift up to 20 pounds.

Despite claimant's residual capacity, she has expressed an interest in retirement. She has asked her treating physician, Dr. Rockey, to issue a retirement slip on her behalf. Dr. Rockey has refused, stating that claimant is capable of sedentary employment.

In late 1982 claimant's vocational counselor developed a light duty seamstress job at claimant's former place of employment. A description of the job's duties and physical requirements was presented to Dr. Rockey, who stated his approval. Claimant refused the position, however, indicating that she had no interest in the job and reaffirming her desire to retire.

It is claimant's burden to prove entitlement to an award of permanent total disabiltity. ORS 656.206(3). She may do so by proving that she is either physically incapacitated or, although less than physically incapacitated, that she has been rendered permanently unemployable by a combination of physical impairment and adverse social and vocational factors. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). A claimant who is less than physically incapacitated generally must prove that he or she is motivated to seek employment and that a reasonable effort has been made in that regard, see Home Insurance Co. v. Hall, 60 Or App 750, rev. den., 294 Or 536 (1983); cf. George M. Turner, 37 Van Natta 531 (1985), unless a work search would be futile, Butcher v. SAIF, 45 Or App 313 (1980).

The Referee found claimant to be permanently and totally disabled, implicitly finding that it would be futile for claimant to seek work due to the combination of her physical and nonphysical disabilities. We disagree. According to claimant's treating physician, claimant is capable of sedentary work not involving extensive use of the legs. A job within claimant's capabilities has been offered, but refused. Claimant has sought no work on her own. She has expressed a desire to retire. Her future plans clearly do not include reentry into the job market. While retirement is claimant's prerogative, in this case it should not be accompanied by an award of permanent total disability.

With regard to the extent of claimant's right leg disability, we are satisfied that claimant has been adequately compensated by the 30 percent awarded by the December 1982 Determination Order.

ORDER

The Referee's order dated June 26, 1985 is reversed, and the Determination Order dated December 17, 1982 is reinstated.

BRUCE C. ALLISON, Claimant
Doblie, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-04894
January 14, 1986
Order Denying Motion to Strike Appellant's Brief

The insurer has moved the Board for an order striking claimant's appellant's brief on the ground that the brief cites, quotes and argues evidence not considered by the Referee. We have reviewed the record for the purpose of ruling on the insurer's motion and have ascertained that all of the evidence to which the insurer objects, while not admitted into evidence, is contained in the record. The question whether the Referee should have admitted the evidence in question is not now before us; however, dealing with that issue will be a part of our eventual de novo review of this case. To the extent claimant's brief refers to evidence outside the record, it will not be considered. ORS 656.295(3) and (5). However, we find no reason to strike the brief in its entirety.

The insurer's motion to strike claimant's appellant's brief is denied. The respondent's brief is due 21 days from the date of this order. The Board will consider a reply brief pursuant to OAR 438-11-010 (eff. November 6, 1985).

IT IS SO ORDERED.

RUTH A. BURCH, Claimant
Bischoff & Strooband, Claimant's Attorneys
Roberts, et al., Defense Attorneys

Own Motion 85-0588M
January 14, 1986
Interim Own Motion Order

By order dated November 1, 1985 the Board postponed action on claimant's request for own motion relief until resolution of the pending request for hearing (WCB Case No. 83-02440). Claimant has advised the Board that the Referee has deferred ruling on the hearing case until the Board rules on the own motion request. She asks that the Board reactivate the own motion petition and issue an order at this time.

The Board declines to proceed on the own motion request at this time. In Mickey Wilcox, 36 Van Natta 1706 (1984), we stated:

> "Were we to reopen this claim, it might ultimately create a situation at the time of closure in which it would be difficult to determine which portions of claimant's permanent disability were attributable to an aggravation under the Board's own motion jurisdiction and which portions of his permanent disability were attributable to his condition prior to expiration of his aggravation rights."

We concluded then, and conclude now, that the Referee should proceed pursuant to Jeffrey Barnett, 36 Van Natta 1636 (1984). Claimant's request is denied.

IT IS SO ORDERED.

LESTER R. CARMAN, Claimant
Brown & Tarlow, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-07952
January 14, 1986
Order on Reconsideration

Claimant has requested that we reconsider our Order on Review issued December 31, 1985 and increase the amount of the attorney fee awarded claimant's attorney. The request for reconsideration is allowed.

Claimant is entitled to an attorney fee to be paid by the insurer because he prevailed on the issue of extent of disability raised by the insurer's request for Board review, i.e. claimant's compensation was not disallowed or reduced. ORS 656.382(2). On the other hand, claimant cross-requested review, seeking an increase in unscheduled permanent partial disability, but was unsuccessful in obtaining an increase. Thus, the effort expended on the extent of disability issue was disproportionate to the favorable results obtained. See OAR 438-47-010(2). We, nevertheless, conclude that the previous award of $250 in attorney fees was inadequate under the circumstances. Considering all relevant factors, we conclude that an insurer-paid attorney fee of $500 for services on Board review is reasonable in this case. See Kenneth E. Choquette, 37 Van Natta 927 (1985).

On reconsideration, we also wish to correct one error in our previous order. In our previous order, we stated that the Referee based his decision on a penalty issue on our order in Harold A. Lester, 37 Van Natta 745 (1985) (Order after Remand). That is incorrect. The Referee based his decision on Brad T. Gribble, 37 Van Natta 92 (1985), in which we held that a penalty could be based upon medical expenses that are "then due." Claimant's argument on Board review was based upon Harold A. Lester, supra, which we have concluded is not on point. Neither, however, is Gribble on point, as we have held, based upon Donald O. Otnes, 37 Van Natta 522, 524 (1985), and Gary L. Clark, 35 Van Natta 117, 119 (1983), that the costs of medical services are not amounts "then due" until the services have actually been performed.

ORDER

Our Order on Review dated December 31, 1985 is modified. Claimant's attorney is awarded $500 as a reasonable attorney fee on Board review for prevailing against the insurer's request for reduction of claimant's permanent partial disability compensation, to be paid by the insurer in addition to compensation. As modified and clarified herein, our previous Order on Review is republished effective this date.

ROBERT E. DAHL, Claimant
Pozzi, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-01008
January 14, 1986
Order Allowing Motion to Strike Appellant's Brief

The insurer has moved the Board for an order "striking" claimant's appellant's brief on the ground that it was not timely filed. Claimant sought and obtained three extensions of time within which to file his opening brief. The last established due date for the opening brief was September 16, 1985. The brief was filed October 8, 1985, or 22 days after expiration of the third extension. The brief was accompanied by a cover letter requesting a fourth extension.

For the reasons set forth in Vanessa Dortch, 37 Van Natta 1207 (1985), we decline to consider claimant's opening brief. This matter will proceed to de novo review in ordinary course of business.

IT IS SO ORDERED.

CHARLENE V. DEVEREAUX, Claimant
Evohl Malagon, Claimant's Attorney
Miller, et al., Defense Attorneys

WCB 83-03330
January 14, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Devereaux v. North Pacific Ins. Co., 74 Or App 388, rev den, 300 Or 162 (1985). The court has ordered that claimant's claim of occupational disease for bilateral carpal tunnel syndrome be accepted.

Therefore, the insurer's formal denial dated August 11, 1983 is set aside and claimant's claim is remanded to the insurer for acceptance, processing and closure according to law.

IT IS SO ORDERED.

MONTE B. FRANCIS, Claimant
Pozzi, et al., Claimant's Attorneys
Breathouwer & Gilman, Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10888,84-10889, 84-11063 & 84-11064
January 14, 1986

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Fink's order which: (1) upheld the stipulation agreement between Gates, McDonald and Company and the SAIF Corporation, whereby SAIF agreed to accept responsibility for claimant's current low back condition as an aggravation claim; (2) found that the January 16, 1985 Determination Order did not prematurely close claimant's low back injury claim; and (3) increased claimant's unscheduled permanent disability award from 15 percent (48 degrees), as awarded by the aforementioned Determination Order, to 25 percent (80 degrees). On review, claimant contends that he suffered a new injury for which Gates is responsible, his low back injury claim was prematurely closed, and he is entitled to a greater award of unscheduled permanent disability.

The Board affirms the order of the Referee with the following comments concerning the issues of premature closure and extent of disability.

Following our de novo review we are persuaded that claimant's condition was medically stationary at the time of claim closure. In reaching this conclusion we have judged the reasonableness of the medical expectations at the time of claim closure by the evidence available at the time, not through subsequent developments of the case. Alvarez v. GAB Business Services, 72 Or App 524, 527 (1985); Maarefi v. SAIF, 69 Or App 527, 531 (1984). Moreover, had we considered the subsequent developments of the case, we would find these developments indicative of additional diagnostic and palliative measures and not persuasive evidence that claimant's condition was not medically stationary.

Furthermore, after conducting our review of the medical and lay evidence, we conclude that the Referee's award of unscheduled permanent disability adequately compensates claimant for his loss of earning capacity due to the compensable injury. See ORS 656.214(5).

ORDER

The Referee's order dated May 31, 1985 is affirmed.

GARY F. LACEY, Claimant
Dennis W. Skarstad, Claimant's Attorney
Moscato & Byerly, Defense Attorneys
Beers, Zimmerman & Rice, Defense Attorneys
Schwabe, et al., Defense Attorneys
David O. Horne, Defense Attorney

WCB 84-02536, 84-08734, 84-13713 & 84-13714
January 14, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Freightliner Corporation, a self-insured employer, requests review of Referee Pferdner's order which set aside its denial of claimant's bilateral carpal tunnel syndrome claim. On review, Freightliner contends that the claim is not compensable, or alternatively, that it is not the responsible employer/insurer.

We affirm the order of the Referee with the following comment concerning the responsibility issue.

In an occupational disease context in which more than one employer/insurer is potentially responsible, the last injurious exposure rule provides that, if a worker proves that the disease could have been caused by work conditions that existed at more than one place of employment, the last employment providing potentially causal conditions is deemed to have caused the disease. Boise Cascade Corp. v. Starbuck, 296 Or 238, 241 (1984). The onset of disability is the triggering date for determination of which employer is the "last potentially causal employer." Bracke v. Baza'r, 293 Or 239, 248 (1982). Where claimant's disability has not resulted in time loss, but merely has required medical treatment, the time disability occurs is generally determined to be the date claimant first sought medical treatment. SAIF v. Carey, 63 Or App 68 (1983); Adam J. Gabel, 36 Van Natta 263 (1984); William Vaandering, 36 Van Natta 1296 (1984). An earlier employer remains liable, even though work conditions of a later employment could have caused the disease, if the later employment "did not contribute to the cause of, aggravate, or exacerbate the underlying disease." Boise Cascade Corp. v. Starbuck, supra., 296 Or 238, 243; Bracke v. Baza'r, supra, 293 Or 239, 248;.

Following our de novo review of the medical and lay evidence, we find that claimant first sought medical treatment for his bilateral wrist condition while Freightliner was on the risk. Since claimant apparently has suffered no time loss resulting from his condition, his disability occurred as of the date of this treatment. Inasmuch as we are unpersuaded that claimant's approximately two week employment for a subsequent employer contributed to the cause, aggravation, or exacerbation of his underlying disease, Freightliner remains responsible as the last employer where claimant's work conditions could have caused his disease.

ORDER

The Referee's order dated April 9, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by Freightliner Corporation.

WINFRED LOGUE, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09652
January 14, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of that portion of Referee T. Lavere Johnson's order that awarded claimant permanent total disability. SAIF offers alternative arguments on review: (1) that the Referee was without jurisdiction to rate the extent of claimant's disability at hearing because claimant failed to prove a worsening of his compensable condition since a September 1984 Determination Order; and (2) that even if the Referee had jurisdiction to rate extent, claimant failed to prove entitlement to an award of permanent total disability.

We affirm the Referee's order with the following comments regarding SAIF's first argument, i.e., that the Referee was without jurisdiction to rate the extent of claimant's disability. SAIF cites Ellis v. SAIF, 67 Or App 107 (1984) and Johnson v. Industrial Indemnity, 66 Or App 640 (1984), as support for its argument. Ellis and Johnson hold that once a "final" determination of claimant's disability has been made, claimant is entitled to compensation for medical services only absent proof of a worsening of a compensable condition subsequent to the final determination. Ellis, 67 Or App at 109; Johnson, 66 Or App at 642.

SAIF asserts that the last arrangement of compensation in this case was a September 1984 Determination Order that awarded no additional permanent disability compensation over that previously awarded by way of a stipulated settlement. SAIF further argues that claimant failed to prove that his compensable condition worsened since this last arrangement, and that under Ellis and Johnson, claimant was not entitled to additional compensation thereafter.

Ellis and Johnson are distinguishable from the present case. In Ellis and Johnson, the last arrangements of compensation were Determination Orders that became final by operation of law when they were not appealed. Thus, those orders were "final determinations" of claimant's disability. By contrast, the Determination Order at issue in the present case was the very basis for claimant's request for hearing. That order did not become "final," for it was from that order that claimant appealed. The Referee clearly had jurisdiction to review claimant's claim in order to determine whether adequate compensation had been awarded.

ORDER

The Referee's order dated May 2, 1985 is affirmed. Claimant's attorney is awarded $700 for services on Board review, to be paid by the SAIF Corporation.

HARRY J. MARSHALL, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09863
January 14, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Fink's order that: (1) denied his request for an award of permanent total disability; (2) affirmed the Determination Order granting 32 degrees for 10 percent unscheduled permanent partial disability for the left hip; and (3) awarded 75 degrees for 50 percent loss of the left leg and 75 degrees for 50 percent loss of the right leg in lieu of the Determination Order granting 15 degrees for 10 percent loss of each foot. The SAIF Corporation cross-requests review of that portion of the order that increased claimant's scheduled injury award. The issues on review are permanent total disability or, in the alternative, extent of unscheduled and scheduled permanent partial disability.

We affirm that portion of the Referee's order that denied claimant's request for an award of permanent total disability.

On the issue of unscheduled disability, we find claimant to be entitled to an increased award. Claimant has received an award of 10 percent unscheduled disability. After considering his age, education, work experience, residual functional capacity, transferable skills and impairment, we find that he is entitled to an award of 80 degrees for 25 percent unscheduled disability.

On the issue of scheduled disability, we reverse the order of the Referee. The Referee found claimant to be entitled to an increased award for the "legs." In fact, claimant suffers disability of the feet, and the disability appears to be confined to a peripheral neuropathy that causes numbness of the plantar surface of the feet. While we recognize that claimant suffers disability, we find that he has been adequately compensated by the 10 percent awards previously granted by Determination Order. In reaching our conclusion, we note under OAR 436-65-548(1) (renumbered 436-30-310, May 1, 1985), a complete sensory loss of plantar sensation in the foot represents a maximum 10 percent loss of the foot.

ORDER

The Referee's order dated March 7, 1985 is reversed in part, modified in part and affirmed in part. That portion of the order that awarded claimant 75 degrees for 50 percent scheduled permanent partial disability for each foot is reversed and the Determination Order granting 15 degrees for 10 percent scheduled disability for each foot is reinstated. That portion of the order that affirmed the Determination Order granting 32 degrees for 10 percent unscheduled permanent partial disability for the left hip is modified. In lieu of the Determination Order award, claimant is awarded 80 degrees for 25 percent unscheduled permanent partial disability. Claimant's attorney's fees shall be adjusted consistent with this order. The remainder of the Referee's order is affirmed.

GEORGE H. McMULLEN, Claimant
Scott M. McNutt, Claimant's Attorney
Beers, Zimmerman & Rice, Defense Attorneys
Cowling, et al., Defense Attorneys

WCB 84-10663 & 85-01172
January 14, 1986
Order Denying Motion to Dismiss Request for Review

Argonaut Insurance Company, joined by claimant, has moved the Board for an order dismissing EBI Companies' Request for Review of Referee Mongrain's order on the ground that the Request for Review was not served on all parties. Our review of the relevant portions of the record pursuades us that EBI's Request for Review was timely served upon the Board and the attorneys for all parties. Service on an attorney for a party is deemed service on the party. Nollen v. SAIF, 23 Or App 420, 423, rev den (1975); Ralph W. Gurwell, 35 Van Natta 1310 (1983).

Argonaut's and claimant's motions to dismiss EBI's Request for Review are denied. Respondents' briefs are due within 21 days from the date of this order. The Board will consider a reply brief pursuant to OAR 438-11-010 (eff. November 6, 1985).

IT IS SO ORDERED.

STANLEY C. PHIPPS, Claimant
Aitchison, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
John E. Snarskis, Defense Attorney

WCB 84-01838 & 84-02301
January 14, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Industrial Indemnity Company requests review of Referee Pferdner's order that found it responsible for claimant's low back condition and upheld the SAIF Corporation's denial of claimant's low back aggravation claim. This is a proceeding under ORS 656.307. The issue is responsibility between successive employers.

Claimant first injured his low back in January of 1979 while employed by SAIF's insured. He ultimately received a permanent partial disability award totalling 64 degrees for 20 percent for injury to the low back. His symptoms waxed and waned over the years until March of 1983. In late March 1983 claimant attended a prayer meeting, after which he became less symptomatic. While there is some evidence that claimant became totally asymptomatic after the prayer meeting, we are persuaded by the evidence as a whole that claimant's symptoms decreased, but did not disapear. In August 1983 claimant sought treatment from a naturopath for low back pain on at least two occasions.

On the morning of September 27, 1983 claimant felt a pulling sensation in his low back while lifting a piece of machinery while employed by Industrial Indemnity's insured. This incident did not immediately result in the onset of pain, but claimant's symptoms began to increase later in the evening of September 27, 1983. Claimant was thereafter unable to work. Claimant first made an aggravation claim with SAIF and, after SAIF denied the claim, made a claim with Industrial Indemnity for a new injury. Both insurers agreed that claimant's inability to work was due to a compensable condition, but each denied responsibility. On February 27, 1984 Industrial Indemnity was designated as paying agent pursuant to ORS 656.307.

The Referee viewed the medical evidence as being equally divided as to whether claimant's disability was as a result of aggravation of the 1979 injury or was due to an injury in September 1983. He then relied upon Industrial Indemnity Co. v. Kearns, 70 Or App 583 (1984), for the proposition that,

> "[There is a] rebuttable presumption that if the last incident 'contributed 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 of the final condition.'"

He concluded that Industrial Indemnity presented no evidence to rebut the presumption, and held it responsible for claimant's compensation.

We disagree both with the Referee's characterization of the medical evidence and his reliance on Industrial Indemnity Co. v. Kearns, supra. We conclude that Kearns has no applicability in this case.

In Kearns, the claimant had two accepted back injuries in 1979, each the responsibility of a different insurer. In 1981 the claimant's treating physician asked to have the claimant's claim reopened for aggravation of his 1979 injury, but did not specify which 1979 injury. We stated a rule for determining responsibility in cases involving successive injuries to the same body part:

> "Where there are multiple accepted injuries involving the same body part, we will assume that the last injury contributed independently to the condition now requiring further medical services or resulting in additional disability, and the employer/insurer on the risk at the time of the most recent injury has the burden of proving that some other accepted injury last contributed independently to the condition which presently gives rise to the claim for compensation . . . ." Duane Kearns, 35 Van Natta 772, 777 (1983).

The Court of Appeals approved our statement, holding that it was not inconsistent with the Supreme Court's analysis of the "last injury rule" in Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1983). Industrial Indemnity Co. v. Kearns, supra, 70 Or App at 587. Finding the claimant's physician's statements relating to responsibility ambivalent, we applied the presumption to find the most recent insurer liable for the aggravation claim and the court affirmed our order.

Kearns, however, did not involve the question whether the present claim for compensation is as a result of an aggravation of an old injury or is a result of a new injury entirely. Kearns unquestionably involved an aggravation of an old injury, the question being that of which old injury had aggravated. The rebuttable presumption, then, is that the most

recent accepted injury remains the cause of claimant's increased disability. Kearns does not stand for the proposition that a specific incident is presumed to be a new injury, rather than an aggravation of an old injury. Whether claimant has suffered a new injury or an aggravation is a question of fact, and the proper inquiry is whether claimant's present condition is a continuation of the 1979 injury or whether some subsequent incident independently contributed in a material way to claimant's current condition. See Ceco Corp. v. Bailey, 71 Or App 782, 785 (1985).

The relevant evidence bearing upon the question is claimant's testimony and the opinions of four medical doctors. Contrary to the Referee's conclusion that this evidence was equally divided, we find that it overwhelmingly establishes that claimant suffered an aggravation of his 1979 injury.

Claimant testified that, since the 1979 injury, he had continued to experience pain in the same part of his back and that the pain was sometimes better and sometimes worse over the years. He testified that when the pain worsened in September 1983, "I felt like it was the same thing all over again." Dr. Duff at first opined that claimant had suffered a new injury, however, his conclusion was based upon erroneous information that claimant had been totally asymptomatic for six months prior to September 1983. When he was advised that claimant's symptoms had in fact persisted, Dr. Duff changed his opinion and concluded that the September 1983 incident did not independently contribute to claimant's condition.

Drs. Thomas and Wilson both opined that the September 1983 incident was not an independent injury. Further, both doctors were provided with Professor Larson's characterization of an aggravation -- "a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion . . . ," see Perdue v. SAIF, 53 Or App 117, 121 (1981); Smith v. Ed's Pancake House, 27 Or App 361, 364 (1976) -- and both agreed that the statement was a "perfect" description of claimant. Dr. DeLisle opined that claimant's condition was a continuation of an ongoing low back syndrome.

We find that the evidence clearly preponderates in favor of a holding that SAIF is responsible for claimant's current compensation as an aggravation of the 1979 low back injury.

Although an issue neither anticipated nor raised by the parties, we turn now to the question of attorney fees. In Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985), the Court of Appeals directly addressed the question of statutory authority for an award of attorney fees to a claimant's attorney for participation in a hearing under ORS 656.307. On remand from the court, Petshow v. Ptld. Bottling Co., 62 Or App 614 (1983), we concluded that claimant's attorney was not entitled to an attorney fee for his role in litigation of the responsibility issue. We relied upon OAR 438-47-090(1), as interpreted by previous Board cases, see, e.g., Robert Heilman, 34 Van Natta 1487 (1982), concluded that the claimant's attorney's participation had not been "active and meaningful" as to the responsibility issue, and awarded no fee. David R. Petshow, 36 Van Natta 1323, 1324-25 (1984) (Order on Remand). Claimant requested judicial review. The court held:

> "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 previal 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 responsibility issue was nominal and that he is therefore not entitled to any additional attorney fee . . . under ORS 656.386(1). . . ." Petshow v. Farm Bureau Ins. Co., supra, 76 Or App at 570-1.

The court acknowledged that insurer paid attorney fees relating to other issues involving unreasonable claims processing were appropriate and let them stand. The court did not reach the question whether we had correctly applied OAR 438-47-090(1) to the facts of the case.

In this case, issues as to penalties and attorney fees for alleged unreasonable claims processing were resolved by the parties by stipulation prior to the hearing. The hearing involved only the issue of responsibility. The very fact that a ".307 order" was issued by the Workers' Compensation Department is conclusive that neither insurer denied the compensability of claimant's condition. See ORS 656.307(1). Both insurers denied responsibility. However, as the court points out in Petshow v. Farm Bureau Ins. Co., supra, there was never any doubt that claimant would prevail on one of the responsibility denials. There were no ancillary issues that posed a threat to claimant's entitlement to compensation. See, e.g., Nat. Farm Ins. v. Scofield, 56 Or App 130 (1982) (claim allegedly barred by untimely filing; allegedly no proof of compensable aggravation); Hanna v. McGrew Bros. Sawmill, 44 Or App 189, modified, 45 Or App 757 (1980) (claim allegedly barred by failure to appeal denial). We, therefore, conclude that under Petshow v. Farm Bureau Ins. Co., supra, claimant was a nominal party both at hearing and on Board review and claimant's attorney is not entitled to attorney fees.

We also conclude, in view of Petshow v. Farm Bureau Ins. Co., supra, that the phrase "actively and meaningfully participates" as used in OAR 438-47-090(1) must be interpreted to mean taking a position and actively litigating a point bearing upon the claimant's entitlement to receive compensation or the amount thereof. There was no such participation in this case.

ORDER

The Referee's order dated April 5, 1985 is reversed. Industrial Indemnity Company's denial of responsibility dated January 25, 1984 is reinstated and approved. The SAIF Corporation's denial of responsibility dated December 20, 1983 is set aside. The SAIF Corporation is hereby ordered to accept claimant's claim of aggravation of his January 3, 1979 industrial

injury and process said claim according to law. The SAIF Corporation is further ordered to reimburse Industrial Indemnity Company for all claim costs, exclusive of penalties and/or penalty-associated attorney fees, if any, paid pursuant to the Order Designating Paying Agent dated February 27, 1984.

PAUL RIGGINS, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 84-0054M
January 14, 1986
Own Motion Order on Reconsideration

The Board issued an Own Motion Order on May 4, 1984 declining to grant own motion relief to claimant. Specifically, claimant was requesting payment for prescriptions needed for the control of "posttraumatic seizure disorder". Claimant's injury occurred prior to 1966 and does not carry with it the right to continuing medical services. The Board declined to grant the relief claimant sought.

Claimant has now requested that the Board reconsider its position in this claim and grant payment for the prescribed Dilantin. It is not the Board's policy to automatically grant medical services to claimants who were injured prior to 1966. The law did not provide for that right and the Board generally requires something more than proof of a relationship between the injury and the needed treatment. The Board has, on several occasions, reopened a pre-'66 claim for the payment of medical services where the claimant underwent a period of curative care intended to return him or her to a medically stationary status. While each own motion case is unique and must be reviewed on its own merits, the Board will not generally reopen a pre-'66 claim for the payment of palliative treatment necessary to maintain the injured worker's status. We continue to deny the relief claimant seeks in this case.

IT IS SO ORDERED.

GERALD L. SNEED, Claimant
Emmons, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-10713
January 14, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seymour's order that found claimant's low back injury claim to be barred for having been untimely filed. The issue on review is whether claimant's claim is barred and, if not, whether the claim is compensable.

Claimant alleges that he sustained a compensable injury to his low back and left leg when he jumped off of a forklift, landing on his left heel. The injury allegedly occurred December 14, 1982. Claimant testified that he finished his shift on the day of the accident and visited a chiropractor, Dr. Burck, the next day. Dr. Burck's records indicate that claimant was treated with chiropractic adjustments shortly after the alleged industrial injury.

Although claimant now alleges that his injury occurred on the job, he asked Dr. Burck to indicate on a disability slip that the injury was not work-related. Claimant was concerned about the potential negative implications of filing an injury

claim with his employer. He was also concerned that his filing a claim might result in his employer being made aware of claimant's drinking problem. Dr. Burck honored claimant's request and represented to claimant's employer that claimant was injured off the job. Claimant did the same, apparently convinced that his injury would not result in permanent impairment.

In early 1983 claimant suffered two off-the-job injuries. He underwent low back surgery soon thereafter. After realizing that the surgery might result in permanent impairment, claimant filed a workers' compensation claim with the employer in an attempt to tie his disability to the alleged December 1982 injury. The claim was filed on September 25, 1984, a year and nine months after the alleged industrial injury occurred. Upon receipt of the claim, the employer's insurer issued a denial on the basis that the claim had been untimely filed. It conducted no investigation because of the substantial time lapse between the alleged injury and the date of filing.

ORS 656.265(1) provides that notice of an accident shall be given no later that 30 days after it occurs. Failure to give notice as required bars a claim unless the employer had knowledge of the injury, or the insurer has not been prejudiced by the failure to receive notice. ORS 656.265(4)(a). There is no assertion by claimant that the employer had knowledge of a work-related injury, for claimant affirmatively represented to the employer that his injury occurred off the job. Claimant does assert, however, that the insurer was not prejudiced by his failure to give notice within the statutory filing period.

The Referee found that claimant sustained a compensable injury, but he barred the claim as having been untimely filed. The Referee concluded that he was bound by Vandre v. Weyerhaeuser, 42 Or App 702 (1979), in which the court noted that the passage of time alone may result in prejudice to the insurer. The Referee reached his holding "reluctantly" because he felt that claimant's early reporting would not have materially enhanced the insurer's ability to conduct an investigation.

We agree with the result reached by the Referee. Unlike the Referee, however, we are not reluctant to find that the insurer was prejudiced by the events surrounding this claim. We find that the insurer was clearly prejudiced, not only by the passage of time, but also by the actions taken by claimant and his chiropractor and the occurrence of subsequent off-the-job injuries. The affirmative representation by claimant and his doctor that claimant's injury occurred off the job precluded the insurer from conducting an investigation when the facts of the case were fresh. Claimant's subsequent injuries further complicated the claim, making it difficult to separate the effects of the alleged work-related incident from those of the off-job accidents.

It is the insurer's burden to prove that it has been prejudiced by failure of notice. Satterfield v. Compensation Dept., 1 Or App 524 (1970). The insurer in the present case has met its burden.

ORDER

The Referee's order dated June 6, 1985 is affirmed.

CLATUS E. BIRTWISTLE, Claimant
DAROLD D. WHITE, Employer
J.W. McCracken, Jr., Claimant's Attorney
Russell D. Bevans, Attorney
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 84-06054
January 15, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests reveiw of Referee Michael V. Johnson's order that found claimant was not a subject worker when he was injured on March 5, 1984. The issue is claimant's status as a partner under ORS 656.027(8).

The Board affirms the order of the Referee.

ORDER

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

BERNIE HINZMAN, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 83-0097M
January 15, 1986
Own Motion Order on Reconsideration

We issued our Own Motion Order on August 14, 1985. In that order we allowed SAIF Corporation an offset of overpaid temporary disability compensation to be recovered by withholding an amount equal to 5% of presently due temporary disability compensation out of each periodic payment until claim closure pursuant to ORS 656.278. Claimant's attorney has since written several letters questioning our allowance of the offset. In light of claimant's attorney's letter dated January 9, 1986, we treat these letters collectively as a request that we reconsider our previous order. The request for reconsideration is allowed.

Claimant's chief objection is that we allowed SAIF an offset of $1,067.30 when SAIF only claimed entitlement to an offset of $872.25. We agree with claimant that previous correspondence in this record provides some support for claimant's argument that SAIF's claim of overpayment was for $872.25. Argument could also be made that SAIF's claim was for as little as $195.05 or for as much as $1,067.30, and there is evidence lending some support to each of the three amounts.

As we pointed out in our previous order, when we were faced with the confusion evident as to the amount of the offset, we requested that the Audit Division of the Workers' Compensation Department inform us of the benefits to which claimant was entitled and the benefits claimant had actually been paid. We found the Audit Division's figures to be more persuasive than either SAIF's or claimant's and adopted them, resulting in our finding that claimant had been overpaid $1,067.30 in temporary disability compensation.

On reconsideration of the record, we find nothing to justify our reaching a different conclusion, see ORS 656.278(1), and we adhere to our previous order.

IT IS SO ORDERED.

VERNON D. KELSO, Claimant
David C. Force, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 83-10281
January 15, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Daron's order that: (1) upheld the self-insured employer's denials of claimant's aggravation and medical services claims involving the right shoulder; and (2) denied claimant's request for penalties and attorney fees for the self-insured employer's alleged unreasonable denials. Claimant also moves the Board to remand this case to the Referee for consideration of medical evidence generated post-hearing. The issues on review are the compensability of claimant's right shoulder aggravation claim, medical services and the propriety of remand.

With regard to the remand issue, we can remand a case to the Hearings Division if we find that the hearing record was incompletely or improperly developed. ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). We have applied a restrictive policy with regard to remand, however, Casimer Witkowski, 35 Van Natta 1661 (1983), and we will normally remand for the taking of additional evidence only if it is shown that such evidence was not obtainable with due diligence prior to the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985); Robert A. Barnett, 31 Van Natta 172 (1981).

In the present case, the evidence sought to be admitted is a medical report from a Social Security Administration physician. The physician offers an opinion with regard to the diagnosis of claimant's neuromuscular condition. The report was authored after the hearing pursuant to claimant's application for federal disability benefits. In his request for remand, claimant argues that because he did not seek federal benefits until after the record had been closed, the medical report generated from his application could not have been produced with due diligence before the hearing.

While claimant's argument is technically correct, we note that a great deal of medical evidence regarding his diagnosis was generated in preparation for litigation, both by the employer and by claimant himself. The post-hearing report is no more cumulative medical evidence. Claimant has not persuaded us that its significance exceeds that of the evidence acquired in time for hearing. We are satisfied that claimant had ample opportunity to produce evidence of his diagnosis before the hearing, and that the record has been properly closed.

On the merits, we affirm the Referee's order.

ORDER

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

BETTY J. McMULLEN, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 83-08212
January 15, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of that portion of Referee McCullough's order which found that it was responsible for claimant's current psychiatric treatment. Claimant cross-requests review, contending that her attorney fee award should be increased.

The Board affirms the order of the Referee. Inasmuch as claimant submitted no brief to assist us in conducting our review, she is not entitled to an attorney fee. Richard N. Conturier, 36 Van Natta 59 (1984).

ORDER

The Referee's order dated June 17, 1985 is affirmed.

SPENCER L. METCALF, Claimant
Cash Perrine, Claimant's Attorney
Schwabe, et al., Defense Attorneys
Ronald E. Rhodes, Defense Attorney

WCB 85-01244 & 85-01555
January 15, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

North Pacific Insurance Company requests review of those portions of Referee Myers's order that set aside its denial of claimant's low back aggravation claim and affirmed Logger Assurance Company's denial of claimant's new injury claim. The issue on review is responsibility.

The Board affirms and adopts the order of the Referee. Because the compensability of claimant's low back condition was not at issue on Board review, claimant's attorney shall receive no fee for services before the Board. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 570-71 (1985).

ORDER

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

LELAND L. MORSE, Claimant
Galton, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-08582
January 15, 1986
Order on Review

Reviewed by the Board en banc.

The insurer requests review of that portion of Referee Menashe's order which awarded compensation for permanent total disability for injury to claimant's low back. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

Claimant was a truck driver with 25 years experience with the same company when he fell at work and injured his low back on June 15, 1982. Treatment of the injury has been conservative. No surgery is planned.

The attending physician, Dr. Hardiman, rated claimant's permanent impairment at 10 to 15 percent based on the AMA publication Guides to the Evaluation of Permanent Impairment and recommended that claimant not return to work as a truck driver. The claim was closed by Determination Order dated February 23, 1983 which awarded temporary disability compensation and 48 degrees for 15 percent unscheduled permanent partial disability. Claimant returned to work briefly but had to discontinue truck driving. The claim was subsequently reopened and reclosed two times for aggravations with additional awards of temporary disability compensation and 16 degrees for 5 percent unscheduled permanent partial disability. The total permanent disability award at the time of hearing was 64 degrees for 20 percent unscheduled permanent partial disability.

Claimant began drawing his retirement pensions from his union and Social Security on January 1, 1984. He had applied for the Social Security retirement benefits in September 1983. Claimant retired because his doctor told him that he could not drive truck any more. When claimant was contacted by a vocational rehabilitation counselor in the fall of 1983, claimant refused vocational assistance because he was retiring.

Claimant was examined in May 1984 by Dr. Mandiberg. Dr. Mandiberg opined that claimant could return to work at a "highly specified job" where claimant could stand and sit at will and work for two to three hours at a time. In December 1984 Dr. Berkeley examined claimant and opined that he was unable to drive for more than 30 minutes at a time, he should not lift or bend or twist, and that claimant was totally disabled at that time.

At the time of the hearing, claimant was 69 years old. Claimant testified that his condition at the time of the hearing was the same as it had been at the last examination by Dr. Hardiman in 1982. He had sought no work since he retired in January 1984. His leg pain returned if he drove for more than about 30 minutes, but he drove to Reno in one day and a few days later he drove home in one day.

Dr. Berkeley testified at the hearing that he considered claimant's limits to be no lifting, no bending, no twisting, no crawling, no climbing, and 30 minutes driving. Dr. Berkeley's opinion was not changed by learning that claimant had driven more than 600 miles in one day on two occasions since Dr. Berkeley had originally formed this opinion. Dr. Berkeley opined that claimant was severely impaired but that fluctuations in symptoms could be anticipated.

An employer representative testified that claimant's seniority entitled him to choose jobs within the employer's business and that claimant had qualified for his union retirement pension ten years before he retired. The employer representative also testified that claimant could have worked until he was 70 years old if he could perform the work.

The Referee found claimant was a credible witness. Based on claimant's work history, he also found claimant was a motivated worker. The Referee found that the suggestion that claimant could work part-time was not evidence of regular gainful employability and that claimant was not employable in the

competitive labor market. The Referee alternatively found that claimant's impairment plus social and vocational factors made it futile for claimant to attempt to sell his services.

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). Unrelated physical impairment that arises post-injury is not considered in determining permanent total disability. Emmons v. SAIF, 34 Or App 603 (1978). If the compensable condition did not cause permanent worsening of a preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of injury. Bob G. O'Neal, 37 Van Natta 255, 77 Or App 194 (1985); John D. Kreutzer, supra; Frank Mason, 34 Van Natta 568, aff'd mem., 60 Or App 786 (1982). In the context of permanent total disability, we consider the extent of claimant's impairment caused by all disabling conditions, regardless of compensability, that preexisted the industrial injury and the impairment resulting from the injury itself, and determine what the effect, including possible synergistic effect, of all these combined conditions was at the time of the hearing. Arndt v. National Appliance Co., supra; Deborah L. Jones, 37 Van Natta 1573 (1985).

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 preexisting impairment, impairment related to preexisting conditions, impairment related to the industrial injury, and social and vocational factors. See Livesay v. SAIF, 55 Or App 390 (1981); Deborah L. Jones, supra. However, a finding that claimant can regularly perform part-time work can preclude a finding of permanent total disability. Hill v. SAIF, 25 Or App 697 (1976); Thomas J. Stokes, 37 Van Natta 134, aff'd mem. 75 Or App 578 (1985).

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 claimant 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). Finally, a permanent total disability award cannot be reduced on the basis of a speculative future change in employment status but only on the actual conditions existing at the time of the hearing. Gettman v. SAIF, 289 Or 609 (1980); Clark v. Boise Cascade Corp., 72 Or App 397 (1985); Morris v. Denny's, 50 Or App 533 (1981).

Based on the limitations that Drs. Hardiman, Mandiberg, and Berkeley have recommended, we find that claimant retains significant wage earning capacity. That claimant was unable to return to work as a truck driver, which was the only work claimant had done for many years, does not make him permanently and totally disabled without at least attempting to seek work within his remaining capacity. Claimant refused vocational assistance and has made no effort to seek work. We find that he has not proved that it would be futile for him to seek work, based on impairment and social and vocational factors, and that he has not proved that he is willing to seek regular gainful employment, nor that he has made any effort to obtain such employment. Therefore, we reverse the Referee's award of compensation for permanent total disability.

Claimant is significantly disabled. 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). See also, Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

Considering claimant's age, occupational and educational background, and his impairment as it was at the time of the hearing, we find that claimant would be adequately compensated by an award of 160 degrees for 50 percent unscheduled permanent partial disability.

Claimant's compensation is reduced by this order, therefore, there is no award of attorney fees. No offset for compensation paid pursuant to the Referee's award is allowed. ORS 656.313(2); SAIF v. Casteel, 74 Or App 566 (1985).

ORDER

That portion of the Referee's order dated April 16, 1985 which awarded compensation for permanent total disability is reversed. Claimant is awarded 160 degrees for 50 percent unscheduled permanent partial disability in lieu of prior awards. Claimant is awarded no attorney fees. The remainder of the order is affirmed.

Board Member Lewis Dissenting:

Because I agree with the Referee's well-reasoned Opinion and Order finding claimant to be permanently and totally disabled, I respectfully dissent from the majority's opinion.

I agree with the Referee that claimant is totally incapacitated from a physical standpoint alone. I further agree that even if claimant is not totally physically incapacitated, it is highly unlikely that he could sell his services in the labor market due to the combination of his serious back impairment, advanced age and limited education. Claimant's underlying degenerative back condition was materially affected by his compensable injury. Although claimant has a high school education, it was completed over fifty years ago. Furthermore, he was 69 years of age at the time of the hearing.

I recognize a doctor has stated that claimant could ". . . return to a highly specified job which would enable him to

stand up and sit down at will and work for no more than 2-3 hours at a time." I am not convinced, however, that this statement represents an indication that claimant is capable of regularly performing suitable and gainful employment, ORS 656.206(1), or that claimant could in fact do the job suggested by the physician, even if it were available. I believe that it would be futile for claimant to seek regular employment. Butcher v. SAIF, 45 Or App 313 (1980).

I personally fail to see how a severely disabled, 69 year old man who is precluded from performing the only work he has ever done can be considered to have retained "significant wage earning capacity," as was suggested by the majority opinion.

In my opinion, claimant is permanently precluded from performing gainful and suitable work. I would affirm the Referee's order.

LARRY R. PAYN, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 85-0684M
January 16, 1986
Own Motion Order

SAIF Corporation has submitted to the Board claimant's claim for consideration pursuant to ORS 656.278. Claimant sustained a compensable injury on December 20, 1973 and his aggravation rights have expired. Claimant underwent surgery on October 31, 1984 and is requesting temporary total disability compensation for the period of time he was medically nonstationary. SAIF has paid for the knee surgery, but is unwilling to reopen claimant's claim for the payment of further compensation.

The record indicates that claimant has not been employed since the 1973 injury. Absent evidence to the contrary, we conclude that he has voluntarily removed himself from the general labor market. Cutright v. Weyerhaeuser Company, 299 Or 290 (1985). The request for own motion relief is denied.

IT IS SO ORDERED.

LELAND O. BALES, Claimant
Johnson, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-04721
January 17, 1986
Order Denying Motion for Attorney Fee

On September 12, 1985 we issued our order allowing claimant's motion to dismiss the SAIF Corporation's request for Board review on the ground that review had not been timely requested. ORS 656.289(3); 656.295(2). Claimant timely petitioned for an attorney fee award, relying upon SAIF v. Bond, 64 Or App 505 (1983), for the proposition that a claimant is entitled to an attorney fee under ORS 656.382(2) when an insurer's or employer's request for Board review is dismissed prior to a decision on the merits. SAIF v. Bond, supra, was expressly overruled by Agripac, Inc. v. Kitchel, 73 Or App 132 (1985). We have since held, based upon Agripac, Inc. v. Kitchel, supra, that a claimant is not entitled to an attorney fee where an insurer's or employer's request for Board review is dismissed prior to decision on the merits. Rodney C. Strauss, 37 Van Natta 1212, 1214 (1985). Claimant's request for an attorney fee is denied.

IT IS SO ORDERED.

SHIRLEY M. GEHRKE, Claimant
John D. McLeod, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-04735
January 17, 1986
Order on Reconsideration

The insurer has requested reconsideration of our Order Dismissing Request for Review and Remanding dated December 4, 1985. The insurer points out that in James R. Drew, 37 Van Natta 570 (1985), we held that the failure of an employer to request review of a Referee's order vacating an order of dismissal resulted in the order becoming final and not subject to further review.

In Paul W. Bryan (Dec'd), 37 Van Natta 1431 (1985), we recognized the anomaly presented by our order in James R. Drew, supra, and overruled Drew to the extent that it required a party to appeal from a nonappealable order. We made it clear in Bryan that a Referee's order denying a motion to dismiss a request for hearing is not a reviewable order, but that the Referee's decision is reviewable after the entry of a final, reviewable order that resolves the matters upon which the hearing was requested.

This approach is consistent with the Court of Appeals' holding that a Board order which remands to a Referee for further proceedings is not a final order for purposes of ORS 656.298 and, therefore, not subject to judicial review. Hammond v. Albina Engine & Machine, 13 Or App 156 (1973).

Reconsideration is allowed. On reconsideration, we adhere to our earlier order dismissing the insurer's request for review and remanding this case to the Hearings Division for further proceedings.

IT IS SO ORDERED.

DAN W. HEDRICK, Claimant
Hayner, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 84-10652
January 17, 1986
Order on Reconsideration

The self-insured employer has requested that we reconsider a portion of our Order on Review dated December 31, 1985. In that order we affirmed without opinion Referee Foster's order setting aside the employer's denial of claimant's low back condition. We also awarded claimant's attorney a fee of $550 for services before the Board. The employer asks that we reconsider our award of attorney fees. The employer's request for reconsideration is granted. After reconsidering our order, we agree with the employer that claimant's attorney was due no fee on Board review.

Although claimant prevailed before the Board on an employer-initiated request for review, claimant submitted no brief for our consideration. Attorney fees are determined by the degree of counsel's meaningful participation on review. See, e.g. James A. McGougan, 37 Van Natta 539 (1985); Karl J. Wild, 37 Van Natta 491 (1985). We normally will award no fee on Board review absent counsel's filing a brief before us. See Ada K. Cooper, 37 Van Natta 1279, 1281 (1985). After a review of the procedural posture of the present case, we find that claimant's counsel did not meaningfully participate on Board review and that no fee should have been awarded in this forum.

Now, therefore, having granted the self-insured employer's request for reconsideration, we set aside that portion of our order dated December 31, 1985 that awarded claimant's attorney $550 for services on Board review. We adhere to the remainder of our order, which is hereby republished effective this date.

IT IS SO ORDERED.

JANE L. CAPUTO, Claimant
Thomas J. Ditton, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 85-01933
January 21, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Knapp's order that: (1) set aside its partial denial of claimant's industrial injury claim for the low back; and (2) affirmed the Determination Order awarding 64 degrees for 20 percent unscheduled permanent partial disability for the low back. The issues on review are whether claimant's current low back condition is related to her compensable injury, and extent of unscheduled disability.

Claimant is a former potato trimmer. She compensably injured her low back in September of 1984 when she raised up from a kneeling position and experienced severe lumbosacral pain. She later experienced left leg symptoms. Dr. Fulper, the employer's plant physician, suspected a herniated disk. A neurologic consultation was arranged, and Dr. Gehling felt that claimant had either a facet problem or an irregular radiculopathy. A CT scan revealed degenerative facet changes and hypertrophic facet joints. Claimant was released for light duty. Dr. Gehling suspected that claimant would continue to experience pain as a result of her degenerative condition.

Claimant's pain did continue and she returned to Dr. Johnson, her family physician. Dr. Johnson authorized additional time loss and opined that claimant's injury had "exaggerated" her underlying degenerative condition. The employer then sought an independent medical examination from Dr. Rosenbaum, a neurologist. Dr. Rosenbaum diagnosed a lumbar strain superimposed on claimant's preexisting degenerative condition. He felt that claimant's original injury was disabling, but that its effects would be temporary, lasting about six months. Dr. Rosenbaum suggested that any symptoms claimant might experience thereafter would be the result of claimant's degenerative condition, which Dr. Rosenbaum felt was neither caused nor worsened by the compensable injury.

Based on Dr. Rosenbaum's report, the employer issued a partial denial of claimant's degenerative lumbar condition, reaffirming its acceptance of the lumbar strain. The employer then asked Drs. Fulper and Gehling, the two initial examining physicians, whether they concurred with Dr. Rosenbaum's opinion. Dr. Fulper expressed his concurrence on January 29, 1985. Dr. Gehling also concurred, stating:

> "I presently do not feel [claimant's] pain is related to her industrial injury.

> Certainly her iliolumbar strain could be related to her injury, but I would anticipate this would resolve on its own over a four to six month period. If [after an additional two months] she is no better . . . one would assume that all her pains were related to a degenerative process and not her industrial accident."

On January 29, 1985 claimant's family doctor, Dr. Johnson, also concurred with Dr. Rosenbaum's analysis. In March 1985 he stated his opinion that claimant's injury continued to be the "major" cause of her pain at that time. A month later, however, Dr. Johnson confirmed that claimant's lumbar strain had stablized and that ongoing time loss would be related to the degenerative process.

A May 15, 1985 Determination Order awarded 20 percent unscheduled disability for the effects of claimant's lumbar strain. Claimant requested a hearing, contesting both the employer's partial denial and the Determination Order, arguing for an increased unscheduled award. She testified at hearing that she had no low back pain until her industrial injury, but that the pain has been present since the injury date.

The Referee affirmed the Determination Order. He set aside the employer's partial denial, however, finding " . . . the preponderance of the medical evidence establishes that there is a causal relationship between claimant's symptoms and her industrial injury." The Referee acknowledged that claimant's degenerative lumbar condition preexisted her injury and that the injury did not cause or worsen the preexisting condition. He felt, however, that the injury "lighted up" claimant's degenerative condition, thereby making the symptoms of that conditon compensable. He cited Jameson v. SAIF, 63 Or App 553 (1983) and Armstrong v. SIAC, 146 Or 569 (1934), which hold that if an industrial injury exacerbates an underlying condition, resulting in disability, the underlying condition is compensable.

After a review of the record, we disagree with the Referee's interpretation of the medical evidence. We find little in the medical record to suggest that claimant's injury actually caused the underlying degenerative condition to become symptomatic. We recognize that Dr. Johnson initially felt that claimant's injury "exaggerated" the underlying condition. Dr. Johnson, however, later agreed with Dr. Rosenbaum that subsequent to the resolution of claimant's lumbar strain, any symptoms would be the result of the underlying condition, which Dr. Rosenbaum felt was not caused nor worsened by the industrial injury.

We find no statement by any physician indicating that the industrial injury set in motion a symptom complex related to the degenerative condition. We acknowledge claimant's testimony that she was asymptomatic up to the time of the injury. While her testimony in that regard is probative, her medical situation is sufficiently complex to require medical support for the lay testimony. Claimant has failed to prove that her current condition is the result of her industrial injury. The employer's partial denial shall be reinstated.

The remaining issue is the extent of claimant's

unscheduled disability. The employer argues that both the Referee's order and the Determination Order should be reversed, and that claimant is entitled to no award of unscheduled disability. The employer asserts that claimant's symptoms at the time of claim closure were the result of her degenerative condition, and that the condition was not the result of the industrial injury.

Claimant is entitled to an award of unscheduled disability if she demonstrates a permanent loss of earning capacity as a result of the industrial injury. ORS 656.214(5). Requisite to an award of unscheduled disability is proof of permanent physical impairment resulting from the compensable injury. OAR 436-65-600(2)(a) (renumbered 436-30-380 May 1, 1985). In the present case, claimant's compensable injury consisted of a lumbar strain. We are persuaded by the medical evidence that the effects of that strain resolved at the time of or before the issuance of the Determination Order. The effects of the compensable injury, therefore, were not permanent and no permanent disability award could be based thereon. That portion of the Determination Order awarding permanent disability shall be set aside.

ORDER

The Referee's order dated July 10, 1985 is reversed in part and affirmed in part. Those portions of the order that set aside the self-insured employer's partial denial and affirmed the May 15, 1985 Determination Order are reversed. The employer's partial denial is reinstated. The remainder of the Referee's order is affirmed. The May 15, 1985 Determination Order is set aside in part. That portion of the Determination Order that awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability is set aside. The remainder of the Determination Order is affirmed.

DANIEL J. SABOL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11114
January 21, 1986
Order on Reconsideration

The SAIF Corporation requests reconsideration of the Board's Order on Review dated December 17, 1985 and submits medical reports in support of a request to remand the case and consolidate it with two subsequent hearing requests presently pending. The Board received claimant's response to SAIF's requests and abated the order to allow sufficient time to consider the requests.

SAIF's proffered evidence is reports from three psychiatrists. One doctor is claimant's treating psychiatrist, the other two doctors are examiners on behalf of the employer and SAIF. All three doctors report that claimant suffers pain in his back and right leg which they relate to his injury on July 30, 1984. The doctors were aware that the claim for the July 1984 injury had been denied and that the denial by SAIF had been upheld by the Referee.

None of the doctors expressed an opinion whether the July 1984 injury claim was the result of fraud, misrepresentation, or other illegal activity. None of the doctors doubted that claimant suffered pain in his low back and right leg as a result

of a work incident on July 30, 1984. One of the doctors incorrectly reports the date of injury to associate it with a stressful period in claimant's life when claimant's psychological condition might have contributed to claimant's injury, but does not deny that claimant was injured. The strongest evidence to support SAIF's contention that claimant suffered no injury is that one of the doctor's thinks that claimant's psychological condition predisposed him to suffer such injuries.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). 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). It is tempting to try to include everything that might be or become relevant in the record. However, there is the practical consideration that the parties will never have a determination of their respective rights if the hearing process can be reopened and relitigated on the basis of each subsequent medical consultation. John P. Kleger, 37 Van Natta 1183 (1985). On the other hand, where the issue was one of compensability, a report of surgery performed after a hearing was held sufficient to require remand to the Referee even though the report was available to the parties before the case was docketed for review but not submitted to the Board before it issued an Order on Review. Parmer v. Plaid Pantry #54, 76 Or App 405 (1985).

In Parmer, the Court was careful to point out that the proffered evidence was not offered as the sum of the proof that was lacking, but that it was offered as evidence to establish that the record was incomplete on the issue of causation. The Court held that claimant was entitled to have the record completed on the basis of post-surgical evidence.

In this case, the proffered evidence does not deny that claimant suffered a sudden onset of symptoms, which has been medically confirmed, but merely provides a further insight into claimant's total circumstances and a further description of the mechanism of injury. The proffered evidence, if considered substantively, does not cast doubt on the Board's conclusion regarding the July 30, 1984 injury. Therefore, the Board finds that the proffered evidence is cumulative and that the case has not been "improperly, incompletely or otherwise insufficiently developed or heard by the referee." ORS 656.295(5); John P. Kleger, supra. Consequently, the Board denies the request to remand.

The Board's order dated December 17, 1985 is hereby reconsidered and republished.

IT IS SO ORDERED.

TOM C. REEVES, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05599, 84-09909 & 84-11382
January 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

EBI Companies (EBI) requests review of that portion of Referee Fink's order that set aside its denial of claimant's industrial injury claim for the low back and approved the SAIF Corporation's denial of the same claim. The issue on review is whether EBI is precluded from retroactively denying claimant's claim by Bauman v. SAIF, 295 Or 788 (1983).

In 1983 Mr. Ryther of the Eagle Forest Products Company contracted with various subcontractors to purchase, clean and sell sawdust. It contracted with Mr. Duval, owner of Flatland Foresters Company (Flatland), to haul the sawdust to its destination. Flatland was insured by EBI at all pertinent times. Eagle Forest Products apparently carried no workers' compensation insurance.

Mr. Ryther hired Mr. McGregor to assist in setting up the job. Mr. McGregor hired claimant on May 13, 1983 to be a loader operator. Ten days later, while in the course of this employment, claimant injured his low back. Claimant and Mr. McGregor were uncertain regarding who claimant's employer was at the time of claimant's injury. Mr. McGregor ultimately suggested (apparently innocently) that claimant submit his claim to Flatland. Claimant did so, innocently relying on Mr. McGregor's representation that Flatland was his employer. Flatland then sent the claim to EBI, which accepted and paid benefits on the claim.

In early 1984 Flatland informed EBI that claimant was never an employe of Flatland. On March 27, 1984, more than 60 days after it received claimant's claim, EBI issued a denial, asserting that claimant was not a subject worker of its insured at the time of his injury. Because of the uncertainty regarding employer responsibility, the Workers' Compensation Department referred the claim to the SAIF Corporartion for processing. On August 3, 1984 SAIF denied the claim.

The Referee set aside EBI's denial on the basis of Bauman v. SAIF, 295 Or 788 (1983), which provides that unless there is a showing of fraud, misrepresentation or other illegal activity, an employer or insurer formally accepting a claim for compensation may not "back up" and deny the compensability of the claim once the 60 day period for accepting or denying the claim has elapsed. Bauman, 295 Or at 793-94.

On review EBI argues that Bauman is not applicable to the present case, because claimant's subject employe status is at issue in the first instance. EBI argues that the existence of a subject employe relationship is a prerequisite to determining a claimant's entitlement to benefits, and that the policy of ORS 656.262, to which Bauman refers, does not extend so far as to require payment of compensation where a claimant's subject worker status is in dispute. EBI cites Bell v. Hartman, 289 Or 447 (1980), for its proposition and points out that claimant's subject worker status remains at issue in the present case. It argues that it should not be estopped by Bauman from issuing its denial based on an alleged lack of the requisite employment relationship.

EBI's argument is novel, but unpersuasive. First, Bauman unambiguously holds that an accepted "claim for compensation" shall not be retroactively denied, absent the successful invocation of one of the Bauman court's enumerated exceptions. The issue of subject worker status is not among those exceptions. Clearly, the present claimant's claim was one for "compensation" and it was accepted. It cannot now be denied. Second, Bell v. Hartman, supra, was decided before the Bauman decision and did not involve a retroactive denial, a distinction we find to be fundamental and dispositive.

EBI also offers several arguments regarding the exceptions to the Bauman rule. As was noted, the prohibition against retroactive denials may not apply if the employer or insurer proves that fraud, misrepresentation or other illegal activity has led to an erroneous acceptance of the claim. EBI does not argue that fraud occurred in the present case. It does argue, however, that its acceptance was the result of two misrepresentations: (1) Mr. McGregor's misrepresentation to claimant that claimant was an employe of Flatland; and (2) claimant's innocent misrepresentation to Flatland that he was an employe of that company.

EBI argues that under Bauman, a "misrepresentation" need not be willful; it may merely be negligent. EBI also argues that the misrepresentation need not come from claimant himself, but that a third party's misrepresentation, such as the one by Mr. McGregor in this case, is sufficient to invoke the Bauman exception. EBI's arguments are intriguing; however, we do not find them persuasive.

After reviewing the record, we believe that EBI's failure to adequately investigate claimant's claim is the probable reason for the claim's erroneous acceptance. EBI had a duty to fully investigate the claim in order to determine claimant's right to compensation, as well as its own responsibilities. It accepted the claim and paid benefits for several months before discovering that it might not be responsible. Notwithstanding the insurer's arguments to the contrary, to uphold its denial months after the claim was accepted would be contrary to the policy of Bauman, i.e., to promote stability in the workers' compensation system. We agree with the Referee that EBI's retroactive denial must be set aside.

ORDER

The Referee's order dated June 14, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by EBI Companies.

ALBERTO V. MONACO, Claimant
John J. Lannan, Claimant's Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 85-00723
January 23, 1986
Order on Review (Remanding)

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of that portion of Referee Tuhy's order which set aside its denial of claimant's aggravation claim for a low back injury. On review, the insurer contends that a subsequent Washington employer is responsible for claimant's current condition. We agree that claimant's work related incident

for the Washington employer independently contributed to his present disability. Inasmuch as the record is incomplete regarding the status of claimant's Washington claim, we remand this matter for further evidence.

Claimant was 26 years of age at the time of hearing. In June 1984, while working as a welder, he compensably injured his low back during a lifting incident. Claimant continued to work for the following two weeks. However, his pain increased, prompting him to seek treatment from Dr. Mills, chiropractor. Dr. Mills diagnosed lumbar strain and authorized one week of time loss.

In July 1984 claimant came under the care of Dr. Morrow, chiropractor. In mid-July Dr. Morrow released claimant for regular work on a trial basis. Dr. Morrow reported that claimant had made excellent progress and "should be able to perform his regular duties with minimum risk of aggravation."

Claimant returned to work, but primarily worked on a part-time basis. Since the performance of his work activities increased his pain complaints, claimant continued to receive treatments from Dr. Morrow approximately two times a week. In late October 1984 claimant was laid off from his employment.

In November 1984 Dr. Morrow reported that claimant's condition was medically stationary. Dr. Morrow recommended that claimant receive treatments "on a maintenance basis of once every three weeks."

Approximately three weeks after his lay-off, claimant obtained a welding job with a Washington employer. His symptoms persisted, causing him to continue to seek periodic treatment for his pain and discomfort. Claimant also felt that his symptoms reduced his job performance.

In December 1984 claimant lifted a corner angle weighing approximately 40 to 50 pounds. He immediately experienced a "grabbing, pinching sensation in my back with the heat." The symptoms were basically the same as those he had experienced in June 1984, except he now also felt a "sharp, stabbing pain." Claimant has not returned to work since this incident.

Dr. Morrow requested claim reopening. Although he termed claimant's December 1984 incident an aggravation of the June 1984 injury, Dr. Morrow also concluded that "this second injury has worsened his condition and prolonged his recovery time."

Claimant testified that he had applied for and received workers' compensation benefits in Washington. There is no further indication concerning the status of the Washington claim.

Dr. Morrow testified that claimant's low back was obviously weakened and predisposed to further aggravation because of the June 1984 incident. Dr. Morrow described the December 1984 incident as the same injury to the same area of claimant's body. However, Dr. Morrow acknowledged that claimant's pain was worsened and his ability to move was reduced as a result of the December 1984 incident. Consequently, Dr. Morrow opined that the December 1984 incident contributed to claimant's permanent problem in that his condition had been incrementally worsened.

The Referee set aside the insurer's denial of claimant's

aggravation claim. Persuaded by Dr. Morrow's opinion and claimant's testimony, the Referee found that the most likely cause of claimant's disability was the June 1984 injury. In addition, the Referee concluded that the December 1984 incident had not independently contributed to claimant's disability.

Subsequent to the Referee's order the Court of Appeals issued its opinion in Miville v. SAIF, 76 Or App 603 (December 4, 1985). In Miville, the claimant had sustained a compensable Oregon injury and several subsequent work-related injuries which occurred out-of-state. The court was presented with the question of whether the Oregon employer would remain responsible so long as the original injury was a material contributing cause of the claimant's present disability, under an application of the analysis set forth in Grable v. Weyerhaeuser Co., 291 Or 387 (1982), or whether the Oregon employer would be absolved of responsibility if the subsequent out-of-state injuries contributed independently to the claimant's present disability, pursuant to the "last injurious exposure" rule as discussed in Smith v. Ed's Pancake House, 27 Or App 361 (1976).

The Miville court held that 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, the original employer remains responsible, even though the out-of-state injuries contributed independently to the present disability. Accordingly, the Miville court remanded to determine whether the claimant had filed an out-of-state claim and, if so, whether his condition had been finally determined to be compensable in that state. If the claimant had filed an out-of-state claim and received a final determination that his condition was not compensable, then the Oregon employer remained responsible. On the other hand, if the claimant had not filed an out-of-state claim, or if he had done so and had been awarded compensation, the Oregon employer would not be responsible for the claimant's present condition.

Following our de novo review of the medical and lay evidence, we are persuaded that although claimant's June 1984 injury continues to be a material contributing cause of his present disability, the December 1984 incident has also independently contributed to his disability. The December 1984 incident involved a sudden, traumatic event which immediately evoked increased pain complaints, as well as reduced mobility. Moreover, claimant felt a "sharp, stabbing pain," a symptom which he had not previously experienced. Finally, claimant has been unable to resume his prior work activities since the December 1984 incident.

Portions of Dr. Morrow's testimony support the proposition that claimant's current condition represents an aggravation of his June 1984 injury. However, Dr. Morrow also opined that the December 1984 incident had independently contributed to a permanent incremental worsening of claimant's condition. Considering the mechanics of the December 1984 incident, as well as claimant's subsequent symptoms, treatment, and physical limitations, we find this latter portion of Dr. Morrow's opinion persuasive.

Although the evidence suggests claimant has filed a

claim for Washington benefits, it is unclear whether a final determination has been achieved. Consequently, pursuant to Miville, we remand to the Referee for hearing to determine whether claimant has been "awarded compensation" from his Washington claim. If so, responsibility for claimant's present disability will shift from the insurer. If the claim has been finally determined not to be compensable, the insurer will remain responsible.

ORDER

That portion of the Referee's order dated April 12, 1985 concerning the insurer's denial of claimant's aggravation claim is vacated. This matter is remanded for further proceedings consistent with this order.

WILLIAM G. MURRAY, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-08907
January 23, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Fink's order which increased claimant's award of unscheduled permanent disability for a low back injury from 10 percent (32 degrees), as awarded by a July 7, 1983 Determination Order, to 30 percent (96 degrees). On review, SAIF 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 1982, while working as a laborer for the Department of Transportation, he suffered a compensable low back injury in a lifting incident. His condition was diagnosed as a muscle strain or ligament strain. Treatment has been conservative, primarily consisting of physical therapy, muscle relaxants, exercise, and trigger point injections.

In January 1983 claimant returned to work, subject to a light duty restriction. However, his pain continued, eventually forcing him to terminate his employment in the summer of 1983.

A June 1983 CT scan indicated a disc herniation at L5-S1. In spite of these findings, Dr. Balme, claimant's treating orthopedist, did not recommend surgery. Instead, Dr. Balme concluded that claimant avoid heavy lifting, prolonged standing, and vigorous twisting activities. Dr. Balme further suggested that claimant be retrained to a more sedentary occupation. In August 1983 Dr. Balme opined that claimant limit his: (1) lifting and carrying from 35 to 60 pounds; (2) stooping, sitting, or bending; (3) walking in rough terrains; and (4) work involving frequent travel and extensive driving.

In October 1983 claimant was assigned to a direct employment program. Several vocational goals were developed, including photo journalism, t.v./radio production, and design consultant/draftsman. Eventually, claimant received a job offer from a television station, located in another city. However, since the potential employer reduced its initial offer from $6.50 to $4.50, claimant determined that a move was not economically feasible.

In February 1984 Dr. Balme referred claimant to Dr. Klump, neurosurgeon. Dr. Klump had also examined claimant in April 1983. Claimant's complaints included severe lumbar pain, with radiating bilateral pain. Claimant demonstrated a full range of motion with localized pain on full extension and flexion. Straight leg raising tests produced low back and buttock pain. Dr. Klump questioned whether the CT scan confirmed a central disc herniation. Consequently, a repeat myelogram was recommended, which was subsequently performed and considered to be normal.

In March 1984 Dr. Balme agreed with Dr. Klump's interpretation of the myelogram. Claimant was encouraged to pursue back exercises. Dr. Balme continued to opine that claimant could return to a light duty job, provided he avoid heavy lifting or vigorous twisting activities.

Since his injury claimant has received unemployment benefits and has worked for several employers. He has performed a variety of manual labor duties, including landscaping, ranch equipment operation/maintenance, and automobile mechanic. Portions of each duty increased his pain. However, claimant generally ended these employments for reasons other than his back pain.

Claimant has a high school education. Most of his work experience has concerned manual labor activities, similar to those referred to above. In addition, claimant briefly worked as a cook.

Claimant suffers from constant low back pain, which radiates into his legs. Physical exertion increases his symptoms. To relieve his pain, claimant takes over-the-counter medication and lies down. As a result of his injury claimant has curtailed, if not eliminated, several of his former hobbies, household chores, and recreational activities.

Noting that claimant appeared "cagey" and "glib" in responding to questions, the Referee stated that he was ambivalent concerning claimant's credibility. Consequently, the Referee concluded that the extent of claimant's permanent disability would be based, essentially, on the medical evidence. Reasoning that claimant's physical limitations permanently restricted him from performing several of his former duties, the Referee increased claimant's disability award from 10 percent to 30 percent.

We agree that claimant's injury and subsequent physical limitations have caused 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 his physical impairment, which includes 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 10 percent unscheduled permanent disability award adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated March 20, 1985 is modified. In lieu of all prior awards, claimant is awarded 10 percent (32 degrees) unscheduled permanent disability for his low back injury, which is his total award to date. Claimant's attorney's fees shall be adjusted accordingly.

HENRY E. OLDS, Claimant
John O'Brien, Claimant's Attorney
Fellows, et al., Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-08770
January 23, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Galton's order which increased claimant's unscheduled permanent disability award for a low back injury from 25 percent (80 degrees), as awarded by a June 13, 1984 Determination Order, to 50 percent (160 degrees). On review, the employer contends that the award should be reduced. We agree and modify.

Claimant was 52 years of age at the time of hearing. He originally compensably injured his low back in April 1973 following a lifting incident. This injury resulted in a September 1973 hemilaminectomy. Through Determination Orders and stipulations claimant has received a total award of 43.4 percent permanent disability stemming from this injury. In 1978 claimant returned to work as a freight handler. Although he continued to experience periodic back pain, from approximately May 1978 to September 1983 he sought no medical treatment.

In August 1982 claimant commenced working for this employer as a warehouseman. In performing his duties, claimant was occasionally required to lift items weighing up to 150 pounds. In September 1983 he suffered his compensable low back injury while unloading a truck. Dr. Mandiberg, claimant's treating orthopedist, diagnosed acute low back strain. Treatment has been conservative, primarily consisting of physical therapy, back exercises, and medications.

In January 1984 Dr. Mandiberg reported that claimant could perform the duties of a delivery truck driver. Among other duties, this job required sliding 50 pound items onto a hand truck approximately 4 or 5 times a day. Apparently, Dr. Mandiberg considered the job's requirements within claimant's 20 pound repetitive lifting restriction. For undisclosed reasons this job did not materialize.

In April 1984 the Orthopaedic Consultants performed an independent medical examination. Claimant stated that following his 1973 surgery his leg pain had disappeared, but some back pain had persisted. His current complaints included aching sensations in his low back and both legs, which he felt were identical to the symptoms he experienced before his 1973 surgery. The Consultants opined that claimant could not return to his former occupation. However, they felt that claimant could perform light to medium work duties. Claimant's total loss of function was rated as mildly moderate, but the Consultants concluded that the portion attributable to the September 1983 injury was minimal. Dr. Mandiberg agreed with these findings.

A July 1984 Determination Order awarded claimant 25 percent permanent disability. Claimant requested a hearing.

Claimant testified that he had no trouble performing his work activities as a warehouseman prior to his September 1983 injury. Since the injury claimant experiences pain and aching from the small of his back to his legs. These symptoms increase whenever claimant exerts himself. In claimant's opinion, he could not return to his former occupation.

Claimant has a high school education. His work experience has primarily involved heavy manual labor activities. For example, he has worked as a green chain laborer, grocery clerk, furniture mover, and freight loader. Since his injury claimant has worked as a hotel desk clerk and as a newspaper deliveryman. Claimant was paid considerably less in these occupations than he was as a warehouseman.

The Referee found that claimant was a credible and reliable witness. Considering claimant's physically demanding work activities since his 1973 injury and surgery, the Referee reasoned that the effects of the prior injury had "nearly and probably completely dissipated." Concluding that claimant was foreclosed from performing his former occupation or other heavy physical labor, the Referee increased claimant's permanent disability award to 50 percent.

The medical opinions and claimant's credible testimony persuasively establish that claimant has suffered permanent impairment attributable to his 1983 compensable low back injury. Consequently, we agree that his compensable injury has resulted in a permanent loss of earning capacity. ORS 656.214(5). However, we consider the Referee's unscheduled permanent disability award to be excessive.

Pursuant to ORS 656.222, 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).

In rating the extent of claimant's permanent disability, we consider claimant's physical impairment, including his credible 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 and claimant's prior disability award, we conclude that a total award of 25 percent unscheduled permanent disability adequately compensates claimant for his 1983 compensable low back injury.

ORDER

The Referee's order dated March 26, 1985 is modified. In lieu of all prior awards, claimant is awarded 25 percent (80 degrees) unscheduled permanent disability for his 1983 low back injury, which is his total award to date. Claimant's attorney's fees shall be adjusted accordingly.

ALAN F. PHILLIPS (Deceased), Claimant
Marilyn K. Odell, Claimant's Attorney
Coons, et al., Attorneys
Fishleder & Wheeler, Defense Attorneys

WCB 84-00288
January 23, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Lewizetta C. Phillips, widow of deceased worker Alan F. Phillips, requests review of Referee Brown's order that upheld the self-insured employer's denial of Mrs. Phillips' claim for survivor's benefits. The issues are the admissibility of an exhibit and entitlement to survivor's benefits.

The hearing in this case was held on December 14, 1984. At the hearing Mrs. Phillips attempted to introduce a deposition of one of Mr. Phillips' treating physicians which had been taken six days before the date of the hearing. The Referee marked the deposition as Exhibit 65 but excluded it on the ground that it had not been timely submitted.

The Referee erred in excluding Exhibit 65. Mrs. Phillips submitted the exhibit within seven days of receiving it 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 exclude the exhibit. See Susan F. Vernon, 37 Van Natta 1562 (1985); Merle Barry, 37 Van Natta 1492 (1985). Exhibit 65 is in the record and was considered on review. See Herbert D. Rustrum, 37 Van Natta 1291, 1293 (1985).

On our de novo review of the record, including Exhibit 65, we affirm the order of the Referee on the issue of compensability.

ORDER

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

GREGG C. SORBETS, Claimant
Vick & Associates, Claimant's Attorneys
Larry Dawson, Defense Attorney
Bottini & Bottini, Defense Attorneys

WCB 84-09929 & 84-13329
January 23, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

SAFECO Insurance Company requests review of Referee Podnar's order that set aside its denial of responsibility for claimant's ongoing medical treatment after a hearing held under ORS 656.307, ordered it to reimburse Northwest Farm Bureau Insurance Company (the designated paying agent) for "any monies expended in the processing of [claimant's] claim," ordered it to pay the cost of a deposition and ordered it to pay claimant's attorney a fee of $1200. Northwest Farm Bureau requests clarification concerning whether the order requires SAFECO to reimburse it for monies it expended for legal representation at the hearing. The issues are responsibility, the cost of a deposition and attorney fees.

On the issue of responsibility we affirm the order of the Referee.

On the issue of the cost of the deposition we affirm the

order of the Referee with the following comment. As a general rule deposition costs are the responsibility of the party whose witness is the subject of the deposition. Michael M. McGarry, 34 Van Natta 1520 (1982); see Hanna v. McGrew Bros. Sawmill, 44 Or App 189, 194-95, modified on other grounds, 45 Or App 757 (1980). A witness who appears by means of written reports, see e.g., ORS 656.210(2), is the witness of the party that first submits the reports which give rise to the deposition request. See Hanna v. McGrew Bros. Sawmill, supra, 44 Or App at 194-95; Michael M. McGarry, supra, 34 Van Natta at 1520. When an insurer deposes a doctor or vocational expert who is a witness of the claimant, the cost of the depostion is shifted from the claimant to the insurer by OAR 438-07-005(5). See W. Craig Walker, 37 Van Natta 974 (1985).

In the present case a deposition of Dr. Leistikow, claimant's treating chiropractor, was requested by SAFECO. SAFECO submitted 20 exhibits to the Referee on December 27, 1984, including a number of forms and reports authored by Dr. Leistikow. Northwest Farm Bureau submitted several exhibits on January 8, 1985, including three authored by Dr. Leistikow. These three exhibits, however, were merely duplicates of those already submitted by SAFECO. Claimant submitted two exhibits on February 8, 1985 including a report by Dr. Leistikow dated January 12, 1985. On April 10, 1985, apparently because of some confusion in the numbering of the exhibits, SAFECO consolidated all of the exhibits offered by the parties and resubmitted them along with one additional report by a consulting chiropractor. The depostion of Dr. Leistikow was conducted on April 18, 1985. On April 22, 1985 Northwest Farm Bureau submitted three additional exhibits, including a report by Dr. Leistikow dated March 1, 1985. The hearing was held on May 1, 1985.

In his order the Referee assessed the cost of the deposition against SAFECO commenting that "[t]here is no evidence that any medical opinion submitted by Dr. Leistikow was untimely or presented a surprising deviation from the doctor's previous reports. The deposition was taken at the behest of SAFECO." We agree that SAFECO should bear the cost of the deposition but for reasons other than those given by the Referee. SAFECO submitted all but two of the exhibits authored by Dr. Leistikow. One of the other exhibits was submitted by claimant prior to the deposition. The remaining exhibit was submitted by Northwest Farm Bureau a few days after the deposition. Given these facts, SAFECO's request for a deposition was prompted either by the reports it submitted or by the report submitted by claimant. Either way SAFECO must bear the cost of the deposition under the rules previously discussed.

On the issue of attorney fees we reverse the order of the Referee. The hearing in this case involved only the issue of responsibility. In such a case, an attorney fee is warranted only if the claimant's attorney "actively and meaningfully participates at the hearing in behalf and in defense of claimant's rights." OAR 438-47-090(1). We recently construed this language in light of Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985), to mean "taking a position and actively litigating a point bearing upon the claimant's entitlement to receive compensation or the amount thereof." Stanley C. Phipps, 38 Van Natta [13] (WCB Case Nos. 84-01838, 84-02301; January 14, 1986).

In the present case SAFECO denied responsibility on the theory that claimant had sustained a new injury while working for the subsequent employer insured by Northwest Farm Bureau. Northwest Farm Bureau denied responsibility on the theory that claimant's problems were due to an aggravation of an injury he had sustained while working for the previous employer insured by SAFECO. Claimant took the position that SAFECO was the responsible insurer and his attorney made some attempt to advance this position both prior to the hearing through participation in the deposition of Dr. Leistikow and during the hearing through a one-sentence opening statement and through direct examination of claimant. Assuming that the efforts of claimant's attorney properly may be called "active litigation" of the issue of responsibility, we fail to see under the facts of this case how SAFECO's responsibility relates to claimant's "entitlement to receive compensation or the amount thereof." We conclude, therefore, that an attorney fee is not warranted in this case.

Finally, Northwest Farm Bureau requests clarification of that portion of the Referee's order requiring SAFECO to "reimburse Northwest Farm Bureau for any monies expended in the processing of this claim pursuant to an ORS 656.307 order of February 13, 1985." Northwest Farm Bureau asks whether the order requires SAFECO to pay it an attorney fee in connection with the .307 hearing. We read the Referee's order as requiring SAFECO to reimburse Northwest Farm Bureau for any monies Northwest Farm Bureau may have paid to or on behalf of claimant during its role as the designated paying agent. See ORS 656.307(1). There is no statutory authority for an award of attorney fees between the insurers in this case.

ORDER

The Referee's order dated May 17, 1985 is affirmed in part and reversed in part. That portion of the order awarding claimant's attorney a fee of $1200 is reversed. The remaining portions of the order are affirmed.

PAMELA R. STOVALL, Claimant
Evohl F. Malagon, Claimant's Attorney
Roberts, et al., Defense Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 84-13447 & 85-01254
January 23, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

EBI Companies request review of that portion of Referee Brown's order which set aside its denial of claimant's occupational disease claim for a right carpal tunnel syndrome condition. On review, EBI contends that Liberty Northwest Insurance Company, as insurer for a subsequent employer, is responsible for claimant's current condition. We agree and reverse.

We first address a procedural matter. Claimant has filed a Motion to Strike Liberty's "Reply Brief." Generally, respondents on Board review are limited to filing a brief in response to the appellant's brief. However, under these circumstances we conclude that Liberty's "Reply Brief" was not inappropriate. The "estoppel" argument, as contained in Liberty's respondent's brief, resembles an affirmative defense. Thus, it was not improper for Liberty to reply to claimant's response to

this argument. Consequently, claimant's Motion to Strike Liberty's "Reply Brief" is denied.

Claimant was 25 years of age at the time of hearing. She worked for EBI's insured, a seafood processor, from July 1983 until June 1984. Her wrist problems began in December 1983, while she was working as a crab shaker. Although she experienced pain and swelling in her wrist and hand, she neither sought medical treatment nor missed any time from work. In July 1984 claimant started working for Liberty's insured as a black cod scraper. Within two weeks, her pain and swelling had returned.

In September 1984 claimant sought medical treatment from Dr. Smith, orthopedist. Claimant reported that her symptoms began while she was working as a crab shaker for EBI's insured and had been bothering her intermittently since. Her symptoms had increased since her return to fishery work with Liberty's insured. Dr. Smith's preliminary diagnosis of right carpal tunnel syndrome was subsequently confirmed and decompression surgery was performed.

In February 1985 Dr. Melson, neurologist, performed an independent medical examination. Dr. Melson concluded that claimant's condition arose as a consequence of her work as a crab shaker and was later aggravated further by cod scraping. In Dr. Melson's opinion, claimant's carpal tunnel syndrome first made its clinical appearance while she was working for EBI's insured and was exacerbated by her activities with Liberty's insured, which resulted in her need for surgery. Dr. Melson further stated that claimant's work activities as a cod scraper resulted in a "recrudescence of symptoms and surgery."

The Referee found EBI responsible. He reasoned that claimant's condition was caused by her first employer, EBI's insured, and that her subsequent work activities produced nothing more than a worsening of symptoms. The Referee declined to apply the last injurious exposure rule, finding that claimant established that her work exposure for EBI's insured was causative.

Where the evidence shows that a disability is caused solely by an injury occurring during an earlier employment, there is no reason to apply the last injurious exposure rule. Boise Cascade Corp. v. Starbuck, 296 Or 238, 241 (1984). However, 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. Boise Cascade Corp. v. Starbuck, supra., 296 Or at 245.

In an occupational disease context, the last injurious exposure rule provides that, if a worker proves that the disease could have been caused by work conditions that existed at more than one place of employment, the last employment providing potentially causal conditions is deemed to have caused the disease. Boise Cascade Corp. v. Starbuck, supra., 296 Or at 241 (1984); Meyer v. SAIF, 71 Or App 371, 373 (1984). The onset of disability is the triggering date for determination of which employer is the "last potentially causal employer." Bracke v. Baza'r, 293 Or 239, 248 (1982). In order to shift responsibility to an earlier employer, the last employer where conditions existed

that could have caused the disease must establish that the conditions at the earlier employer were the sole cause or that it was impossible for conditions at the last employer to have caused the disease. FMC Corp. v. Liberty Mutual Ins. Co., 70 Or App 370 (1984), clarified, 73 Or App 223 (1985).

Following our de novo review of the medical and lay evidence, we are not persuaded that either one of claimant's work-related exposures was the more likely cause of her disability. Claimant's symptoms initially arose while she was working for EBI's insured. However, she suffered no disability until she engaged in work activities with Liberty's insured. Although Dr. Melson's opinion is couched in terms which suggest that claimant's work conditions at Liberty's insured merely evoked a reappearance of symptoms, it was only after working for Liberty's insured that claimant sought medical treatment and had her condition diagnosed. Moreover, it was Dr. Melson's conclusion that claimant's work activities for Liberty's insured not only "aggravated further" and "exacerbated" her carpal tunnel syndrome condition, but resulted in her need for surgical intervention. Under these circumstances, we find that claimant's work exposure for Liberty's insured either contributed to the cause of, aggravated, or exacerbated her underlying disease. See Bracke v. Baza'r, supra; Boise Cascade Corp. v. Starbuck, supra.

Inasmuch as we are convinced that the disability was caused by successive work-related exposures but are unconvinced that any one employment was the more likely cause of the disability, we find it necessary to apply the last injurious exposure rule. Since claimant's work activities as a cod scraper for Liberty's insured could have caused her carpal tunnel syndrome and because she did not become disabled until she engaged in these activities, we find that the "last potentially causal employer" was Liberty's insured. See Boise Cascade Corp. v. Starbuck, supra., 296 Or 238, 241. Accordingly, Liberty's insured is deemed to have caused the disease.

We disagree with Liberty's argument that claimant should be precluded from asserting a claim stemming from her employment with Liberty's insured because of her failure to admit on her application form that she had experienced prior wrist problems. Liberty has not referred us to any authority which applied the so-called "equitable estoppel" doctrine to relieve an employer/insurer of responsibility for a compensable condition. Under Bauman v. SAIF, 295 Or 788 (1983) and its progeny an insurer is entitled to issue a back-up denial where a claimant has engaged in fraud, misrepresentation, or other illegal activity. However, Bauman does not entitle the insurer to avoid responsibility for an otherwise compensable claim. Accordingly, we conclude that the "equitable estoppel" doctrine should not be applied.

Finally, we conclude that claimant is not entitled to an attorney fee. Claimant's attorney was present at the hearing and also participated in claimant's interrogation. Furthermore, claimant has consistently advocated a position both at the hearing and on Board review. However, neither insurer contested compensability and the only issue presented at either level concerned responsibility. Under these circumstances, we conclude that claimant was a nominal party both at hearing and on Board review and, as such, is not entitled to an attorney fee. See Petshow v. Farm Bureau Insurance Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13 (January 14, 1986).

ORDER

The Referee's order dated May 17, 1985 is reversed. EBI Companies' denial is reinstated and Liberty Northwest Insurance Company's denial is set aside. Liberty Northwest shall reimburse EBI for its claim's costs to date.

LESTER R. CARMAN, Claimant
Brown & Tarlow, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-07952
January 24, 1986
Order on Reconsideration

Claimant has requested that we reconsider our previous order on reconsideration, which adjusted the insurer-paid attorney fee awarded claimant's attorney. Reconsideration is granted. Our previous decision was based upon our finding that $500 was a reasonable attorney fee in this case for prevailing against the insurer's appeal in an attempt to reduce claimant's compensation, with or without a cross-appeal. Our Order on Review dated December 31, 1985, as modified by the Order on Reconsideration dated January 14, 1986 is republished effective this date.

IT IS SO ORDERED.

BEATRIZ M. DELCASTILLO, Claimant
Dale Johnson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-10969
January 24, 1986
Order on Review (Remanding)

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Quillinan's order which set aside its denial of claimant's aggravation claim for a cervical condition. On review, SAIF requests remand, contending that it is entitled to present evidence rebutting evidence submitted by claimant which was admitted post-hearing. We grant SAIF's request.

In May 1983 claimant sustained a compensable neck injury in a motor vehicle accident. X-rays were normal. Her condition was diagnosed as cervical strain. Following an extensive period of conservative treatment, her claim was closed in May 1984. Claimant was awarded 5 percent unscheduled permanent disability, which was increased to 15 percent by an October 1984 Referee's order.

In June 1984 claimant returned to her regular work as a clerk and bookkeeper. She continued to seek periodic chiropractic treatment for her persistent headaches and cervical pain. In October 1984 her complaints worsened, forcing her to discontinue her work activities.

Claimant's treating chiropractor requested claim reopening and referred her to Dr. Smith, neurosurgeon. Besides neck/shoulder pain and headaches, claimant described a numbness and tingling into her hands and toes. X-rays demonstrated a slight offset and perhaps narrowing in the C4-5 area. Dr. Smith suspected a herniated cervical disc. Following a November 1984 myelogram, Dr. Smith diagnosed cervical spondylopathy.

The Orthopaedic Consultants performed an independent medical examination. Claimant's most recent X-rays were not available, so the Consultants reviewed October 1983 films which

demonstrated "some mild flattening of the cervical curve, otherwise normal." Diagnosing chronic cervical strain without neurological findings, the Consultants concluded that there was no clinical evidence of a herniated cervical disc. In the Consultants' opinion claimant's condition had not worsened beyond the 15 percent permanent disability she had been awarded.

In December 1984 Dr. Smith reported that injections of Xylocaine into the C4-5 and C5-6 spaces had resulted in nearly complete relief of claimant's pain. These results persuaded Dr. Smith that claimant had a spondylopathic process in these areas. Dr. Smith suggested that another injection test be conducted. If complete relief was again achieved, Dr. Smith recommended that claimant undergo a cervical discectomy.

The hearing was held on March 19, 1985. At issue was the compensability of claimant's aggravation claim. Dr. Smith had performed cervical surgery on March 6, but apparently no reports concerning the results of the surgery were available. In closing argument SAIF's counsel stated that the issue of compensability of the surgery was "hanging in the wings." Since "the mails take at least a couple of days to get to Medford," SAIF's counsel suggested that the Referee's order contain a disclaimer noting that the surgery issue could not be reached.

On March 26 the Referee issued her order, upholding SAIF's denial of claimant's aggravation claim. The Referee found that the evidence failed to establish a causal connection between claimant's injury and her current condition.

On April 15 claimant requested reconsideration. With her request claimant enclosed a copy of an April 2 letter from Dr. Smith. Basing his opinion on claimant's subsequent evaluations and surgery, Dr. Smith concluded that claimant's condition had worsened and was related to her compensable injury. Dr. Smith reported that claimant's recent surgery had revealed that she did not have "classical radiculopathy," which generally is readily diagnosable. Rather, claimant's surgery had demonstrated a "discal disruption," with discogenic pain and radiculitis.

On April 25 the Referee issued an Order on Reconsideration. The Referee reopened the "incompletely developed" record, concluding that Dr. Smith's report constituted "newly discovered evidence." Reasoning that Dr. Smith's opinion had provided the requisite causal relationship between claimant's compensable injury and her current condition, the Referee found the aggravation claim compensable.

On May 8 SAIF objected to the Referee's Order on Reconsideration and moved for an Order of Abatement. Specifically, SAIF requested an opportunity to respond to Dr. Smith's post-hearing report, contending that it had not been given sufficient time to address claimant's motion for reconsideration.

On May 13 the Referee denied SAIF's request. The Referee noted that there had been a discussion at the hearing concerning the surgery and additional reports. The Referee recalled that the surgery report had been requested, but had not been received at the time of the hearing. Reasoning that SAIF had failed to respond in any manner until its May 8 motion for abatement, the Referee concluded that SAIF's request was too late.

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

Following our de novo review of the record, we find that remand is appropriate. We agree with the Referee's decision to reopen the record to include Dr. Smith's post-hearing report. This case is similar to Armstrong v. SAIF, 67 Or App 498, 503 (1984) and Egge v. Nu-Steel, 57 Or App 327, rev den 293 Or 456 (1982), in that the claimant's chronic condition remained undiagnosed at the time of hearing, or, although diagnosed, unsupported by objective medical evidence until after the hearing. In each case the court held that the record should be reopened to consider post-hearing reports which clarified the claimant's condition.

Furthermore, the arrival of Dr. Smith's surgery report was not only anticipated by the parties, but the surgery's results had a significant impact on the causal relationship issue. The Court of Appeals has recently held that the Board should have reopened a record where a post-hearing surgery vindicated a surgeon's previous opinion and filled the gap the Board had found in the surgeon's previous opinion. See Parmer v. Plaid Pantry #54, 76 Or App 405 (1985). As with the post-hearing report in Parmer, Dr. Smith's subsequent report filled the gaps which the Referee had found in Dr. Smith's prior opinions. Finally, the nature of Dr. Smith's post-hearing report and the circumstances surrounding its late submission, persuade us that reopening was warranted. See OAR 438-07-025(2).

Although we agree that the record should have been reopened, we conclude that SAIF should be entitled to present evidence rebutting Dr. Smith's report. We appreciate the time constraints placed upon the Referee when claimant's motion for reconsideration was presented just 10 days before the Referee's jurisdiction lapsed. However, considering the significance of this "newly discovered evidence" and its late submission, we conclude that the Referee should have issued an Order of Abatement rather than an Order on Reconsideration. The issuance of an Order of Abatement would have granted SAIF a reasonable time to respond to claimant's motion and the post-hearing report. Moreover, following receipt of SAIF's response, if any, the Referee could then have issued an Order on Reconsideration. Thus, this procedure would have provided both parties an opportunity to address the post-hearing evidence and would have also allowed the Referee sufficient time to evaluate the parties' contentions and issue a thorough decision.

We understand the Referee's desire to provide an efficient decision-making process, as well as the Referee's reluctance to leave matters pending. Furthermore, we agree that SAIF could have notified the Referee of its concerns in a more prompt fashion. Yet, we find that under these circumstances, in the interests of substantial justice, SAIF should be entitled to respond to claimant's post-hearing evidence.

Accordingly, this matter is remanded to the Referee for

hearing, at which time SAIF shall be granted the opportunity to present evidence in rebuttal to the post-hearing evidence produced by claimant.

ORDER

This case is remanded to the Referee for further action consistent with this order.

ODILON DELGADO, Claimant
Steven C. Yates, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-03156
January 24, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of those portions of Referee T. Lavere Johnson's order that: (1) affirmed the Determination Order dated July 7, 1982 awarding claimant 32 degrees for 10 percent unscheduled disability for the cervical, thoracic and lumbar spine; (2) found claimant's claim to have been properly closed by the July 7, 1982 Determination Order; (3) affirmed the self-insured employer's March 4, 1983 denial of claimant's aggravation claim, which included a denial of claimant's claim for chiropractic services; (4) affirmed the employer's August 28, 1984 denial of claimant's aggravation claim; (5) affirmed the employer's denial of claimant's claim for chiropractic services rendered after September 14, 1984; and (6) denied claimant's request for penalties and attorney fees for the employer's alleged unreasonable resistance to the payment of chiropractic services after September 14, 1984. In addition, claimant requests attorney fees for any and all issues on which he prevails before the Board. The issues on review are premature closure or, in the alternative, extent of unscheduled disability, the compensability of two aggravation claims, the compensability of chiropractic services, and penalties and attorney fees.

We affirm the Referee's order on all issues except extent of unscheduled disability. We are convinced that claimant is entitled to an increased award over the 10 percent awarded by Determination Order. We recognize that claimant's physical impairment is minimal. It is apparent, however, that his earning capacity is diminished by significant social and vocational deficits. Claimant is a 37 year old Mexican alien whose formal education consists of only three years. His work experience has been limited to heavy farm labor. He has few, if any transferable skills. He neither reads nor writes English. Taking into account these adverse factors, and considering claimant's physical impairment, we are convinced that claimant has suffered a 20 percent loss of earning capacity as a result of his industrial injury. The Referee's order in that regard will be modified.

ORDER

The Referee's order dated July 12, 1985 is modified in part and affirmed in part. That portion of the order that affirmed the Determination Order award of 32 degrees for 10 percent unscheduled disability is modified. In lieu of all prior awards, claimant is awarded 64 degrees for 20 percent unscheduled permanent partial disability. Claimant's attorney is allowed a fee equaling 25 percent of claimant's increased compensation, not to exceed $3,000. The remainder of the Referee's order is affirmed.

TIMOTHY W. EVANS, Claimant
Evohl F. Malagon, Claimant's Attorney
Roberts, et al., Defense Attorneys
John E. Snarskis, Defense Attorney

WCB 85-01835 & 85-01838
January 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

EBI Companies (EBI) requests review of Referee Tenebaum's order that set aside its denial of claimant's aggravation claim involving the left knee and affirmed Industrial Indemnity's denial of claimant's new injury claim for that knee. EBI also stipulates that in the event we affirm the Referee's order as to responsibility, claimant's attorney fee for services at hearing should be raised from the $500 awarded by the Referee to $700.

We affirm the Referee's order on the issue of responsibility. We cannot honor EBI's stipulation regarding attorney fees, however, because we find that claimant's attorney was entitled to no fee at hearing. Neither is claimant's attorney entitled to a fee on Board review.

This case involves only the question of which of two insurers is responsible for claimant's left knee condition. The fact that a "paying agent" order was issued by the Workers' Compensation Department is conclusive that neither insurer denied the compensability of claimant's condition. See ORS 656.307(1). There was no doubt that claimant would prevail on one of the responsibility denials. There were no ancillary issues that posed a threat to claimant's entitlement to compensation. Because entitlement to compensation or the amount thereof were not at issue, claimant was a nominal party both at hearing and on Board review and claimant's attorney is not entitled to attorney fees. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985); Stanley C. Phipps, 38 Van Natta 13 (filed January 14, 1986).

ORDER

The Referee's order dated August 26, 1985 is reversed in part and affirmed in part. That portion of the order that awarded claimant's attorney a fee of $500 for services at hearing is reversed. The remainder of the order is affirmed.

WILLIAM E. HAMILTON, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00255
January 24, 1986
Order of Dismissal

The SAIF Corp. has requested review of Referee's order dated December 18, 1985. The request for review was filed with the Board on January 21, 1986 , more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

NORMAN I. MILLER, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-06081
January 24, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee T. Lavere Johnson's order that increased claimant's award for unscheduled permanent partial disability from 25 percent (80 degrees) to 50 percent (160 degrees). Claimant contends that he should be awarded permanent total disability or, in the alternative, that his award for permanent partial disability should be increased. The SAIF Corporation contends that claimant's award should be decreased. The issue is extent of disability.

Claimant injured his low back in February 1979 while working as a handyman for a convenience store. Pursuant to a Determination Order dated January 22, 1980 and a stipulation dated October 6, 1980, claimant was awarded a total of 40 degrees for 12.5 percent unscheduled permanent partial disability.

Claimant again injured his low back in September 1982 in the course of his employment as a groundskeeper for a university when he moved a large cast iron bench. After three and one half months of conservative treatment claimant was released for light work by his treating physician, Dr. Danner.

Claimant returned to his previous position at the university and performed well for several weeks until he did some heavy lifting. Claimant then experienced a marked increase in low back pain and was unable to continue working. A CAT scan, myelogram and EMG were performed, but they were negative for disc abnormalities or nerve compression.

Claimant continued to receive conservative treatment. He was declared medically stationary by a panel of the Orthopoedic Consultants in a report dated October 20, 1983. The panel rated claimant's impairment overall as mild and that due to the September 1982 injury as minimal. Claimant's treating physician, Dr. Danner, fully agreed with this assessment.

Throughout late 1983 and early 1984 claimant participated in vocational rehabilitation. Claimant's vocational counselor eventually located a company willing to train claimant as an optical technician. The requirements of this job were within claimant's physical and educational limitations. Claimant refused to accept this training for reasons unrelated to his limitations. Claimant's vocational counselor termed claimant's refusal "unfortunate and premature" and vocational assistance was discontinued.

By Determination Order dated November 30, 1983 claimant was awarded 80 degrees for 25 percent unscheduled permanent partial disability in connection with his September 1982 low back injury. Claimant requested a hearing on this Determination Order and the Referee increased claimant's award to 50 percent (160 degrees). This award is the subject of the present appeal.

Following our de novo review of the medical and lay evidence, including claimant's testimony, 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). Further, we are not persuaded that claimant is effectively foreclosed from gainful employment by reason of a combination of medical and nonmedical factors, the so-called "odd-lot" doctrine. See Clark v. Boise Cascade, 72 Or App 397, 399 (1985). We conclude, therefore, that claimant is not entitled to an award of permanent total disability.

On the question of the extent of claimant's permanent partial disability, considering claimant's impairment, the pertinent social and vocational factors, ORS 656.214(5); OAR 436-65-600 et seq. (renumbered OAR 436-30-380 et seq., May 1, 1985), and the previous award of permanent partial disability for injury to claimant's low back, ORS 656.222, we conclude that claimant is most appropriately compensated for the loss of earning capacity due to his September 1982 injury by an award of 128 degrees for 40 percent permanent partial disability. We, therefore, modify the order of the Referee.

ORDER

The Referee's order dated May 29, 1985 is modified. Claimant's total award for unscheduled permanent partial disability for his September 1982 injury is reduced from 50 percent (160 degrees) to 40 percent (128 degrees). Claimant's attorney's fee is adjusted accordingly.

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

WCB 82-08886 & 83-07686
January 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Brown's order which awarded no permanent partial disability in lieu of an August 17, 1982 Determination Order award of 64 degrees for 20 percent unscheduled permanent partial disability for claimant's pancreas and upheld a July 27, 1983 Determination Order award of 16 degrees for 5 percent unscheduled permanent partial disability for his neck. Claimant contends that the Referee was without jurisdiction to modify the 1982 Determination Order award and that the 1983 Determination Order award is inadequate.

Claimant was injured in a mill accident on January 11, 1980. The claim was accepted. Diabetes mellitus was diagnosed shortly after the injury. On June 23, 1980 the self-insured employer denied that the pancreatic condition was related to the industrial accident. A Referee set aside the partial denial on May 11, 1981.

On January 5, 1982 the employer denied further responsibility for claimant's diabetes, contending that there was no longer a residual effect of the industrial injury on the condition. A Referee set aside the January 5, 1982 partial denial on May 18, 1982.

On August 17, 1982 a Determination Order awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability resulting from injury to his pancreas. On September 28,

1982 the Board received claimant's request for hearing on the Determination Order. Also on September 28, 1982, the Board reversed the May 18, 1982 order and reinstated the January 5, 1982 denial of further responsibility for claimant's diabetes. On April 11, 1984 the Court of Appeals reversed and remanded the case to the Board for reinstatement of the Referee's order; which the Board did on October 31, 1984.

The employer wrote to the Referee on February 14, 1985 that it was taking the position that claimant was not entitled to permanent partial disability for his diabetes and that the August 17, 1982 Determination Order was incorrect. The employer said that it was specifically raising that issue before the Referee at that time.

During the colloquy at the commencement of the hearing, claimant withdrew his request for hearing with respect to the August 17, 1982 Determination Order and moved to strike the issues raised by the employer in its February 14, 1985 letter. The Referee ruled that either litigation on the January 5, 1982 denial tolled the statutory period in which to request a hearing on the August 17, 1982 Determination Order or, in the alternative, that claimant's September 1982 hearing request was sufficient to place the Determination Order award in issue. On review the employer argues in support of the Referee's analysis.

ORS 656.283(1) provides that, subject to ORS 656.319, any party may at any time request a hearing on any question concerning a claim. ORS 656.319(4) provides:

> "With respect to objections to a determination under ORS 656.268(3), a hearing on such objections shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed to the parties."

In SAIF v. Maddox, 295 Or 448 (1983), the Oregon Supreme Court considered whether the compensability of a claim must be determined finally before the extent of disability may be litigated. The court held that a determination of extent of disability would not be stayed pending an appeal of compensability. Relying on Maddox, the Court of Appeals in Wright v. SAIF, 76 Or App 479 (1985), held that the one-year limitation of ORS 656.268(6) was not tolled pending resolution of an appeal on the underlying compensability issue.

The employer's attempt to cross-request review of the August 17, 1982 Determination Order came more than a year after the Determination Order issued. Hence, the employer's February 14, 1985 request is without legal effect.

In Jimmie Parkerson, 35 Van Natta 1247, 1250 (1983), we discussed the effect of a respondent's failure to separately cross-request Board review of a referee's order. We said:

> "The primary purpose for filing a cross-request for review is to maintain control over the Board's jurisdiction. A respondent who has failed to cross-request

> Board review and who raises an issue in its respondent's brief is at the mercy of an appellant who, upon recognizing the fact that a potentially meritorious argument has been raised in respondent's brief, or for any other reason, withdraws the request for Board review. If the respondent has cross-requested review, the Board would retain jurisdiction over the cross-request. If the respondent had not cross-requested review, there would be nothing to retain jurisdiction over and respondent would lose the opportunity to have the issue raised in its brief reviewed."

We apply similar reasoning here. There being no timely cross-request for hearing on the August 17, 1982 Determination Order, the employer was at the mercy of claimant. Upon claimant's withdrawal of his request for hearing with respect to the Determination Order, there was nothing to retain jurisdiction with respect to the Determination Order, and the employer lost the opportunity to contest the Determination Order award. The Referee was without jurisdiction to modify the August 17, 1982 Determination Order award.

We affirm those portions of the Referee's order upholding the July 27, 1983 Determination Order with the following comments, which we make in light of precedential developments subsequent to the Referee's order. The 1983 Determination Order was issued with respect to disability arising out of claimant's August and September 1982 industrial injuries. These injuries contributed to certain preexisting physical impairments. Claimant contends that the extent of his disability should be determined by considering his entire condition, not just those aspects attributable to his 1982 compensable injuries.

ORS 656.214(5) provides that extent of unscheduled disability is to be rated based on the permanent loss of earning capacity due to the compensable injury. In Barrett v. D & H Drywall, 300 Or 325 (1985), the Supreme Court held that a worker's preexisting condition is to be considered in awarding unscheduled permanent disability; but directed that the award be based on the extent of disability to the worker, measured by loss of earning capacity caused by the accident, taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury.

Although claimant's preexisting condition must be considered in awarding unscheduled disability, that does not mean that awards are to be made for preexisting physical impairments. The relevant inquiry remains the loss of earning capacity caused by the industrial accident.

ORDER

The Referee's order dated June 12, 1985 is affirmed in part and reversed in part. That portion of the Referee's order modifying the August 17, 1982 Determination Order is reversed, and the Determination Order award is reinstated and affirmed. The Referee's order is affirmed in all other respects.

The insurer requested reconsideration of our Order on Review. We abated our prior order to allow the parties sufficient opportunity to present their arguments on reconsideration. The request for reconsideration is allowed. On reconsideration, we withdraw our previous memorandum order and reverse the Referee's order that set aside the insurer's denial of claimant's low back aggravation claim.

Claimant was initially injured in 1979. The injury was diagnosed as a low back strain. Claimant has been treated conservatively throughout the course of her treatment. Claimant has had one previous aggravation claim, which was accepted and later closed by a Determination Order dated June 8, 1983. The June 1983 Determination Order is the last award or arrangement of compensation.

Claimant has received no award for permanent disability. Claimant requested a hearing on the June 1983 Determination Order, asserting that she is entitled to a permanent disability award. While that hearing request was pending, claimant's attorney made an aggravation claim on claimant's behalf, which was denied by the insurer. At the hearing, the issue of the extent of claimant's disability was reserved for further proceedings and the hearing proceeded on the aggravation issue. The Referee found that claimant had established an aggravation claim and set aside the insurer's denial.

In order to establish an aggravation claim, claimant must prove by a preponderance of the evidence that her injury-related condition has become worse since the last award or arrangement of compensation. ORS 656.273(1); Clemmer v. Boise Cascade Corp., 75 Or App 404 (1985). Medical evidence is not a jurisdictional prerequisite to proof of an aggravation claim. Garbutt v. SAIF, 297 Or 148 (1984). Increased symptoms, without attendant pathological worsening, may be sufficient to establish an aggravation. Billy Joe Jones, 36 Van Natta 1230, 1233 (1984), aff'd mem, 76 Or App 402 (1985); Richard A. Scharback, 37 Van Natta 598 (1985). However, when an aggravation claim is based solely upon an increase in symptoms, the claim will be upheld only if the increased symptoms are beyond those to be expected as a "waxing and waning" of the compensable condition. See Clemmer v. Boise Cascade Corp., supra; Hoke v. Libby, McNeil & Libby, 73 Or App 44 (1985).

Viewing the evidence as a whole under the standards set forth above, we conclude that claimant has failed to establish a worsening of her injury-related condition since the last award or arrangement of compensation. The medical evidence in this case does not establish objectively that claimant's condition has worsened. Claimant's treating physician at the time of the first claim closure, Dr. Silver, opined that claimant's "condition has not changed since I last saw her in June, 1982, and for that matter, since I initially saw her in June, 1980." He acknowledged, however, that current treatment is reasonable as palliative care for claimant's condition.

Claimant's current treating physician, Dr. Bald, did not review any of claimant's previous medical records and did not discuss claimant's case with any of her previous treating or examining physicians. He declined to render an opinion as to whether claimant's present condition is any different -- either better or worse -- than her condition in June of 1983. However, Dr. Bald's diagnosis is the same as that of every other treating or examining physician -- chronic lumbar strain.

Claimant's credible testimony was that her back pain has been more or less constant, with fluctuations. The issue of the extent of claimant's permanent disability as of the most recent Determination Order was reserved by the parties and is not before us. We nevertheless conclude that claimant's present symptomatology, which is established by her testimony, is insufficient in this case to establish that her condition has worsened, especially in view of the medical evidence directly to the contrary. Clemmer v. Boise Cascade Corp., supra; Hoke v. Libby, McNeil & Libby, supra. See also Edward J. Nicks, 37 Van Natta 1012 (1985).

ORDER

Our previous Order on Review dated July 16, 1985 is withdrawn. The Referee's order dated September 6, 1984 is reversed. The insurer's denial dated August 7, 1984 is reinstated and approved.

VINCHAY H. VIEN, Claimant
John P. Manning, Claimant's Attorney
Acker, Underwood & Smith, Defense Attorneys

WCB 83-08846 & 83-09227
January 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee St. Martin's order that upheld the insurer's denials of claimant's claims for injury to his low back. The issue is compensability.

After de novo review of the record as a whole, we affirm and adopt the Referee's order, with the following comment. Claimant has moved the Board for an order remanding this matter to the Referee to consider further evidence relating to the circumstances under which claimant obtained an Oregon driver license, which claimant argues would bear upon the Referee's findings with regard to claimant's ability to understand and communicate in English. Although the Referee did twice mention the fact that claimant has an Oregon driver license, we conclude that this fact did not bear significantly on the Referee's ultimate determination, that claimant had an adequate understanding of "simple, basic English." The Referee's conclusion was based primarily upon the testimony of claimant's coworkers and observation of claimant himself. We also find that the affidavit tendered to the Board, which we consider only for the purpose of deciding the issue of whether to remand, contains no information that could not have been obtained by inquiring directly of claimant. Claimant appeared at the hearing, was represented by counsel and testified through an interpreter. The evidence claimant now seeks to introduce could easily have been offered at the hearing, merely by asking the claimant himself what circumstances surrounded his obtaining a driver license. Claimant's request for remand is denied.

ORDER

The Referee's order dated June 13, 1985 is affirmed.

ELIZABETH M. WHITE, Claimant
Pozzi, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-03175
January 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee T. Lavere Johnson's order which: (1) upheld the insurer's partial denial of primary amyloidosis, iatrogenic diabetes, Raynaud's phenomenon, hypertension, and syncopal episodes as unrelated to her accepted low back and left ankle injuries; and (2) which awarded 48 degrees for 15 percent unscheduled permanent partial disability in addition to that portion of the Determination Order dated July 2, 1984 which awarded 144 degrees for 45 percent unscheduled permanent partial disability for injury to claimant's low back. Claimant's unscheduled disability awards total 192 degrees for 60 percent permanent disability and her scheduled disability award is 13.5 degrees for 10 percent loss of use or function of her left ankle. Claimant contends that she is permanently and totally disabled. The issues on review are compensability of the denied conditions, and extent of unscheduled permanent partial disability including permanent total disability.

On the issue of compensability of claimant's primary amyloidosis, iatrogenic diabetes, Raynaud's phenomenon, hypertension, and syncopal episodes, the Board affirms the order of the Referee.

In order to meet the burden of proving that she is permanently and totally disabled, claimant must establish that she 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). Unrelated physical impairment that arises post-injury is not considered in determining permanent total disability. Emmons v. SAIF, 34 Or App 603 (1978). If the compensable condition did not cause permanent worsening of a preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of injury. Bob G. O'Neal, 37 Van Natta 255, aff'd mem., 77 Or App 194 (1985); John D. Kreutzer, supra; Frank Mason, 34 Van Natta 568, aff'd mem., 60 Or App 786 (1982). In the context of permanent total disability, we consider the extent of claimant's impairment caused by all disabling conditions, regardless of compensability, that preexisted the industrial injury and the impairment resulting from the injury itself. We then determine what the effect, including possible synergistic effect, of all these combined conditions was at the time of the hearing. Arndt v. National Appliance Co., supra; Deborah L. Jones, 37 Van Natta 1573 (1985).

Claimant had preexisting degenerative disc disease and a prior industrial injury to her right ankle. The unrelated polyneuropathy condition was discovered coincidentally at the time

of claimant's industrial injury in April 1983. Treatment of the neuropathy induced the subsequent diabetic condition. The diabetes and the polyneuropathy interfered with the healing of claimant's left ankle. Claimant's treating doctor reported that claimant was totally disabled by the effects of her low back injury alone, but that she would also be totally disabled by the polyneuropathy. Subsequent testing established that the neuropathy condition was a sign of severe primary amyloidosis. Although primary amyloidosis was previously unsuspected and undetected, we are persuaded by the treating doctor's ultimate opinion that the condition preexisted claimant's industrial injury.

The Referee found claimant's treating doctor was credible. The doctor testified that claimant's back condition could not be expected to improve with the passage of time nor was there medical treatment which could improve her condition. Claimant was confined to a wheelchair or brief ambulation with the aid of a walker. Claimant's work history was in manual labor and her job on the date of injury was cake baker/decorator.

Claimant's doctor opined that claimant's combined back and ankle injuries preclude her from returning to gainful and suitable employment regardless of the contribution of unrelated medical conditions. Consideration of training was terminated because of claimant's total medical disability.

We find that the synergistic combination of claimant's preexisting primary amyloidosis with industrial injuries to claimant's low back and left ankle results in permanent total disability and modify the Referee's order accordingly. The date from which the award of compensation for permanent total disability should begin is the date when the evidence established by a preponderance that claimant was permanently and totally disabled. We find that the evidence that proves claimant was permanently and totally disabled was the testimony of claimant's treating doctor at the hearing on February 7, 1985 and, therefore, that is the date from which compensation for permanent total disability will be paid.

SAIF is allowed to offset unscheduled permanent partial disability compensation paid pursuant to the Referee's order. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983); Donald W. Wilkinson, 37 Van Natta 937 (1985).

ORDER

The Referee's order dated April 25, 1985 is modified in part and affirmed in part. That portion of the order which awarded additional compensation for unscheduled permanent partial disability is modified to award compensation for permanent total disability from February 7, 1985. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3,000 in total for services before the Referee and the Board as a reasonable attorney's fee. The remainder of the Referee's order is affirmed.

VONDA C. ATWELL, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-02263
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order that upheld the SAIF Corporation's denial of claimant's aggravation claim. The issue is whether claimant's condition has worsened since the last arrangement of compensation.

Claimant began working at the employer's plywood mill in 1978. In January 1982, after working for approximately six months as a dryer feeder, claimant developed tingling, cramping and pain in her hands with pain radiating up both arms. On February 2, 1982 claimant visited Dr. Hartman, a neurologist. Dr. Hartman diagnosed bilateral thoracic outlet syndrome and recommended shoulder shrugging exercises. These exercises did not help and according to claimant caused a worsening of her symptoms. Claimant continued working but switched to a lighter position on the "Raimann machine." Despite this move claimant's symptoms continued to worsen.

Just over a year after her initial visit with Dr. Hartman, claimant visited Dr. Davis, a chiropractor, on February 16, 1983. In his initial report Dr. Davis stated that claimant's visit related to "an industrial injury reportedly incurred on January 4, 1982." He noted complaints of pain in claimant's neck, upper back, shoulders, right arm and right wrist and tingling in both arms. Dr. Davis diagnosed claimant's condition as a severe acute strain of the cervicothoracic spine and began administering chiropractic treatments.

On April 20, 1983 claimant visited Dr. Tennyson, a neurosurgeon. His diagnosis was bilateral thoracic outlet syndrome. He recommended that claimant either find lighter work or undergo surgery.

In May 1983 claimant visited another neurological specialist, Dr. Maukonen. His diagnosis was thoracic outlet syndrome secondary to chronic cervical and upper thoracic strain. He recommended surgery for the thoracic outlet syndrome but stated that this would not relieve the pain and stiffness associated with claimant's cervicothoracic strain. He also recommended that claimant change occupations.

During the summer of 1983 claimant underwent bilteral transaxillary first rib resections performed by Dr. Tobias, a thoracic surgeon. On October 27, 1983 Dr. Tobias reported that claimant had recovered from the operations and had full range of motion in both arms without neurological deficits. He released claimant to return to work and rated her as without permanent impairment. Claimant's claim was closed by Determination Order dated November 17, 1983 with an award of four months temporary total disability but with no award of permanent partial disability. Claimant did not request a hearing on this Determination Order.

Claimant returned to work for her former employer but in a generally lighter position, puttying defects in sheets of

plywood on the "patch line." After claimant returned to work some mild symptoms of thoracic outlet syndrome returned.

In May 1984 claimant experienced an exacerbation of cervical and thoracic pain and received chiropractic care from Dr. Davis. Claimant continued working at the plywood mill until mid October 1984, when Dr. Davis recommended that she leave work for a few weeks. On October 22, 1984 Dr. Davis sent a medical report to SAIF stating that claimant would be unable to work for two or three weeks and asked SAIF to reopen claimant's claim. Claimant at that time complained of neck and upper back pain, bilateral shoulder pain and numbness and tingling in her arms.

On November 2, 1984 claimant was reexamined by Dr. Maukonen. Claimant complained of persistent and increasing pain in her neck and shoulders as well as numbness, cramping and tingling in her hands and arms. Dr. Maukonen reported mild restriction of cervical range of motion and tenderness in the cervicothoracic region to palpation. His impressions were mild residuals from thoracic outlet syndrome and chronic cervico-thoracic strain, which he characterized as unchanged since his examination of claimant prior to her surgeries. He recommended conservative treatment and a change of occupations. On January 28, 1985 SAIF denied claimant's aggravation claim on the ground that the medical evidence failed to establish a worsening of claimant's compensable condition.

Dr. Davis treated claimant an average of twice weekly from October 1984 to March 1985. Dr. Davis then released claimant for light work, but she was unable to return to the plywood mill because no light jobs were available. Later in March claimant found employment as a cook. Claimant had difficulty performing some of the duties of a cook, including stirring food.

At the hearing claimant's treating chiropractor, Dr. Davis, testified that in his opinion claimant's neck and upper back condition had worsened symptomatically since the Determination Order of November 17, 1983. He indicated that claimant's condition had improved since he took her off work at the plywood mill in October 1984, but that her symptoms continued to wax and wane with various activities. He thought that this waxing and waning of claimant's symptoms was a permanent condition.

Claimant testified that she experienced continual cervicothoracic pain and stiffness and a stinging sensation in her left upper back. She stated that these symptoms, while of the same type that she had always had since the time of the original injury, had worsened since the November 1983 Determination Order. She also testified that she continued to experience some pain and tingling in her arms.

In upholding SAIF's denial of claimant's aggravation claim, the Referee found that claimant's condition had not worsened since the last arrangement of compensation and found instead that claimant was experiencing merely the waxing and waning of the symptoms of her original condition. He thought that claimant's symptoms were of the same nature and same general intensity as she had reported prior to the November 1983 Determination Order and emphasized Dr. Maukonen's statement in

November 1984 that claimant's cervicothoracic condition remained unchanged since before her surgeries. He discounted the opinion of Dr. Davis because it related only a symptomological worsening. He remarked that claimant probably should have received a award of permanent partial disability in the November 1983 Determination Order but ruled that claimant was precluded from receiving such an award because she had failed to request a hearing on the Determination Order.

In order to establish an aggravation claim, claimant must prove by a preponderance of the evidence that her compensable condition has worsened since the last award of compensation. ORS 656.273(1); Clemmer v. Boise Cascade, 75 Or App 404, 407 (1985). Increased symptoms, without a concomitant worsening of the underlying condition, may be sufficient to establish an aggravation. Richard A. Scharback, 37 Van Natta 598, 599-600 (1985); Billy Joe Jones, 36 Van Natta 1230, 1233 (1984), aff'd mem, 76 Or App 402 (1985); James W. Foushee, 36 Van Natta 901, 902-04 (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 future symptomatic flare-ups. Jimmie B. Hill, 37 Van Natta 728, 729 (1985). When an aggravation claim is based solely upon an increase of symptoms, the claim is compensable only if the increased symptoms are beyond those to be expected of the waxing and waning of the compensable condition. See Clemmer v. Boise Cascade, supra, 75 Or App at 407; Hoke v. Libby, McNeil & Libby, 73 Or App 44, 46 (1985).

In the present case, we agree with the Referee that there is little or no objective evidence of a worsening of claimant's compensable condition. We conclude, however, that claimant has established a worsening of symptoms beyond those to be expected of the waxing and waning of her compensable condition. Particularly persuasive to us is the fact that after her surgeries claimant returned to work at the plywood mill for nearly a year and then experienced such severe symptoms that she was forced to leave the plywood mill and has been unable to return to the same kind of work since. We conclude that claimant has established her aggravation claim.

ORDER

The Referee's order dated June 27, 1985 is reversed and claimant's aggravation claim is remanded to the SAIF Corporation for acceptance. Claimant's attorney is awarded $1200 for services at the hearing and an additional $600 for services on Board review, to be paid by the SAIF Corporation.

RONALD J. BROUSSARD, Claimant
Vick & Associates, Claimant's Attorneys
Michael Bostwick, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 85-02746 & 85-03630
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

EBI Companies requests review of Referee Howell's order that held it responsible for claimant's low back condition as an aggravation of claimant's September 1984 low back injury. The issue is responsibility between successive employers.

Claimant sustained an injury to his right lower back, diagnosed as a strain, while lifting a railroad tie in September 1984, while employed by EBI's insured. He was treated conservatively by Dr. Huston, a family practice specialist, and his claim was closed by a Determination Order dated January 8, 1985 that awarded no permanent disability compensation. Claimant did not work between September 1984 and February 1985.

In late February 1985 claimant began working as a tree planter for an employer insured by Western Employers Insurance. The work involved carrying a pack full of trees weighing between 25 and 150 pounds over steep, uneven terrain and working about half the time in a bent over position. After the first two days of work, claimant experienced some general soreness. The third day of work involved steeper than usual terrain and harder and drier than usual soil. The next morning claimant awoke feeling very stiff. When he bent over to put on his shoes he experienced intense right low back pain. Dr. Huston referred claimant to Dr. Moor, an orthopedic surgeon, who diagnosed a herniated L4-5 disc on the right. As of the hearing, claimant had not returned to work and was not medically stationary.

The Referee concluded that claimant's current condition is a continuation, i.e. aggravation, of the September 1984 injury with EBI's insured rather than a new injury sustained at Western Employers' insured. The Referee viewed the evidence as establishing that claimant's work at Western Employers' insured resulted in a recurrence of symptoms only and relied upon Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984), to find EBI the responsible insurer. On de novo review, we conclude that a preponderance of the evidence establishes that it is more probable than not that claimant's employment at Western Employers' insured contributed materially to claimant's present disability and need for medical services.

Dr. Huston opined that claimant's 1984 injury had completely resolved with no residual impairment prior to claimant's work with Western Employers' insured. He saw no relationship between the two work exposures. Dr. Moor opined as follows:

> "My opinion regarding this patient is that the condition that he is suffering from at the present time more likely than not is a continuation of the original injury suffered at [EBI's insured].
>
> "He has a disc protrusion at this time and typically these lesions will start to protrude and the patient will feel as though he has had a back strain. Then he will later on develop a full blown disc.
>
> "My understanding is that the work that the patient was doing at the tree planting job was relatively light type of work activity and should not have really strained his back with this type of activity had he not already had a lesion that was there to be aggravated.

> "[A]bout the contributing of the tree planting to his need for treatment, I would have to say that this work could have contributed to his need for treatment equal to any other moderate type of activity could have contributed to his acute condition. It is my opinion that had the patient still been off work and resting his condition would not have aggravated, but any normal type of activity could have aggravated it such as planting trees or any other activity of a moderate nature."

We find Dr. Moor's conclusions to be less persuasive than Dr. Huston's, for two reasons. First, Dr. Moor's opinion regarding the relative contribution of the tree planting work to claimant's present condition is largely based on an incorrect assumption that the work was relatively light. Claimant's credible testimony establishes that, in fact, the work was quite heavy and involved much lifting, bending and twisting.

Second, Dr. Moor assumed that claimant had a preexisting L4-5 disc lesion, resulting from the 1984 injury, that was aggravated by the tree planting work. Although there is some evidence that claimant suffered some right sciatica after the first injury, from which a disc lesion might be inferred, there is no contemporaneous medical evidence or diagnosis to sustain such an assumption. Even if Dr. Moor's assumption is given weight as an uncontroverted "educated guess," however, its legal effect does not warrant a finding of aggravation versus new injury. Dr. Moor's opinion acknowledges that the tree planting work did materially contribute to claimant's present condition. See Peterson v. Eugene F. Burrill Lumber, 294 Or 537, 543 (1983). Even if claimant did have a disc lesion as a result of the 1984 injury, "[I]f the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition, and even if the prior injury contributed the major part to the final condition." Smith v. Ed's Pancake House, 27 Or App 361, 365 (1976). We find that, at a minimum, work exertion at Western Employers' insured concurred with the 1984 injury at EBI's insured to cause claimant's current disability and need for medical services. Western Employers' is, therefore, responsible for claimant's compensation. See Boise Cascade Corp. v. Starbuck, 296 Or 238, 245 (1984).

Claimant specifically elected to be a nominal party on Board review. No attorney fee is awarded on Board review. Cf. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 570-71 (1985); Stanley C. Phipps, 38 Van Natta 13 (WCB Case Nos. 84-01838 & 84-02301, January 14, 1986). Because claimant overcame EBI's denial of compensability, even though we now find EBI not to be responsible for compensation, the attorney fee awarded claimant's attorney by the Referee, to be paid by EBI will be affirmed. ORS 656.386(1).

ORDER

The Referee's order dated July 15, 1985 is reversed in part. Western Employers Insurance's denial dated March 5, 1985 is set aside and this claim is remanded to Western Employers

Insurance for acceptance and processing according to law. EBI Companies' denial dated March 15, 1985 is set aside insofar as it denies or purports to deny the compensability of claimant's low back condition; the remainder of the denial is approved. The Referee's award to claimant's attorney of $1,300 as a reasonable attorney fee, to be paid by EBI Companies, is affirmed. Western Employers Insurance shall reimburse to EBI Companies all claim costs, exclusive of the attorney fee awarded claimant's attorney, paid pursuant to the Referee's order herein.

THERESA M. FLOWERS, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 85-0535M
January 28, 1986
Own Motion Order

Claimant has requested that the Board exercise its own motion authority and grant to her compensation for permanent total disability for her September 5, 1975 industrial injury. Claimant's aggravation rights have expired. The insurer opposes granting own motion relief.

Claimant's claim was last closed by Determination Order on May 8, 1984 which increased her permanent disability compensation. She currently has been awarded compensation for 192 degrees for 60 percent unscheduled disability for injury to her low back, 82.5 degrees for 55 percent loss of function of her right leg and 67.5 degrees for 45 percent loss of function of her left leg. She seeks permanent total disability, contending she did not receive notice that vocational rehabilitation was not feasible until after the one-year appeal period from the May 8, 1984 Determination Order had expired. She also states that an April 9, 1985 letter from Dr. Gritzka was not received by her attorney until July 1985, two months after the appeal period expired. In that letter Dr. Gritzka indicated he felt claimant was not rehabilitatable.

As early as 1983, Dr. Gritzka indicated that consideration should be given to the possibility that claimant was at that time permanently and totally disabled. In August 1984, only three months after issuance of the last Determination Order, Dr. Gritzka stated that "it is still my opinion that this patient is vocationally non-rehabilitatable and if that can be construed to mean that the patient is totally disabled, on the basis of the whole person, then that is my opinion." We conclude that claimant may not have had enough evidence upon which to prove she was permanently and totally disabled within one year after the Determination Order, but she certainly had enough evidence upon which to base an appeal of the order. She failed to appeal the Determination Order in a timely manner. The Board will not use its own motion authority to allow compensation where other legal remedies were available to the claimant but not pursued.

We have also considered the possibility that claimant's condition has materially worsened since the last arrangement of compensation, thereby justifying claim reopening under ORS 656.278. However, we find no persuasive evidence of an objective worsening. The request for own motion relief is hereby denied.

IT IS SO ORDERED.

CHARLES T. FRIEDLEY, Claimant
Robert L. Chapman, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 85-00491
January 28, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of that portion of Referee Brown's order which set aside its denial of claimant's aggravation and medical services claim for a low back condition. In his respondent's brief, claimant contends that the employer's denial was unreasonable. We find that claimant has failed to establish that his current low back condition is causally related to his April 1982 compensable injury. Consequently, we reverse the Referee's order.

Claimant was 33 years of age at the time of hearing. In April 1982, while working as a bartender, he sustained a low back injury when he stooped to lift a keg of beer. Dr. Geller, chiropractor, diagnosed lumbar subluxation and lumbar strain. Dr. Geller testified that claimant gave a history of a prior back injury which had occurred in Hawaii two years before this April 1982 injury. Although claimant testified that the Hawaiian incident involved his mid-back, he conceded that he had also received low back chiropractic adjustments.

Claimant missed no time from work as a result of his April 1982 injury. However, he continued to receive periodic chiropractic adjustments from Dr. Geller. From August 1982 until December 1982 claimant sought no medical treatment, but from February 1983 through December 1983 claimant received chiropractic treatment at least once a month. Except for a few references to right leg complaints during March 1983 and August 1983 visits to Dr. Geller, claimant's complaints primarily concerned his left leg. These left leg complaints included numbness as well as pain.

In the late summer of 1982 claimant was laid off from his employment as a bartender. For the first three or four months of 1983 he leased and operated a car wash. The prolonged standing on concrete as well as claimant's bending activities increased his symptoms. Claimant left the car wash business and became a part owner in a greenhouse. This enterprise existed for approximately eight to ten months, until the first quarter of 1984. At the close of this business claimant applied for and received unemployment benefits for the next six to eight months.

Claimant returned to Dr. Geller in May 1984. Dr. Geller had last examined claimant in December 1983. Claimant's complaints included lower back pain in the left gluteal area. Interpreting claimant's neurological tests as essentially normal, Dr. Geller opined that there was no clinical indication of a herniated disc.

In September 1984 Dr. Coplen, chiropractor, became claimant's attending physician. Claimant complained of low back and left buttock pain, with an occasional radiating sharp pain into the left leg. Dr. Coplen diagnosed moderate lumbosacral strain/sprain with accompanying left radicular pain. Dr. Coplen further reported that claimant was currently off work and would require chiropractic treatment approximately three times a week.

In December 1984 claimant signed a written statement describing the history of his low back problems, as well as his activities since his April 1982 compensable injury. The statement erroneously declared that claimant had never had a prior back problem. Claimant also indicated in the statement that Dr. Geller had advised him to stop working. Claimant admitted at the hearing that Dr. Geller had not made such a recommendation. The statement also did not mention that claimant had owned and operated a greenhouse business for eight to ten months.

In March 1985 claimant was examined by Dr. Dunn, neurosurgeon. Claimant primarily complained of low back pain, which radiated into his buttocks and legs. Dr. Dunn's suspicion of a herniated disc, centrally located at L4-5, was subsequently confirmed by a CT scan. In Dr. Dunn's opinion claimant's condition had worsened and was definitely related to his April 1982 injury.

Dr. Dunn based his opinion on a number of points unsupported by the record. To begin, Dr. Dunn was under the impression that claimant had no back difficulties prior to the April 1982 injury. Dr. Dunn noted that claimant had suffered an injury in 1980 or 1981. However, it was Dr. Dunn's understanding that claimant had suffered a rib fracture, rather than a back injury. Secondly, claimant's history to Dr. Dunn suggested that claimant had missed time from work as a result of his compensable injury. Moreover, the medical report failed to refer to claimant's work activities since the April 1982 injury. Thirdly, Dr. Dunn reported that claimant experienced an immediate onset of back and right extremity pain, whereas the record indicates that claimant's initial complaints were left sided. Finally, claimant's history indicated that his symptoms had continued unabated since his compensable injury, yet Dr. Geller's records demonstrate that claimant sought no medical treatment for several months at a time during both 1983 and 1984.

Claimant testified that he has not been free of low back symptoms since the April 1982 injury. The location of the symptoms has periodically fluctuated between his left and right side, including either buttock and leg. Claimant guessed that the longest time he had gone without treatment "would probably be 60 days."

Based on demeanor alone, the Referee had no reason to question claimant's reliability. However, the Referee acknowledged that based on the totality of the record claimant's reliability was a close question. Reasoning that claimant's testimony concerning his intermittent exacerbations and remissions was consistent with the medical histories of Drs. Geller and Dunn, the Referee concluded that claimant's aggravation and medical services claims were compensable.

In order to prove compensability of either his medical services or aggravation claim, claimant must establish that his current condition is causally related to his compensable injury. Poole v. SAIF, 69 Or App 503 (1984); Van Horn v. Jerry Jerzel, Inc., 66 Or App 457 (1984). If the history given by claimant is inaccurate or incomplete, the persuasive impact of an opinion generated therefrom is substantially decreased. Miller v. Granite Construction Co., 28 Or App 473 (1977).

We are not persuaded that claimant's current low back condition is causally related to his April 1982 compensable injury. Considering the complexities involved in establishing a causal link between an April 1982 nondisabling injury and the subsequent diagnosis of a herniated disc some three years post-injury, the accuracy of a medical history is an essential ingredient in producing a persuasive medical opinion. Dr. Dunn's opinion definitely supports a causal relationship between claimant's current complaints and the industrial injury. However, Dr. Dunn's report indicates that claimant experienced no back problems prior to the April 1982 injury. Moreover, the report suggests that claimant has been receiving treatment on a more or less consistent basis since his compensable injury. Finally, the report fails to address the possible contribution of claimant's subsequent work activities. Inasmuch as Dr. Dunn's opinion is based upon an incomplete, and sometimes inaccurate, medical history, we find the conclusions derived from this flawed information unpersuasive.

Furthermore, the numerous discrepancies between claimant's testimony and his medical histories and prior written statement cause us to question his reliability as a witness. Thus, although lay testimony may be sufficient to establish compensability in certain situations, we find claimant's testimony insufficient under the circumstances detailed above.

Considering claimant's questionable reliability, the absence of a persuasive medical opinion linking claimant's original nondisabling April 1982 injury to his current condition, and the existence of subsequent work activities which at least raise the possibility of another explanation for claimant's current complaints, we find that the employer's denial should be upheld.

ORDER

The Referee's order dated July 17, 1985 is reversed. The self-insured employer's denial issued December 13, 1984 is reinstated.

DELMAR R. GOODRICH, Claimant
Joseph D. Post, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 85-0047M
January 28, 1986
Second Own Motion Determination on Reconsideration

The Board issued an order on January 2, 1986 which granted claimant an additional award of compensation equal to 48 degrees for 15 percent unscheduled disability for injury to his low back and allowed an attorney fee equal to 25% of the increased compensation not to exceed $410. Claimant has requested that the attorney fee be increased to $840 and that his permanent partial disability compensation be paid in a lump sum. The motion was signed by both claimant and his attorney.

We conclude claimant's requests are reasonable and hereby amend our January 2, 1986 order to include the following:

The increased permanent partial disability compensation granted by this order shall be paid to claimant in a lump sum. Claimant's attorney's fee is increased to a maximum of $840, payable out of the compensation.

IT IS SO ORDERED.

DAVID D. ISAAC, Claimant
Gatti, et al., Claimant's Attorneys
Daniel J. DeNorch, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-01679 & 84-13634
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Wilson's order, as adhered to on reconsideration, that affirmed the SAIF Corporation's denial of claimant's aggravation claim for dermatitis and affirmed Liberty Northwest Insurance Company's (Liberty Northwest) denial of claimant's new injury claim for the same condition. The issues on review are whether the Referee properly upheld both denials and, if not, which of the insurers is responsible for claimant's condition.

We draw from the Referee's statement of the facts. On August 14, 1984 claimant was seen by an emergency room physician, Dr. Lewis, with a rash on his hands. Claimant related that a skin infection had recently developed while he washed dishes for SAIF's insured.

Claimant's condition was ultimately diagnosed as impetiginized lesions. He filed a claim with SAIF on August 20, 1983. He was released for regular work a month later. Soon thereafter claimant experienced a return of symptoms. Dr. Wright advised him to avoid wet work. SAIF denied claimant's claim on November 17, 1983.

In May 1984 Dr. Wright advised claimant's attorney that claimant's dishwashing employment was a material cause of his skin condition. Claimant was again released to return to work, but was advised to wear waterproof gloves.

On October 1, 1984 SAIF entered into a stipulated agreement whereby it rescinded its denial and paid temporary total disability benefits in exchange for claimant's dismissal of his request for hearing. Benefits were paid through November 21, 1983, the date claimant was released to return to work.

In late October 1984 claimant returned to Dr. Wright, again complaining of skin problems. Claimant had begun work for a cannery insured by Liberty Northwest. Dr. Wright observed erythema of claimant's distal palmar finger surfaces with scattered small deep vesicles. Claimant filed a claim with Liberty Northwest on October 23, 1984. The claim was denied on December 13, 1984, and on the same date Liberty Northwest requested that the Workers' Compensation Department designate a paying agent pursuant to ORS 656.307(1).

In answer to questions posed by Liberty Northwest, Dr. Wright stated that claimant's present condition was substantially the same as that for which he was treated after it developed at SAIF's insured's, and that the most recent flare-up was essentially a recurrence of that condition. He also suggested that the cannery employment temporarily worsened claimant's underlying disease.

In January 1985 Dr. Wright stated in response to SAIF's questioning that claimant's cannery work had resulted in the need for further medical treatment. Dr. Wright felt that two factors had caused the most recent flare-up: an underlying condition known

as "dyshidotric exzema," and claimant's doing wet work involving contact with potentially irritating substances. Based on Dr. Wright's report, SAIF issued a January 25, 1985 denial of further responsibility for subsequent exposures, and particularly for the cannery exposure. The denial was purportedly not based on the compensability of claimant's condition, however, for SAIF also requested the designation of a paying agent.

Liberty Northwest was ultimately designated as paying agent. It continued to pay interim compensation through March 6, 1985, when Dr. Wright found claimant to be medically stationary. In Dr. Wright's opinion, any permanent residuals claimant might suffer would not have resulted from employment. Claimant was released to return to work and was again advised to avoid wet environments.

SAIF requested Dr. Wright's opinion regarding the causal relationship between the dishwashing exposure in 1983 and the dermatitis flare-up in 1985. In Dr. Wright's opinion there was no relationship.

Claimant testified that he had been washing dishes for approximately a year and a half at the time his condition first arose. When he began work later at the cannery, the condition had cleared. Claimant had done no wet work between jobs. After working in wet conditions at the cannery, however, the condition returned. Claimant had previously worked for the cannery and had developed a rash, but of a different quality and with no infection.

Dr. Wright was deposed on July 27, 1985. In his opinion, claimant had an eczema condition that preexisted his dishwashing employment exposure. The cause of the condition is unknown; it occurs episodically. The skin lesions associated with claimant's eczema permitted irritating substances that claimant contacted on both the dishwashing and cannery jobs to enter the skin, resulting in dermatitis. Dr. Wright noted that claimant's dermatitis cleared without permanent residuals after each employment exposure and that the underlying eczema conditon was unaffected by either job.

The Referee found this case to be medically complex, requiring expert medical diagnosis of the causative elements of claimant's condition. He relied on the various reports and the deposition of Dr. Wright, who diagnosed two conditions: the underlying eczema condition and the dermatitis that resulted from transient exposure to irritants. Dr. Wright found the dermatitis condition to be temporary and the eczema condition to be unrelated to either the dishwashing or cannery employments. Relying on Dr. Wright's statements, the Referee affirmed both denials issued by the insurers. The effect of the Referee's order was to find claimant's conditions not compensable.

On review, claimant argues that the Referee's order was legal error, i.e., that the Referee ruled on the compensability of claimant's conditions when, in fact, the only issue at hearing was which of two insurers was responsible. We agree with claimant's assertion and modify the Referee's order.

The compensability of claimant's conditions was not an issue at hearing; both insurers specifically conceded compensability and the Referee acknowledged that the issue before him was responsibility. Apparently because he found the medical

record to be clearly unfavorable to the compensability of claimant's conditions, however, the Referee ultimately affirmed both insurers' denials.

We agree that if compensability had been at issue, claimant would not have prevailed. Because compensability was conceded at hearing, however, the Referee was not at liberty to entertain that issue. Someone, by operation of law, if not on the facts, is responsible for claimant's conditions. It is now up to us to determine who shall be responsible for claimant's compensation.

Liberty Northwest has offered no brief on review; it is content with the Referee's order. SAIF does not address the Referee's compensability findings; it argues that Liberty Northwest should be found responsible. After considering the Referee's order and SAIF's arguments on review, we find SAIF to be the responsible insurer by virtue of its 1983 stipulated acceptance of claimant's condition.

In Bauman v. SAIF, 295 Or 788 (1983), the court held that absent a showing of illegal activity, the employer/insurer's acceptance of a claim precludes a subsequent denial of the claim once the 60-day statutory period for acceptance or denial has run. Bauman is applicable in the instant case.

Although Bauman involved compensability rather than responsibility, the Court of Appeals has held that under certain circumstances, Bauman is applicable to responsibility cases as well. In Jeld-Wen, Inc. v. McGehee, 72 Or App 12, rev den, 299 Or 203 (1985), claimant suffered successive injuries while employed by different employers. Subsequent to the second injury, claimant filed an aggravation claim with the first employer and a claim for new injury with the second. The second employer denied the new injury claim. The first employer accepted claimant's aggravation claim, and later issued a retroactive denial. The court found the first employer responsible by operation of law, holding that Bauman prohibited the retroactive denial. The court noted:

> "We see nothing in the Supreme Court's holding in Bauman or in the nature of responsibility issues as opposed to compensability isues that persuades us to hold that the Bauman rule is not equally applicable in a resonsibility dispute between employers." McGehee, 72 Or App at 15.

The court reached a different result in Retchless v. Laurelhurst Thriftway, 72 Or App 729, rev den, 299 Or 251 (1985), a case also involving responsibility. Retchless, too, involved successive injuries on different employments. Following the second injury, claims were submitted to both employers' insurers. The second insurer denied. The first insurer accepted claimant's aggravation claim, but later issued a retroactive denial. The denials went to hearing and the Referee found the second insurer responsible over its argument that Bauman should estop the first insurer from retroactively denying claimant's accepted aggravation claim.

The court found the Retchless situation distinguishable from McGehee in that in Retchless, the second insurer was ultimately found responsible for claimant's condition. The court held that the first insurer, which had accepted claimant's claim, remained responsible for payment of claimant's compensation only until another entity was found responsible. In Mary G. Mischke, 37 Van Natta 1155, 1157 (1985), we interpreted this to mean that, although an employer/insurer may not deny the claim vis-a-vis the claimant, it may litigate the issue of responsibility vis-a-vis another employer/insurer, so long as the claimant continues to receive compensation.

The present case is unlike Retchless, for in this case the second insurer has not been found responsible for claimant's compensation. Indeed, on the facts, the second insurer is not responsible. The present case resembles McGehee, however, in that in both cases, claimants' claims were first accepted and then retroactively denied, and no subsequent insurer was held responsible. We find that, like the first insurer in McGehee, the first insurer in the present case remains responsible for claimant's compensation by operation of law until another entity is found responsible. SAIF is the first insurer.

This unique situation requires our consideration of whether claimant's attorney is entitled to a fee on Board review. In Stanley C. Phipps, 38 Van Natta 13 (filed January 14, 1986), we noted that OAR 438-47-090(1) requires claimant's attorney to "actively and meaningfully participate" in the defense of claimant's rights in order to generate a fee. In light of Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985), we interpreted the phrase "actively and meaningfully participate" to mean taking a position and actively litigating a point bearing on the claimant's entitlement to compensation or the amount thereof.

In the present case, neither claimant's entitlement to compensation nor the amount thereof were at issue at hearing; compensability had been conceded, and the issue was which of two insurers was responsible for payment. Claimant's attorney, therefore, was not required to actively litigate claimant's entitlement to compensation at hearing. The effect of the Referee's affirmation of both insurers' denials, however, was to resurrect the issue of compensability. On Board review claimant's attorney necessarily defended claimant's entitlement to compensation as if that issue had never been conceded. Under these circumstances we find claimant's attorney to be entitled to a fee for services on Board review under ORS 656.382(2). Because we find SAIF to be the responsible insurer, it shall also be responsible for the attendant attorney fee. No fee shall be awarded for services at hearing, however, for the compensability of claimant's claim was not an issue in that forum.

ORDER

The Referee's order dated August 13, 1985 is modified in part and affirmed in part. That portion of the order that affirmed SAIF's denial of claimant's aggravation claim is set aside. Claimant's claim is remanded to SAIF for processing and payment of compensation according to law. Claimant's attorney is awarded $450 for services on Board review, to be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed.

MARILYN L. JOHNSON, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 84-02595 & 84-03622
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

EBI Companies request review of Referee Wilson's order which set aside its denial of claimant's "new injury" claim for a low back condition and upheld the SAIF Corporation's denial of claimant's aggravation claim. On review, the issues are compensability and responsibility.

Claimant was 39 years of age at the time of hearing. In March 1979, while pulling lumber off a planer chain for SAIF's insured, she suffered a thoracic and lumbar muscle strain. X-rays revealed some lateral scoliosis, but no obvious pathology. Dr. McNeilly temporarily took her off work and then released her for lighter work. In July 1979 a Determination Order issued, awarding claimant approximately ten days of temporary total disability and two months of temporary partial disability.

After returning to work for SAIF's insured claimant performed a variety of work activities. Most of her duties were less physically demanding, but she also worked on the green chain. Although claimant would experience "occasional acute flareups with her lower back", she did not seek medical treatment. In May 1982 her employment was terminated for economic reasons.

Between May 1982 and November 1983 claimant was unemployed. During this time she worked on her farm, hauling feed, cutting wood, distributing bales of hay, and caring for livestock. Claimant periodically sought medical treatment from Dr. Ekholm, osteopath. Generally, these treatments were precipitated by episodes of excessive physical exertion, such as pitching bales of hay or bending over to build a fire. Dr. Ekholm diagnosed chronic thoracopelvic strain, attributing claimant's symptoms to her 1979 compensable injury.

In April 1983 Dr. Duff, orthopedist, performed an independent medical examination. Claimant complained of low back and right hip pain, radiating occasionally into the right calf. X-rays demonstrated mild disc narrowing in the low back. Dr. Duff diagnosed chronic lumbar strain, with probable early degenerative lumbar disc disease. Concluding that there was no evidence of permanent impairment attributable to claimant's March 1979 injury, Dr. Duff released her to work without restrictions.

In November 1983 claimant applied for employment with EBI's insured, a lumber mill. In connection with her application, claimant was examined by Dr. Denton. Claimant reported that she had suffered occasional back flareups since her 1979 injury, but had not had any problems for approximately the past year. Considering claimant's history and her entirely normal examination, Dr. Denton released her for work without limitations.

Claimant worked for EBI's insured from late November 1983 until mid-January 1984. During this time she performed several physical work activities, including duties on the green chain, on two planer chains, and as a flatcar loader. Claimant

testified that when she began her work, she was not suffering any acute low back or thoracic pain. Within a few weeks she experienced acute thoracic pain which was similar to her earlier complaints. The pain resurfaced while she was pulling lumber off the green chain on December 29, 1983. Claimant described the pain as a "lot, lot worse, and it seemed to hurt more." She continued to work, but received treatment and medication from Dr. Ekholm. She was also assigned to lighter duties. When claimant's symptoms failed to diminish, she was sent home from work until she could obtain a full work release.

In January 1984 Dr. Ekholm reported that claimant had sought treatment in October 1983 after removing moss from a roof. Describing the episode as an exacerbation of pain, Dr. Ekholm opined that claimant's complaints were chronic, probably never completely resolvable, and directly referrable to her 1979 injury. Dr. Ekholm further opined that claimant's December 1983 flareup at work was "directly related to the physical duties of pulling chain with poor abdominal and low back muscle support." Although Dr. Ekholm considered claimant medically stationary, she was placed under a 40 pound lifting and bending restriction.

In January 1984 claimant was examined by Dr. Hardiman, orthopedist. Dr. Hardiman found mild scoliosis, but otherwise no objective findings to support claimant's subjective complaints. Concluding that claimant had a mild dorsolumbar strain syndrome which should not produce significant disability, Dr. Hardiman released her to return to work.

In March 1984 claimant was reexamined by Dr. Denton, who obtained a "more thorough history" than the one previously taken in November 1983. In this history, claimant reported that she had experienced monthly recurrences of back pain since her 1979 injury. Concluding that claimant was experiencing a progression of degenerative disc disease and possibly osteoarthritis, Dr. Denton diagnosed chronic low back pain syndrome. Dr. Denton recommended that claimant be placed under a 70 pound lifting restriction and a 50 pound repetitive lifting restriction. Dr. Denton further suggested that claimant avoid repetitive bending or twisting activities.

In March 1984 Dr. Ekholm reported that claimant had not been taken off work for medical reasons. Dr. Ekholm described claimant's current condition as a flareup attributable to her change from a basically sedentary life style to the more strenuous physical duties of "pulling chain." In Dr. Ekholm's opinion claimant's condition was not a new injury, but rather was "more of the same" from her 1979 injury.

In March 1984 claimant sought treatment from Dr. Leveque, osteopath. In Dr. Leveque's opinion claimant had suffered permanent disability as a result of her March 1979 injury. Furthermore, Dr. Leveque concluded that claimant would remain susceptible to continuing exacerbations of her back problem.

In September 1984 Dr. Snodgrass, neurologist, and Dr. Stewart, orthopedist, of the Western Medical Consultants performed an independent medical examination. Reporting on behalf of the Consultants, Dr. Snodgrass diagnosed lumbar strain, superimposed on developmental thoracic and lumbar scoliosis. In the Consultants' opinion, claimant had sustained minimal dorsal permanent impairment which was attributable to her 1979 injury.

In September 1984 claimant came under of the care of Dr. Ho, osteopath. Dr. Ho concluded that claimant's work for EBI's insured independently contributed to a worsening of claimant's underlying condition. Dr. Ho based his opinion on the following factors: (1) the occurrence of a second incident while claimant worked for EBI's insured; (2) Dr. Ekholm's full work release prior to this incident; and (3) claimant's increase of pain in the mid-back area as well as the low back. Dr. Ho reasoned that claimant's work for EBI's insured required her to seek medical treatment that would not have otherwise been needed.

In October 1984 claimant was reexamined by Dr. McNeilly. Although claimant complained of a more severe and frequent pain, Dr. McNeilly could not detect any deterioration since her last examination, some two or three years prior. Dr. McNeilly found it difficult to ascertain the cause of claimant's symptoms.

In April 1985 Dr. Stewart issued a report. In Dr. Stewart's opinion claimant had a propensity for recurrent strains which were attributable to a permanent impairment from her March 1979 injury. Claimant's work incidents in late 1983 fit within Dr. Stewart's description of a recurrent strain. Dr. Stewart further concluded that these subsequent work incidents did not contribute to any objective material worsening of claimant's condition.

Since her employment with EBI's insured, claimant can no longer perform many of her farm chores. She suffers from chronic pain, which increases after physical exertion. Claimant sees Dr. Ho approximately once a week for osteopathic manipulations. Dr. Ho has also prescribed back exercises, but no medication.

The Referee found the following chain of events consistent with the opinion of claimant's treating physician, Dr. Ho. Claimant had performed rigorous farm work following her initial injury and had been released for unrestricted employment prior to working for EBI's insured. Following her work activities with EBI's insured claimant's condition became acute, she was sent home, and has not received a complete release to return to work since. For these reasons the Referee concluded that claimant's work activities for EBI's insured had independently contributed to a worsening of her underlying condition resulting in her need for medical treatment and her current disability. Applying the "last injurious exposure" rule, the Referee determined that EBI was responsible.

In a successive injury context, the "last injurious exposure" rule places full liability on the insurer at the time of the most recent injury that bears a causal relation to the disability. Bracke v. Baza'r, 293 Or 239, 244 (1982). 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 rule operates to place responsibility on the last employer whose employment may have caused the disability. Boise Cascade Corp. v. Starbuck, 296 Or 238, 245 (1984). However, when a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability, but which did not contribute to the disability, the rule does not apply, and the first employer is liable. Boise Cascade Corp. v. Starbuck, supra., 296 Or at 244.

Whether the work conditions at the later employment contributed to the disability is a question of fact. Boise Cascade Corp. v. Starbuck, supra., 296 Or at 244-45; CECO Corporation v. Bailey, 71 Or App 782 (1984).

Following our de novo review of the medical and lay evidence, we are persuaded that claimant's condition has worsened. However, we find that claimant's subsequent work activities for EBI's insured, although capable of causing her disability, did not actually contribute to it. Consequently, SAIF, as insurer on the risk at the time of the March 1979 injury, is responsible for claimant's present disability. Accordingly, we reverse that portion of the Referee's order which found EBI responsible.

The preponderance of the evidence indicates that claimant's disability was in existence prior to her employment with EBI's insured. Since her March 1979 injury claimant suffered recurring symptoms on a monthly basis. Generally the reappearance of these symptoms occurred whenever claimant exceeded her physical limitations. Her subsequent work activities for EBI's insured merely represent another episode of her continuing symptomatology.

In reaching this decision we find the opinion of Dr. Ekholm instructive. Dr. Ekholm had the opportunity of examining claimant following her March 1979 injury, during her 18 month layoff, and after her work activities for EBI's insured. Such an advantage lends further credence to Dr. Ekholm's conclusions. See Faye L. Ballweber, 36 Van Natta 303, 304 (1984). Portions of Dr. Ekholm's opinion could be interpreted as attributing claimant's current condition to her recent work activities for EBI's insured. However, the tenor of the opinion suggests that claimant is experiencing another in a continuing series of recurring symptoms resulting from her March 1979 injury. Furthermore, this conclusion is shared by the persuasive opinions of Drs. Snodgrass, Stewart and Leveque.

We do not find the opinions of Drs. Denton and Ho particularly persuasive. Dr. Denton's subsequent conclusion that claimant's work activities should be modified does not necessarily demonstrate a change in claimant's condition as a result of her work activities with EBI's insured. Rather, the subsequent recommendation for a job modification is more likely attributable to the physician's reception of a more thorough medical history indicating that claimant's flareups occurred more frequently than she had earlier described. Although Dr. Ho is the current treating physician, he did not begin treating claimant until September 1984, some nine months after the recurrence of her symptoms. Considering this lapse of time and the persuasiveness of the contrary medical opinions, we choose not to follow Dr. Ho's conclusions.

ORDER

The Referee's order dated June 6, 1985 is reversed. The SAIF Corporation's denial issued March 15, 1984 is set aside. EBI Companies' denial issued February 14, 1984 is reinstated and upheld. SAIF shall reimburse EBI for its claims costs incurred to date. Claimant's attorney is awarded $200 for services on Board review, to be paid by the SAIF Corporation.

WINFRED LOGUE, Claimant
Burt, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09652
January 28, 1986
Order on Reconsideration

Claimant has requested reconsideration of that portion of our Order on Review dated January 14, 1986 that awarded claimant's attorney an insurer-paid attorney fee of $700 for services on Board review. ORS 656.382(2). Claimant argues that a fee of $1,800 would be reasonable in this case, given the time expended and the contingent nature of the fee agreement.

In Kenneth E. Choquette, 37 Van Natta 927 (1985), we discussed in detail the factors we consider when determining a reasonable attorney fee for services of a claimant's attorney in an insurer or employer initiated Board review proceeding. In Choquette, we determined that $550 was a reasonable attorney fee in an insurer initiated appeal of a Referee's award of permanent total disability under the circumstances present in that case. In arriving at that amount of attorney fees, we considered the result obtained for the claimant, the effort expended by the attorney and several other factors related to the practice in this forum. Applying those same factors in this case, we concluded that a fee of $700 was reasonable. We adhere to that conclusion.

Claimant's suggestion that the base fee should be subject to a "multiplier" to take into account the contingent nature of the fee agreement was foreclosed by the Court of Appeals in Wattenbarger v. Boise Cascade Corp., 76 Or App 125, 128 (1985).

ORDER

Our previous Order on Review dated January 14, 1986 is republished effective this date.

JOHN D. LOWERY, Claimant
Robert L. Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-12159
January 28, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee Mongrain's order that granted claimant an award of 320 degrees for 100 percent unscheduled permanent partial disability for injury to his lumbar spine. Claimant cross-requests review of the Referee's order, asserting that he is permanently and totally disabled. The issue is extent of unscheduled disability, including permanent total disability.

SAIF's request for review is predicated upon its assertion that the Referee erred in rating claimant's disability prior to the finality of litigation regarding the compensability of recommended low back surgery. SAIF had denied the requested surgery on the ground that it was necessitated by claimant's allegedly preexisting degenerative back condition. At the time of the hearing in this case, another Referee had ruled that claimant's February 11, 1982 industrial injury had aggravated and accelerated the preexisting condition, thereby rendering the surgery compensable. SAIF requested Board review of that decision and that request was pending at the time of hearing in this case.

SAIF's assertion is incorrect. "Extent of disability

may be decided while compensability is being litigated. SAIF v. Maddox, 295 Or 448, [454] . . . (1983)." Price v. SAIF, 296 Or 311, 316 (1984). Further, subsequent to the Referee's order in this case, the Board affirmed the previous Referee's order that held the surgery compensable, and our order was not further appealed. The law of this case is, therefore, that claimant's current low back condition is as a result of his industrial injury, and that determination is final.

SAIF also argues that, if the denied surgery is compensable, claimant is not medically stationary, because the surgery could be expected to improve his condition. This argument is not supported by the record before us. In June 1983 a panel of the Orthopaedic Consultants opined that claimant was medically stationary. On August 30, 1983 Dr. Dunn, claimant's attending physician, noted, "I do feel that the [claimant's] limitations at this point are extreme and his functional capacity and working capacity is zero as is. I feel [claimant] does stand a chance of return to employment with subsequent surgery." On August 31, 1983 claimant was declared medically stationary as of June 10, 1983, the date of the Orthopaedic Consultants' examination, by a Determination Order. There is no evidence that claimant's physical condition changed between June and August of 1983. Other than that claimant "stands a chance of return to employment . . ." with surgery, this record contains no persuasive evidence that claimant is other than medically stationary. We do not equate "stands a chance" with "further material improvement . . . from medical treatment, or the passage of time. " ORS 656.005(17).

Claimant asserts that he is permanently and totally disabled. The Referee found that claimant was entitled to the maximum award for permanent partial disability. He based his decision upon the uncontroverted fact that claimant has not sought employment since 1983, when he was no longer able to work at his previous job, relying upon ORS 656.206(3).

Claimant was age 59 at the time of the hearing. He has a third grade education and has worked at heavy logging jobs since the age of fifteen. He is basically illiterate. Although he has applied for vocational assistance, none has been provided. We also find that claimant did attempt to return to work after January 1983, but has not worked since September 1983. Claimant testified that he had not been able to look for work because he had "been packed in ice and a lot of other things." Claimant's treating chiropractor, Dr. Wehinger, stated in June 1983 emphatically that claimant should not work.

On our de novo review of the record as a whole, we find that claimant is of the class of injured workers for whom a search for work would obviously be futile. See Edge v. Jeld-Wen, 70 Or App 214 (1984); Butcher v. SAIF, 45 Or App 313 (1980). We accordingly find that claimant is permanently and totally disabled. Claimant's award of permanent total disability shall be effective as of the date claimant became medically stationary and vocationally stationary, which we find to be August 30, 1983. SAIF shall be allowed to offset permanent partial disability compensation paid pursuant to the Referee's order against the award of permanent total disability granted by this order. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28, 32 (1983);

Harlan L. Long, 37 Van Natta 671, 37 Van Natta 760 (1985). Claimant's attorney fee is based upon the increased disability award obtained through claimant's cross-request for Board review.

ORDER

The Referee's order dated February 23, 1985 is modified. Claimant is granted an award for permanent total disability effective August 30, 1983 in lieu of the disability award granted by the Referee. The SAIF Coporation is authorized to offset permanent partial disability compensation paid pursuant to the Referee's order against the compensation awarded by this order. 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, in lieu of the attorney fee awarded by the Referee.

LORETTA SANDERS, Claimant
Flaxel, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

Own Motion 84-0306M
January 28, 1986
Own Motion Order

Claimant has requested that her December 7, 1978 industrial injury claim be reopened for additional compensation on account of a worsening of her compensable condition. Claimant's aggravation rights have expired. On June 29, 1984 the SAIF Corporation issued a formal denial in which it denied that claimant's current condition is related to her 1978 injury. Claimant requested a hearing on the denial. We deferred action awaiting the outcome of the hearing. OAR 438-12-005(1)(a).

On May 24, 1985 Referee Quillinan issued her order in which she directed that SAIF's denial be affirmed. The effect of the affirmance of SAIF's denial is a finding that claimant's current condition is not compensable. The Referee's order was not appealed and has become final by operation of law. ORS 656.289(3).

ORS 656.278(5) provides, in relevant part:

> "The provisions of this section do not authorize the board, on its own motion, to modify, change or terminate former findings or orders:
>
> "(a) That a claimant incurred no injury or incurred a noncompensable injury . . . ."

We conclude that the final order determining that claimant's current condition is noncompensable precludes us from exercising own motion jurisdiction over this claim. Claimant's petition for own motion relief is, therefore, denied.

IT IS SO ORDERED.

KAROLA SMITH, Claimant
Steven C. Yates, Claimant's Attorney
Tooze, et al., Defense Attorneys

WCB 84-05071
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of those portions of Referee Menashe's order that upheld the insurer's denial of claimant's

claims for aggravation and medical services. The insurer cross-requests review of those portions of the order that set aside what the Referee perceived to be a retroactive denial of the compensability of claimant's original industrial injury and awarded claimant's attorney a fee of $750.

With regard to the compensability of claimant's aggravation and medical services claims we affirm the order of the Referee.

We reverse that portion of the order that set aside what the Referee perceived to be a retroactive denial and modify the award of attorney fees. Claimant injured her low back in the course of her employment on January 3, 1983. After almost five months of conservative treatment claimant's claim was closed by Determination Order dated May 26, 1983 with an award of temporary total disability but with no award of permanent disability. Nearly a year later, on March 21, 1984, claimant began treating three times per week with Dr. Buttler, a chiropractor. In a report to the insurer dated April 11, 1984 claimant's treating orthopedist, Dr. Struckman, stated that chiropractic treatment, if indicated at all, was indicated only for a week or ten days. On April 23, 1984 the insurer issued a partial denial which stated in pertinent part:

> "We are now advised that you are treating with Chiropractor Buttler and are losing time from work. Please be advised that we are denying your aggravation claim and your entitlement to further Workers' Compensation benefits. This denial is based on the opinion that the continuing care is not medically indicated. Reasonable charges incurred at [Dr. Buttler's office] will be honored through April 30, 1984 only." (emphasis added).

Keying on the phrase emphasized in the above quotation, the Referee interpreted the denial as an attempt to terminate all future liability under ORS chapter 656 for claimant's previously accepted January 1983 industrial injury. This, he concluded, was tantamount to the denial of an accepted claim and violated the rule of Bauman v. SAIF, 295 Or 788 (1983).

We do not disagree that it is possible to read the denial expansively. We have stated, however, that in determining the scope of a denial of medical treatment we will resolve any doubts in favor of limiting the denial to current treatment. Patricia M. Dees, 35 Van Natta 120, 124 (1983). In the present case we do not think that it is necessary to read the denial as anything more than a denial of current medical treatment.

The sentence following the phrase "your entitlement to further workers' compensation benefits" mentions claimant's "continuing care" and an opinion that such care was not medically indicated. These are clear references to claimant's course of treatment with Dr. Buttler and Dr. Struckman's report of April 11, 1984. The sentence after that authorizes treatment with Dr. Buttler for up to one week after the date of the denial. Given the context of the disputed language, we interpret the phrase

"workers' compensation benefits" to refer to claimant's course of treatment with Dr. Buttler and the word "further" to refer either to the continuing nature of that treatment or to the limited period of further treatment authorized by the denial. We conclude that the disputed phrase is nothing more than an inartful reference to claimant's ongoing course of chiropractic treatment with Dr. Buttler and not an attempt to terminate all future liability for claimant's accepted January 1983 industrial injury. Thus interpreting the denial, we reverse that portion of the Referee's order that set aside "the denial of claimant's entitlement to further workers' compensation benefits." For clarifying the admittedly inartful language of the denial we award claimant's attorney a fee of $400 in lieu of the fee of $750 awarded by the Referee.

ORDER

The Referee's order dated April 15, 1985 is affirmed in part, reversed in part and modified in part. Those portions of the order that upheld the insurer's denial of claimant's aggravation claim and claim for medical services are affirmed. That portion of the order that set aside "the denial of claimant's entitlement to further workers' compensation benefits" is reversed. That portion of the order that awarded claimant's attorney a fee of $750 is modified. Claimant's attorney is awarded a fee of $400 in lieu of the $750 awarded by the Referee. For services on Board review claimant's attorney is awarded an additional $400 to be paid by the insurer.

PATRICIA A. REES, Claimant
David C. Force, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-09458
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Seifert's order which awarded 80 degrees for 20 percent [sic] unscheduled permanent partial disability in lieu of the Determination Order dated September 5, 1984 which awarded 128 degrees for 40 percent unscheduled permanent partial disability for injury to claimant's back. Claimant contends that she is permanently and totally disabled. Claimant also argues that the Referee improperly interjected the issue of compensability into the consideration of the extent of claimant's permanent disability by noting that subsequent worsening of unrelated preexisting conditions could not be considered in the calculation of disability. The self-insured employer cross-requests review of the Referee's award of compensation for permanent disability contending that claimant's disability is unrelated to her work or her compensable injury. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

Claimant compensably injured her low back on August 10, 1982. She has not returned to work. Treatment of claimant's industrial injury has been conservative. Her claim was closed by Determination Order as stated above.

At the time of her injury, claimant had the following preexisting conditions and disabilities: (1) degenerative arthritis in her back; (2) degenerative arthritis in her hips; (3)

diseased rotator cuff in her right shoulder; (4) right elbow and wrist conditions which resulted in an award for 20 percent scheduled disability; (5) left forearm conditions which resulted in an award for 10 percent scheduled disability; (6) discs at L3-4 and L4-5 that had been absorbed and no longer existed; and (7) degenerative arthritis of the right knee. Claimant suffered her low back strain injury while shovelling sawdust. After her last compensable injury became medically stationary, claimant had no motion in her low back.

Claimant's treating doctor, an orthopedic surgeon, and an independent examining doctor, also an orthopedic surgeon, agreed that some of claimant's permanent limitations were due to her last compensable injury, but they could not quantify the contribution. The independent examiner agreed with the limits prescribed by the treating doctor.

The treating doctor recommended no sitting, no continuous walking or standing, no bending, no crawling, no stooping, no reaching, no pushing, and no pulling. He reported that claimant needed bilateral hip replacement surgery but that claimant was too young to undergo such surgery at this time. He opined that claimant's general deterioration was proceeding faster than could be accounted for on the basis of either the work related injuries alone or nature alone.

Claimant was referred to two vocational rehabilitation agencies for assistance. Both agencies reported that claimant was willing and motivated but that she was medically unable to benefit from their assistance. The Field Services Division of the Workers' Compensation Department terminated return to work assistance because it was not feasible to attempt further training or placement.

The Referee cited Barrett v. D & H Drywall, 70 Or App 123 (1984), but relied on the reasoning of Barnett v. D & H Drywall, 73 Or App 184 (1985), to rate the extent of claimant's disability. He found that the majority of claimant's disability was due to worsening of unrelated preexisting conditions which were not worsened by the industrial injury. The Referee's order reflected the state of the law for rating extent of unscheduled permanent partial disability at the timehe wrote it. Since the Referee's order, the Supreme Court has considered the problem of the contribution of unrelated preexisting conditions when rating the extent of unscheduled permanent partial disability and found that symptoms caused by an industrial injury which does not worsen the preexisting condition may be considered. Barrett v. D & H Drywall, 300 Or 325 (1985). In addition, the Court of Appeals considered the problem of the synergistic result of multiple injuries combining to produce greater disability than would be attributable to the incremental disability produced by a single industrial injury in the context of the issue of permanent total disability. Arndt v. National Appliance Co., 74 Or App 20 (1985).

In order to meet the burden of proving that she is permanently and totally disabled, claimant must establish that she 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., supra; John D. Kreutzer, 36 Van Natta 284, aff'd mem. 71 Or App 355 (1984). Unrelated physical impairment that arises post-injury is not considered in determining permanent total disability. Emmons v. SAIF, 34 Or App 603 (1978). If the compensable condition did not cause permanent worsening of a preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of injury. Bob G. O'Neal, 37 Van Natta 255, aff'd mem., 77 Or App 194 (1985); John D. Kreutzer, supra; Frank Mason, 34 Van Natta 568, aff'd mem., 60 Or App 786 (1982). In the context of permanent total disability, we consider the extent of claimant's impairment caused by all disabling conditions, regardless of compensability, that preexisted the industrial injury and the impairment resulting from the injury itself, and determine what the effect, including possible synergistic effect, of all these combined conditions was at the time of the hearing. Arndt v. National Appliance Co., supra; Deborah L. Jones, 37 Van Natta 1573 (1985).

The employer argues that claimant's disability is due entirely to the subsequent worsening of preexisting unrelated conditions and that claimant should receive no award for permanent disability relative to the August 1982 back injury. The employer relies on the cases of Perez v. EBI, 72 Or App 663 (1985) and Barrett v. D & H Drywall, 73 Or App 184 (1985). The Barrett case was reversed by the Supreme Court case previously cited. In Perez the court found that the medical evidence was persuasive that the industrial injury was not a material cause of claimant's permanent disability.

We are persuaded by the concurring opinions of the treating and independent examining physicians that claimant's permanent disability is total and that claimant's industrial injury of August 10, 1982 is a material contributing factor to that disability. Claimant's vocational rehabilitation attempts satisfied the requirement of ORS 656.206(3) to the extent that she might have some residual capacity to regularly perform gainful and suitable work. Further attempts to seek work would be futile based on the doctor's recommendation.

Claimant's award of compensation for permanent and total disability should begin at that point in time when the elements of her claim were established. We find that claimant was permanently and totally disabled as of the treating doctor's closing examination report on August 6, 1984. The employer is allowed to offset compensation paid pursuant to the Determination Order and the Referee's Opinion and Order. Donald W. Wilkinson, 37 Van Natta 937 (1985).

Claimant's contentions that her unrelated preexisting conditions are compensable was not an issue before the Referee and the Referee did not consider compensability to be at issue. The Referee's remarks regarding unrelated preexisting conditions reflected the consideration to be given to such conditions at the time of his order. Our order today is not to be construed as a finding that unrelated preexisting conditions are compensable to the extent that claimant is entitled to medical services under ORS 656.245 for their treatment. Claimant's unrelated preexisting conditions are considered only in the context of whether claimant is permanently and totally disabled. The finding that claimant's related and unrelated conditions combine to establish that claimant is permanently and totally disabled does not transform

blocks away. He intended to withdraw $5 in order to have money to buy a soda pop later in the day at his scheduled layover stop. He was injured on the way to the machine. Claimant was being paid for his time when injured.

Claimant testified that the employer made no arrangements for meals and allowed drivers to exit their buses for such purposes as getting a drink, using a bathroom or having a cigarette. Claimant stated that he was aware that the employer prohibited "personal conduct" and that leaving the "work location" without permission was prohibited. He was also aware that he was not on a formal layover at the time of the incident. The bus was equipped with a radio. He could not recall whether he had radioed a dispatcher to ask permission to leave the bus.

ORS 656.005(8)(a) defines a "compensable injury" in part as follows: "A 'compensable injury' is an accidental injury . . . arising out of and in the course of employment requiring medical services or resulting in disability or death . . . ." In Rogers v. SAIF, 289 Or 633, 641-42 (1980), the Oregon Supreme Court discussed the application of that definition:

> "The essence of the Workers' Compensation Act is that financial consequences flow from the existence of the employment relationship itself. Liability and compensability are predicated upon employment. . . . Although the relationship may be measured in different factual situations by the application of one test or another, the ultimate inquiry is the same: is the relationship between the injury and the employment sufficient that the injury should be compensable?"

The Referee found claimant's injury compensable under the so-called "personal comfort doctrine." That doctrine was discussed by the Oregon Supreme Court in Clark v. U. S. Plywood, 288 Or 255 (1980). In that case the claimant was killed during a paid 20-minute lunch break while attempting to retrieve his lunch from atop a glue press where it had been placed to warm. After noting that lunch-time injuries are normally compensable if they occur on the premises and arise from premises hazards, the court said:

> "We believe that the compensability of on-premises injury sustained while engaged in activities for the personal comfort of the employee can best be determined by a test which asks: Was the conduct expressly or impliedly allowed by the employer?
>
> "Clearly, conduct which an employer expressly authorizes and which leads to the injury of an employee should be compensated whether it occurs in a directly related work activity or in conduct incidental to the employment. Similarly, where the employer impliedly allows conduct, compensation should be provided for injuries sustained in that activity. For example, where an employer acquiesces in a course of on-premises conduct, compensation is payable for injuries which might be sustained

from that activity. Acquiescence could be shown by showing common practice or custom in the work place." 288 Or at 266-267.

The Supreme Court applied Rogers and Clark in Wallace v. Green Thumb, Inc., 296 Or 79 (1983). Wallace concerned the compensability of injuries sustained from a fire that started while claimant was preparing a meal in his mobile home located on the employer's premises. Claimant was continuously on call and required by the employer to live on the employer's premises. The court stated:

> "Rogers and Clark, read together, formulated a unitary work-connected test, which, in instances of injuries occurring on premises and during personal comfort activities, focuses on whether the employer has allowed the activity and whether the conduct occurs in a directly related work activity or in conduct incidental to the employment.
>
> "Compensation awards should not result, however, from the 'mere fact' that the employment placed the employee at the site of the injury . . . ." 296 Or at 82-82.

In Wallace the court cautioned that each case presenting this issue must be decided on its own particular facts. In finding compensablity, the Wallace court explained:

> "To perform adequately the 'on-duty' tasks as caretaker of the fire station, claimant had to eat, and to eat he had to prepare meals. His status as a resident employee continuously on call necessitated that he be on the premises during meal preparation, and because the employer had provided no means by which claimant could prepare hot meals other than cooking in his mobile home, his injuries arising from that activity are compensable. His injury arose directly from an unexpected fire occurring in an instrumentality he was required to use in activities not only allowed, but expected, by the employer." 296 Or at 84.)

The Court of Appeals found injuries sustained while obtaining refreshment off the employers' premises to be compensable in Mellis v. McEwen, Hanna, Gisvold, Rankin & Van Koten, 74 Or App 571 (1985), Halfman v. SAIF, 49 Or App 23 (1980), and Jordan v. Western Electric, 1 Or App 441 (1970). Each time the court considered the following factors:

> "'a) Whether the activity was for the benefit of the employer . . .;
> b) Whether the activity was contemplated by the employer and employee either at the time of hiring or later . . .;
> c) Whether the activity was an ordinary risk of, and incidental to, the employment . . .;
> d) Whether the employee was paid for the activity . . .;

previously noncompensable conditions into compensable ones. The standards for finding that a condition is compensable are articulated elsewhere. E.g., Barrett v. D & H Drywall, supra; and Weller v. Union Carbide, 288 Or 27 (1979).

ORDER

The Referee's order March 8, 1985 is reversed. Claimant is awarded compensation for permanent and total disability effective August 7, 1984. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $3,000 as a reasonable attorney's fee. The self-insured employer is allowed to offset compensation already paid pursuant to the Determination Order of September 5, 1984 and the Referee's Opinion and Order dated March 8, 1985.

DAVID L. WAASDORP, Claimant
Robert J. Guarrasi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-02453
January 28, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Myers' order which dismissed claimant's hearing request for lack of jurisdiction. On review, claimant contends that the Referee had jurisdiction to consider a penalty issue stemming from the SAIF Corporation's alleged noncompliance with an Own Motion Order. We affirm the Referee's order.

In August 1984 the Board issued an Own Motion Order reopening claimant's 1977 low back claim. The order directed that temporary total disability compensation would begin as of claimant's recent surgery and continue until closure pursuant to ORS 656.278.

In February 1985 claimant requested a hearing. He raised the issues of penalties and accompanying attorney fees for SAIF's alleged unreasonable failure to continue paying temporary disability as directed by the Own Motion Order and for an alleged unreasonable delay in paying compensation.

In April 1985 the Board issued an Own Motion Determination, closing the claim. Claimant was awarded temporary total disability from his surgery date through January 24, 1985.

Relying on ORS 656.278, the Referee found that claimant's hearing request was "inherently within" the Board's Own Motion jurisdiction. The Referee reasoned that since the request for reopening was within the Board's continuing jurisdiction and not the Hearing Division's jurisdiction, the enforcement of the Own Motion Order would likewise be within the Board's jurisdiction. The Referee further concluded that the enforcement of the Own Motion Order was not "a question concerning a claim" as that phrase is used in ORS 656.283(1). Consequently, the Referee granted SAIF's motion to dismiss, holding that the Hearings Division lacked jurisdiction.

We agree with the Referee that this matter is controlled by ORS 656.278. The relevant portions of the statute provide as follows:

"(1) Except as provided in subsection (5) of this section, the power and jurisdiction of the board shall be continuing, and it may, upon its own motion, from time to time modify, change or terminate former findings, orders or awards if in its opinion such action is justified.

"(2) An order or award made by the board during the time within which the claimant has the right to request a hearing on aggravation under ORS 656.273 is not an order or award, as the case might be, made by the board on its own motion."

There is no contention that claimant's aggravation rights still existed. Likewise, it is uncontroverted that the request for reopening was within the continuing jurisdiction of the Board and not within the Hearings Division's jurisdiction. Thus, it logically follows that the appropriate forum for issues emanating from the Own Motion Order is the Board and not the Hearings Division.

Inasmuch as claimant had no right to a hearing concerning the request for reopening, he also was not entitled to a hearing pertaining to SAIF's alleged noncompliance with the subsequent Own Motion Order. In this regard claimant's attempt to enforce the Own Motion Order by requesting a hearing does not present "a question concerning a claim" as that phrase is used in ORS 656.283(1). Any questions pertaining to the Own Motion Order should have been addressed to the Board, which is empowered to take such action as it deems justified. See ORS 656.278(1). Pursuant to this statutory authority, such action could include referring the matter to hearing for further evidence, should the Board be so inclined. A Referee's opinion concerning this matter would, however, be advisory in nature and not appealable to nor binding upon the Board.

ORDER

The Referee's order dated August 16, 1985 is affirmed.

CRAIG M. WOODARD, Claimant
Don G. Swink, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-10949
January 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Mulder's order which set aside its denial of compensability of claimant's industrial injury claim for his broken left foot. The issue is whether the injury arose out of and in the course of claimant's employment as a Tri-Met bus driver in the Portland metropolitan area.

On October 1, 1984 claimant was working a split shift, filling in for absent drivers. He completed the first portion of his shift about 9:30 a.m. and returned to work about 3:18 p.m. When claimant arrived in downtown Portland about 5:30 p.m., he was five to ten minutes ahead of schedule. He parked his bus and began walking to an automatic bank teller machine a couple of

blocks away. He intended to withdraw $5 in order to have money to buy a soda pop later in the day at his scheduled layover stop. He was injured on the way to the machine. Claimant was being paid for his time when injured.

Claimant testified that the employer made no arrangements for meals and allowed drivers to exit their buses for such purposes as getting a drink, using a bathroom or having a cigarette. Claimant stated that he was aware that the employer prohibited "personal conduct" and that leaving the "work location" without permission was prohibited. He was also aware that he was not on a formal layover at the time of the incident. The bus was equipped with a radio. He could not recall whether he had radioed a dispatcher to ask permission to leave the bus.

ORS 656.005(8)(a) defines a "compensable injury" in part as follows: "A 'compensable injury' is an accidental injury . . . arising out of and in the course of employment requiring medical services or resulting in disability or death . . . ." In Rogers v. SAIF, 289 Or 633, 641-42 (1980), the Oregon Supreme Court discussed the application of that definition:

> "The essence of the Workers' Compensation Act is that financial consequences flow from the existence of the employment relationship itself. Liability and compensability are predicated upon employment. . . . Although the relationship may be measured in different factual situations by the application of one test or another, the ultimate inquiry is the same: is the relationship between the injury and the employment sufficient that the injury should be compensable?"

The Referee found claimant's injury compensable under the so-called "personal comfort doctrine." That doctrine was discussed by the Oregon Supreme Court in Clark v. U. S. Plywood, 288 Or 255 (1980). In that case the claimant was killed during a paid 20-minute lunch break while attempting to retrieve his lunch from atop a glue press where it had been placed to warm. After noting that lunch-time injuries are normally compensable if they occur on the premises and arise from premises hazards, the court said:

> "We believe that the compensability of on-premises injury sustained while engaged in activities for the personal comfort of the employee can best be determined by a test which asks: Was the conduct expressly or impliedly allowed by the employer?
>
> "Clearly, conduct which an employer expressly authorizes and which leads to the injury of an employee should be compensated whether it occurs in a directly related work activity or in conduct incidental to the employment. Similarly, where the employer impliedly allows conduct, compensation should be provided for injuries sustained in that activity. For example, where an employer acquiesces in a course of on-premises conduct, compensation is payable for injuries which might be sustained

from that activity. Acquiescence could be shown by showing common practice or custom in the work place." 288 Or at 266-267.

The Supreme Court applied Rogers and Clark in Wallace v. Green Thumb, Inc., 296 Or 79 (1983). Wallace concerned the compensability of injuries sustained from a fire that started while claimant was preparing a meal in his mobile home located on the employer's premises. Claimant was continuously on call and required by the employer to live on the employer's premises. The court stated:

> "Rogers and Clark, read together, formulated a unitary work-connected test, which, in instances of injuries occurring on premises and during personal comfort activities, focuses on whether the employer has allowed the activity and whether the conduct occurs in a directly related work activity or in conduct incidental to the employment.
>
> "Compensation awards should not result, however, from the 'mere fact' that the employment placed the employee at the site of the injury . . . ." 296 Or at 82-82.

In Wallace the court cautioned that each case presenting this issue must be decided on its own particular facts. In finding compensablity, the Wallace court explained:

> "To perform adequately the 'on-duty' tasks as caretaker of the fire station, claimant had to eat, and to eat he had to prepare meals. His status as a resident employee continuously on call necessitated that he be on the premises during meal preparation, and because the employer had provided no means by which claimant could prepare hot meals other than cooking in his mobile home, his injuries arising from that activity are compensable. His injury arose directly from an unexpected fire occurring in an instrumentality he was required to use in activities not only allowed, but expected, by the employer." 296 Or at 84.)

The Court of Appeals found injuries sustained while obtaining refreshment off the employers' premises to be compensable in Mellis v. McEwen, Hanna, Gisvold, Rankin & Van Koten, 74 Or App 571 (1985), Halfman v. SAIF, 49 Or App 23 (1980), and Jordan v. Western Electric, 1 Or App 441 (1970). Each time the court considered the following factors:

> "'a) Whether the activity was for the benefit of the employer . . .;
> b) Whether the activity was contemplated by the employer and employee either at the time of hiring or later . . .;
> c) Whether the activity was an ordinary risk of, and incidental to, the employment . . .;
> d) Whether the employee was paid for the activity . . .;

e) Whether the activity was on the employer's premises . . .;
f) Whether the activity was directed by or acquiesced in by the employer . . .;
g) Whether the employee was on a personal mission of his own . . .'" Jordan v. Western Electric, supra, 1 Or App at 443-444.

We must determine whether there exists a relationship between claimant's injury and his employment sufficient that the injury is compensable. Claimant's employment as a Tri-Met bus driver required that he be away from the employer's premises for shifts of several hours. One might reasonably contemplate that a need to use a restroom or obtain refreshment would arise during claimant's shift and that he would seek out facilities to satisfy those needs while away from the employer's premises. Indeed, there is evidence to suggest that such activity was acquiesced in by the employer. However, the conditions of claimant's employment were not such as to suggest that a need for personal banking activity would similarly arise during the work shift or that personal banking during working hours would be necessary to adequately perform his duties as a bus driver. Claimant testified that although he could have gone to the bank before returning to work on the afternoon of the injury, he did not do so. The employer prohibited personal conduct during working hours. The banking errand was neither expressly nor impliedly allowed by the employer.

In Allen v. SAIF, 29 Or App 631 (1977), the court held that the accidental death of a security guard on his way to perform personal banking activities during his lunch hour was not compensable. We similarly find that claimant was on a personal mission of his own when he was injured and hold that claimant's broken foot is not compensable.

ORDER

The Referee's order dated June 20, 1985 is reversed. The self-insured employer's denial is reinstated and affirmed.

BETTY A. CORNWALL, Claimant
Brian R. Whitehead, Claimant's Attorney
Bottini & Bottini, Defense Attorneys

WCB 85-09276
January 30, 1986
Order Denying Motion to Dismiss Request for Review

Claimant has requested Board review of Presiding Referee Daughtry's order that dismissed her request for hearing. The insurer has now moved the Board for an order dismissing the request for review on the ground that the Board is without jurisdiction to review the Referee's order.

The Referee's order dismissing the request for hearing was based upon a finding of lack of jurisdiction to consider the merits of the request for hearing. Our jurisdiction to review the Referee's order is based upon ORS 656.289 and 656.295, and is independent of ultimate jurisdiction to decide upon the merits of claimant's case. The insurer's motion is directed at the correctness of the Referee's order, not at our jurisdiction to review that order. As such, the motion is not well taken. The insurer's motion is denied.

IT IS SO ORDERED.

RAYNELL A. LOBATO, Claimant
Ormsbee & Corrigall, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-04932
January 30, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Lobato v. SAIF, 75 Or App 488 (1985). The court has ordered that claimant's aggravation claim be remanded for processing. Therefore, the SAIF Corporation's denial dated May 12, 1983 is set aside and this claim is remanded to the SAIF Corporation for acceptance and processing according to law.

IT IS SO ORDERED.

SPENCER L. METCALF, Claimant
Cash Perrine, Claimant's Attorney
Schwabe, et al., Defense Attorneys
Ronald E. Rhodes, Defense Attorney

WCB 85-01244 & 85-01555
January 31, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review dated January 15, 1986 in which we affirmed the Referee's order assigning responsibility in this proceeding under ORS 656.307 to North Pacific Insurance Company. In our previous order, we specifically noted that claimant was not entitled to an insurer-paid attorney fee on Board review. We cited Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 570-71 (1985), as the authority for our determination that no attorney fee would be awarded on Board review.

We discussed in detail the rationale for our conclusion regarding attorney fees for claimants' attorneys in cases under ORS 656.307 in Stanley C. Phipps, 38 Van Natta 13 (WCB Case Nos. 84-01838 & 84-02301, January 14, 1986). We concluded that, "[I]n view of Petshow v. Farm Bureau Ins. Co., supra, . . . the phrase 'actively and meaningfully participates' as used in OAR 438-47-090(1) must be interpreted to mean taking a position and actively litigating a point bearing upon the claimant's entitlement to receive compensation or the amount thereof." There was no such participation in this case.

The motion for reconsideration is allowed. On reconsideration, we adhere and republish our former order, effective this date.

IT IS SO ORDERED.

DAVID C. DAINING, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09355
February 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Pferdner's order which awarded 32 degrees for 10 percent unscheduled permanent partial disability for injury to claimant's back in addition to the Determination Order dated August 2, 1984 which awarded 128 degrees for 40 percent unscheduled permanent partial disability, and which otherwise affirmed the Determination Order. Claimant contends that his claim was prematurely closed or, in the alternative, that he is permanently and totally

disabled. The issues on review are premature closure and extent of unscheduled permanent partial disability including permanent total disability.

On the issue of premature closure, the Board affirms the Referee's order. At the time of closure no further improvement physically or psychologically was medically expected and subsequent development of the medical opinions did not change those conclusions.

Claimant suffered what was thought to be strain injuries on August 22, 1977 while working as a machinery maintenance mechanic. He suffered occasional time loss due to pain during the next six months, but no surgery was proposed. His claim was first closed by Determination Order on May 25, 1978 which awarded only temporary disability compensation. Claimant was unable to return to work at the heavy occupation of machinery maintenance mechanic, but obtained employment as a welder, then as a carpenter, and then as a front end alignment mechanic. His pain continued and his condition worsened. In March 1981 claimant submitted to surgery at which time it was discovered that the 1977 industrial injury had caused a fracture of claimant's fourth lumbar vertebra. The SAIF Corporation denied compensability of the surgery. The denial was set aside by a Referee's order dated December 18, 1981 which also awarded penalties for nonpayment of interim compensation.

In April 1982 claimant began counselling therapy with Dr. Devour, psychologist, for psychological conditions related to his industrial injury. In September 1982 SAIF was ordered by a stipulated order to pay claimant unpaid temporary total and underpaid temporary partial disability compensation plus penalties and attorney fees.

Claimant's condition continued to be symptomatic, and a fusion at L3-4 was performed in February 1983. By December 1983 claimant's surgeon thought the fusion was progressing satisfactorily and that claimant's permanent limitation was in the range of mildly moderate, although he also suspected that claimant might need additional fusion.

In November 1983 claimant was examined by a panel at Orthopaedic Consultants which included a psychiatrist. The neurosurgeon and the orthopedic surgeons felt claimant was medically stationary, that he could return to work in the light range but that vocational training was necessary, that claimant's impairment was in the moderate range but the impairment due solely to the industrial injury was in the mildly moderate range, and that claimant needed psychiatric evaluation. The psychiatrist, Dr. Wittkopp, diagnosed major depressive disorder and psychogenic pain disorder related to claimant's industrial injury and underlying personality disorder with psychotic and paranoid features. Dr. Wittkopp felt claimant would not benefit from a pain center approach to treatment and concluded:

> "This man desperately needs full-scale psychiatric treatment. This should preferably occur in a setting in which the same individual is able to offer him supportive and mildly insight oriented psychotherapy together with intensive pharmacotherapy carefully tuned to the day

> to day changes in his psychic status. Adequate doses of anti-depressant medication together with anti-psychotic medication would seem called for as a start. ECT [electroconvulsive therapy] is an alternative if other measures do not suffice. . . .
>
> "Should the patient refuse treatment by a psychiatrist I would consider his condition to be stationary with a mild degree of permanent impairment attributed by the industrial incident. Under these conditions (treatment refusal) the prognosis is extremely poor."

Dr. Devour generally agreed with Dr. Wittkopp's analysis. He also opined that claimant might benefit by being separated from the workers' compensation system because a portion of claimant's depression was caused by SAIF's alleged mishandling of the claim.

Dr. Devour referred claimant to a pain center. The pain center submitted a report, which was a summary of several professional opinions, that agreed generally with Dr. Wittkopp's conclusion that claimant could not benefit from its type of program. The report concluded that claimant would not improve psychologically until he accepted the limitations of his body that resulted from the industrial injury and surgeries.

Claimant was then referred to the Callahan Center. The doctor at the Callahan Center concluded that claimant needed to be referred to his orthopedic surgeon to provide a final opinion on the proposed additional fusion surgery, but that otherwise he seemed able to perform work in the light category. The psychologist concluded that claimant had a mixed personality disorder with schizotypal and paranoid characteristics and recommended psychological counselling on a continuous basis.

Claimant was taking medication on a daily basis to control but not eliminate the symptoms of his psychological condition. He was attending counselling sessions with Dr. Devour on a once or twice a month basis from January through August 1984.

Dr. Devour's opinion in July 1984 that claimant would be best served by terminating the compensation claim and continuing psychological counselling was combined with the information that claimant's physical condition seemed stationary to provide the basis for closure of the claim by Determination Order in August 1984. The evaluator's worksheet reveals the recognition of the effect of claimant's psychopathology on the overall impairment claimant suffered as a result of his industrial injury.

Claimant was referred for vocational rehabilitation. Direct employment assistance was followed by authorization for a training program. Claimant was referred to Dr. Cherry by a counselor at the Rehabilitation Review Division of the Workers' Compensation Department.

Dr. Cherry opined that claimant's condition was worse, was not medically stationary, and that claimant should be

receiving disability compensation. He also opined that claimant was "presently" permanently and totally disabled. He reviewed the report of the Orthopaedic Consultants and opined that it established that claimant was permanently and totally disabled at that time. Dr. Cherry reported that claimant required orthopedic and neurological treatment to improve his condition. Dr. Cherry referred claimant to Dr. Beals, orthopedic surgeon, for an evaluation. Dr. Beals suggested that additional fusion might improve claimant's condition. Dr. Smith, claimant's surgeon in 1983, examined claimant, performed diagnostic tests, and concluded that claimant would not benefit from additional surgery.

The vocational counselor referred claimant to a hydraulics firm for an interview. The owner was willing to interview claimant in person even though he felt claimant was too aggressive and inappropriate based on a telephone interview. Claimant drove part way to the personal interview but turned around and went home because he could not handle the situation emotionally. The vocational counselor called claimant to explain the importance of attending interviews and the counselor noted that claimant was incoherent and rambling. The counselor advised claimant to contact the psychologist for assistance. The vocational counselor reported that claimant's psychological condition was the major barrier to reemployment.

Claimant located and obtained training in a sedentary occupation as a safety coordinator for a waste disposal company. He could not obtain employment with the company, however, because he was unable to work full-time due to his back injury and leg pain.

Claimant was examined for a second time by a panel at Orthopaedic Consultants. The panel reported that there was no significant change since the original examination except that some preexisting conditions which were asymptomatic before the industrial injury had become symptomatic since the injury. The panel concluded that the claimant was still medically stationary, that his impairment was moderate, and that impairment due solely to the industrial injury was in the range of mildly moderate.

Vocational rehabilitation consultant Byron McNaught reviewed claimant's file and interviewed claimant. Mr. McNaught testified that he believed that claimant could not obtain and hold regular gainful employment based on his present skills and his present impairments. Mr. McNaught also felt claimant's frustrations with the vocational assistance that had been offered were justified based on the physical and psychological restrictions. He also felt claimant had shown that he was motivated and willing to work.

At the time of the hearing, claimant was 39 years old, had a high school education and some community college coursework. His previous work experience was in heavy manual labor as a baker, automobile mechanic, carpenter, and drydock foreman or in jobs with high exposure to public contact as a retail salesman and automobile service writer. These jobs are foreclosed to claimant by either the physical or psychological impairments or by the combination of his physical and psychological impairments according to the limits prescribed.

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). Unrelated physical impairment that arises post-injury is not considered in determining permanent total disability. Emmons v. SAIF, 34 Or App 603 (1978). If the compensable condition did not cause permanent worsening of a preexisting condition, we consider only impairment due to the preexisting condition as it existed on the date of injury. Bob G. O'Neal, 37 Van Natta 255, 77 Or App 194 (1985); John D. Kreutzer, supra; Frank Mason, 34 Van Natta 568, aff'd mem., 60 Or App 786 (1982). In the context of permanent total disability, we consider the extent of claimant's impairment caused by all disabling conditions, regardless of compensability, that preexisted the industrial injury and the impairment resulting from the injury itself, and determine what the effect, including possible synergistic effect, of all these combined conditions was at the time of the hearing. Arndt v. National Appliance Co., supra; Deborah L. Jones, 37 Van Natta 1573 (1985).

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 preexisting impairment, impairment related to preexisting conditions, impairment related to the industrial injury, and social and vocational factors. See Livesay v. SAIF, 55 Or App 390 (1981); Deborah L. Jones, supra. However, a finding that claimant can regularly perform part-time work can preclude a finding of permanent total disability. Hill v. SAIF, 25 Or App 697 (1976); Thomas J. Stokes, 37 Van Natta 134, aff'd mem., 75 Or App 578 (1985).

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 claimant 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). Motivation is not to be confused with psychological impairment. Wilson v. Weyerhaeuser, supra; Seaberry v. SAIF, 19 Or App 676 (1974); Robert D. Klum, 37 Van Natta 720 (1985). Finally, a permanent total disability award cannot be reduced on the basis of a speculative future change in employment status but only on the actual conditions existing at the time of the hearing. Gettman v. SAIF, 289 Or 609 (1980); Clark v. Boise Cascade Corp., 72 Or App 397 (1985); Morris v. Denny's, 50 Or App 533 (1981).

The Referee found that claimant had not met the requirements of ORS 656.206(3) that he "is willing to seek regular gainful employment and that [claimant] has made reasonable efforts to obtain such employment." The Referee disregarded the evidence that claimant was attempting to identify and obtain regular gainful employment or training and the various counselors' recognition that claimant's progress was hindered by the psychological problems. The Referee improperly mixed the issue of motivation with the problem of claimant's psychological impairment.

We find that claimant's physical impairment is in the moderate range based on the opinion of the Orthopaedic Consultants. See Barrett v. D & H Drywall, 300 Or 325 (1985). Claimant has disabling pain in his back and leg which probably cannot be relieved by medical treatment. The descriptions of claimant's psychological condition, when controlled by medication, are consistent with class 2 impairment of the whole person under OAR 436-36-540(5)(b). This finding by the Evaluation Division was not challenged at hearing or on review. We find that claimant has made a reasonable effort to seek and obtain regular gainful employment and has made a reasonable effort to cooperate with vocational assistance. Further assistance might be helpful, but is speculative. Considering the extent of claimant's physical and psychological disability due to his industrial injury of August 12, 1977 and preexisting disability of claimant's right hand, we find that claimant is permanently and totally disabled.

Compensation for permanent total disability should begin on the earliest date when the elements of permanent total disability were established. Morris v. Denny's, 53 Or App 863 (1981); Robert Tucker, 37 Van Natta 952 (1985). A finding of the effective date is based upon all of the relevant medical, social and vocational factors. Morris v. Denny's, supra. We find that claimant's vocational disability was not changed after he became medically stationary and that he was, therefore, permanently and totally disabled at the time he became medically stationary, which we find was June 19, 1984.

SAIF shall be allowed to offset compensation paid for unscheduled permanent partial disability pursuant to the Referee's order against the increased compensation awarded by this order. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983); Donald W. Wilkinson, 37 Van Natta 938 (1985). SAIF shall also be allowed to offset temporary and permanent disability compensation paid pursuant to the Determination Order because this order is granting compensation for permanent and total disability in lieu of the Determination Order and the Referee's order.

The Referee noted in his order that there was no fee allocated to claimant's attorney because there was no attorney fee agreement of record in the case. There is still no attorney fee agreement of record in the case and, therefore, no fee will be allowed claimant's attorney for services at hearing or on Board review. ORS 656.388; OAR 438-47-010(3).

ORDER

The Referee's order dated April 24, 1985 is modified in part and affirmed in part. That part which modified the award of compensation by the Determination Order dated October 22, 1984 is modified to award compensation for permanent and total disability

in lieu of the Determination Order award for permanent partial disability. The Determination Order is modified to award permanent and total disability effective June 19, 1984. The SAIF Corporation is allowed to offset compensation paid for temporary and permanent disability awarded by the Determination Order and the Referee's order. The remainder of the Referee's order is affirmed.

RAYMOND E. DEROBOAM, Claimant
Oscar R. Nealy, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-07419
February 7, 1986
Order Denying Motion to Dismiss Request for Review

The SAIF Corporation has moved the Board for an order dismissing claimant's request for Board review on the ground of failure to comply with ORS 656.295(2). The basis of SAIF's motion is that there is no "certificate of mailing" of the request for review. A request for Board review need not be in any particular form. ORS 656.295(1).

In this case, claimant requested review by filing an "Application to Schedule" form. Although that form is customarily used by the Hearings Division, and not by the Board, the form used in this case contained all of the statutorily required information. The form further recites that copies were mailed to the employer and insurer, although those parties were not identified by name. SAIF does not assert that it did not receive the request. We conclude that the request for Board review complied with ORS 656.295. SAIF's motion is denied.

IT IS SO ORDERED.

LAWRENCE W. DIGBY (Deceased), Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-01620
February 7, 1986
Order of Remand

Claimant has requested review of Referee Thye's order that upheld the SAIF Corporation's denial of survivor's benefits under ORS 656.226 to Judy Digby, the alleged statutory beneficiary of the deceased worker. The deceased worker and Judy Digby were not married, but had cohabited together for more than one year and had a child out of their relationship. The issue at hearing was whether, at the time of his death, the deceased worker had been divorced from his former spouse, who is still living.

Subsequent to the request for Board review in this case, we issued our Order on Review in Lawrence W. Digby (Dec'd), 37 Van Natta 992, 995 (1985), in which we reversed the Referee's order in WCB Case No. 84-01667 finding the deceased worker's myocardial infarction to be compensable, thereby reinstating SAIF's denial of the underlying workers' compensation claim. Claimant has requested judicial review of our order and that request is presently pending before the Court of Appeals. Pursuant to SAIF's earlier request, we advised the parties that we would suspend the briefing schedule and hold further action in this case in abeyance pending resolution by the court of the underlying issue of compensability.

Claimant has now moved the Board for an order remanding this case to the Referee for the taking of further evidence on the issue of the deceased worker's marital status. Claimant has proferred evidence in the form of a copy of a certificate of

marriage, which she argues establishes that the deceased worker's former spouse became married to another man subsequent to her marriage to the deceased worker. We consider the proferred evidence solely for the purpose of determining whether the record below was "improperly, incompletely or otherwise insufficiently developed or heard by the referee . . . ." ORS 656.295(5).

In Parmer v. Plaid Pantry #54, 76 Or App 405, 409 (1985), the court held that remand to the Referee was required where a "rather conclusory" medical report offered to the Board after its Order on Review was mailed was relevant to the issue being litigated. While the present case is not exactly like Parmer, we believe it is sufficiently analagous that remand is appropriate. The proferred evidence in this case, like the proferred medical report in Parmer, was not available after a duly diligent search prior to the hearing and tends toward "filling the gap" which the Referee found in claimant's case. We also conclude that the certificate of marriage in this case was not submitted as complete evidence on the issue joined, but as a basis for a remand to the Referee for completion of the record. We, therefore, remand this case to Referee Thye for further proceedings.

ORDER

This matter is remanded to the Hearings Division for further proceedings consistent with this order.

WILLIAM H. KAHL, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-10923 & 83-00907
February 7, 1986
Order of Dismissal

The SAIF Corporation has moved the Board for an order dismissing claimant's request for Board review on the ground that the request was not timely served on the Board. The issue is jurisdiction.

The Referee's order in this case was mailed to the parties on December 12, 1983. From our review of the record, we conclude that on December 27, 1983 SAIF received what was more probably than not the original of a request for Board review of the Referee's order in this case. This conclusion is reached based in large degree upon SAIF's attorney's sworn description of the document received by SAIF, reinforced by our review of the transmittal letter, which includes in the address portion the "ZIP" code 97312. We take official notice of the fact that 97312 is the "ZIP" code for the SAIF Corporation's Salem head office and for no other postal patron; the Board's "ZIP" code is 97310. The Board did not receive any notice that claimant had requested review until September 28, 1984, when claimant's attorney inquired as to the status of his request for review and forwarded a copy of a request for review dated December 19, 1983.

ORS 656.289(3) provides in relevant part that, "[A Referee's] order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295." ORS 656.295 provides in relevant part:

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

"(2) The requests for review shall be mailed to the board and copies of the request shall be mailed to all parties to the proceeding before the referee."

Reading ORS 656.289(3) together with ORS 656.295(2), it is clear that a request for review, in order to invest the Board with jurisdiction, must be mailed to the Board within 30 days of the date the Referee's order is mailed.

At the time review was requested in this case, the Board's Rule of Practice and Procedure for Contested Cases relating to requests for Board review was identical to that currently in effect. Former OAR 436-83-700(1) and (2) and current OAR 438-11-005(1) and (2) both read:

"(1) The time and manner of filing for Board review is [sic] found in ORS 656.289 and 656.295.

"(2) The 30 days of ORS 656.289(3) is satisfied upon mailing the request to the Board." (Emphasis added.)

Although ORS 656.295(2) does not use the word "filing," the administrative rules equate "filing" and "mailing." Cf. ORS 656.298(3) (notice of appeal to court must be "filed" with the court.) At the time the request for review in this case was allegedly mailed, the administrative rules did not define "filing." That term is now defined by OAR 438-05-040(4), which in relevant part provides:

"(4) 'Filing' means:

"(a) the receipt of a document by the Board at any office of the Board; or

"(b) date of mailing. If the date of mailing is relied upon as the date of filing, there must be acceptable proof from the post office of the mailing date. Acceptable proof from the post office shall be a receipt stamped by the post office showing the date mailed and the certified or registered number."

The current rule, OAR 438-05-040(4)(b), provides that the minimum acceptable proof of mailing is a "receipt stamped by the post office showing the date mailed and the certified or registered number." We apply the rule strictly, because the Court of Appeals has firmly held that compliance with ORS 656.295 is "an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983), quoting from Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 284 (1977), and Nollen v. SAIF, 23 Or App 420, 423 (1975), rev den (1976). See also Brett A. Stevens, 38 Van Natta 110 (WCB Case No. 84-12337, decided this date); Roy L. Morris, 38 Van Natta 99 (WCB Case No. 84-05170, decided this date).

Under the rules in effect at the time relevant in this case, acceptable proof of mailing was not defined. Arguably, undefined or unaddressed matters relating to procedure in this forum could be resolved by reference to the Attorney General's Model Rules of Procedure. See former OAR 436-83-010. Those rules, in effect in December 1983, provide, "The petition shall be deemed filed when received by the agency." OAR 137-02-020(1). However, because this rule is contrary to former OAR 436-83-700(2), that mailing satisfies the time requirement, we conclude that proof of mailing by a preponderance of relevant and competent evidence is sufficient under the former rule.

In this case, we are pursuaded that claimant's request for review was misaddressed and was not mailed to or received by the Board within 30 days of the Referee's order. We are, therefore, without jurisdiction to consider claimant's request for Board review.

ORDER

Claimant's request for Board review of the Referee's order dated December 12, 1983 is dismissed.

FERNANDO LOPEZ, Claimant
Ginsburg, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-13300
February 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Podnar's order that awarded claimant 16 degrees for 5 percent unscheduled permanent partial disability for injury to his low back and upheld the self-insured employer's denial of claimant's claim for medical services. Claimant also contends that the Referee erred in excluding two exhibits. The employer contends that if the Board admits these two exhibits it should remand the case to allow the employer an opportunity to depose the authors of the exhibits. The issues are the admissibility of the exhibits, remand, the extent of disability and the compensability of claimant's claim for medical services.

The hearing in this case was held on July 24, 1985. At the beginning of the hearing claimant attempted to introduce medical reports by Dr. Thomas and Dr. Ellis. The report by Dr. Thomas was dated five days prior to the date of the hearing and that by Dr. Ellis two days prior to the date of the hearing. The Referee marked these reports as Exhibits 72 and 73 respectively, but excluded them as untimely submitted.

We agree with claimant that the Referee erred in not admitting Exhibits 72 and 73. 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 exclude the exhibits. Susan F. Vernon, 37 Van Natta 1562 (1985); Merle Barry, 37 Van Natta 1492 (1985).

Having decided that Exhibits 72 and 73 must be admitted, we now turn to the employer's request for remand. The Board may remand a case if it determines that the case has been improperly,

incompletely or otherwise insufficiently developed or heard by the Referee. ORS 656.295(5). Dr. Thomas and Dr. Ellis each authored a number of exhibits that were admitted at the beginning of the hearing without objection. Exhibits 72 and 73 contain little or nothing not already reflected in these earlier exhibits. As of the date of the hearing, Dr. Thomas, the author of Exhibit 72, had treated claimant for more than a year. Dr. Ellis, the author of Exhibit 73, had treated claimant for more than six months.

Given these facts, we conclude that this case has not been improperly, incompletely or otherwise insufficiently developed or heard by the Referee. The employer cannot reasonably argue that it was surprised by the content of Exhibits 72 and 73 or by the identity of the authors of these exhibits. Had the employer thought it necessary to depose Dr. Thomas or Dr. Ellis regarding their opinions, it had ample opportunity to do so prior to the hearing. We, therefore, reject the employer's request for remand. See Jorge Navarro, 37 Van Natta 1107, 1107 (1985); Bernard L. Osburn, 37 Van Natta 1054, 1055 (1985). Exhibits 72 and 73 are in the record and will be considered on review. See Herbert D. Rustrum, 37 Van Natta 1291, 1293 (1985).

Regarding the extent of claimant's disability, on our de novo review of the record, including Exhibits 72 and 73, we conclude that considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214 (5); OAR 436-30-380 et seq., he has been adequately compensated for the permanent loss of earning capacity due to his compensable injury by an award of 16 degrees for 5 percent unscheduled permanent partial disability. We, therefore, affirm the Referee's award.

Regarding claimant's claim for medical services, we conclude that claimant has failed to carry his burden of proving that his ongoing chiropractic treatments are reasonable and necessary. Claimant injured his low back in the course of his employment on December 1, 1983. Claimant received conservative treatment and his claim was closed by Determination Order on January 7, 1985 with no award for permanent partial disability. On January 14, 1985 claimant began weekly chiropractic treatments with Dr. Ellis.

On March 5, 1985 an independent medical examination was conducted by Dr. Tilden. Dr. Tilden found no objective evidence of physical impairment in claimant's spine and stated that no further treatment, curative or palliative, was indicated for claimant's 1983 industrial injury. After receiving Dr. Tilden's report the employer denied payment of medical services subsequent to April 17, 1985.

On May 8, 1985 Dr. Ellis wrote the employer's claims adjusting agency to voice his disagreement with Dr. Tilden's conclusions and to request that authorization for palliative care be reinstated. Dr. Ellis stated that claimant had reported increasing pain without continued care. In another report dated July 22, 1985 Dr. Ellis repeated his conclusion that ongoing palliative care was reasonable and necessary.

At the hearing claimant testified that the treatments by Dr. Ellis provided relief from his back pain for four to six hours and allowed him to be more active and to sleep better. He further testified that he had discontinued treating with Dr. Ellis at the

time of the employer's denial and had experienced no increase in symptoms. Claimant was employed for two weeks during April 1985, planting small trees for a nursery. Claimant began this job just before he discontinued treatment with Dr. Ellis. A few months later claimant was employed for a month sorting berries in a cannery. Claimant's jobs at the nursery and the cannery were terminated for reasons unrelated to his industrial injury.

The Referee upheld the insurer's denial of medical services because he concluded that "no useful purpose [was] served by continued palliative care." Under the facts outlined above, we agree with this conclusion. Although the medical evidence in this case is divided, we accept the opinion of Dr. Tilden. The history reflected in Dr. Ellis's report is inconsistent with claimant's testimony at the hearing. Dr. Ellis relies heavily upon history to the effect that claimant's symptoms had worsened substantially after the discontinuation of treatment in April 1985. This was denied by claimant. Even assuming that the medical evidence was evenly divided, claimant's testimony convinces us that claimant's course of treatment with Dr. Ellis is not reasonable and necessary. Claimant is able to work without continuing palliative care. Under these circumstances, continued palliative care is not required by the nature of claimant's injury or the process of recovery. See ORS 656.245(1).

ORDER

The Referee's order dated July 30, 1985 is affirmed.

DEBBIE A. MONREAN (KAHN), Claimant
Evohl F. Malagon, Claimant's Attorney
Cowling, et al., Defense Attorneys

WCB 83-07570
February 7, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Quillinan's order that affirmed the October 17, 1983 Determination Order following completion of vocational rehabilitation that awarded her 32 degrees for 10 percent unscheduled permanent partial disability for injury to her low back in lieu of a 112 degree for 35 percent award made by a 1981 Determination Order. The insurer cross-requests review of that portion of the Referee's order that denied the insurer's request for authorization to offset payments made pursuant to the 1981 Determination Order against the 1983 award. The issues are extent of disability and offset.

The Board affirms that portion of the Referee's order that approved the award of 32 degrees for 10 percent unscheduled permanent partial disability. On the issue of the offset, we reverse the Referee.

Claimant has received four Determination Orders, only two of which are relevant to the offset question. On January 26, 1981 claimant received an award of 112 degrees for 35 percent unscheduled permanent partial disability for injury to her back. Claimant thereafter participated in at least two programs of vocational assistance. After completion of the most recent vocational assistance program, claimant received the final Determination Order. This order, dated October 17, 1983, awarded

claimant 32 degrees for 10 percent unscheduled permanent partial disability for injury to her back. The Determination Order specifically states, "This award is in lieu of, and not in addition to, all previous awards made in this claim." The most recent determination of claimant's disability was made pursuant to ORS 656.268(5), which requires claims to be redetermined upon completion or termination of vocational assistance programs. See Hanna v. SAIF, 65 Or App 649 (1983); Boise Cascade v. Jones, 63 Or App 194 (1983).

The insurer argued at hearing and argues on review that it should be authorized to offset the 35 percent award, which has been paid in full, against the 10 percent award granted by the most recent Determination Order. To the extent that such an action is expressly authorized by statute, an insurer or employer may reduce compensation due to a claimant only when authorized to do so by the Workers' Compensation Department, a Referee, the Board or a court. Forney v. Western States Plywood, 66 Or App 155 (1983), aff'd, 297 Or 628 (1984). See also Zwahlen v. Crown Zellerbach, 67 Or App 3 (1984); Mesa v. Barker Manufacturing Co., 66 Or App 161 (1983).

ORS 656.268(4) provides in relevant part:

> "Any determination under this subsection may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid. . . ." (Emphasis added.)

The insurer argues that, to the extent they exceeded the value of 32 degrees, the payments made pursuant to the January 1981 Determination Order were "permanent disability payments prematurely made . . . ." We agree. The 1983 award was expressly "in lieu of, and not in addition to, all previous awards made in this claim." "In lieu of" means "Instead of; in place of; in substitution of." Black's Law Dictionary 708 (5th Ed. 1979). See also Donald F. Spears, 37 Van Natta 1650 (1985). We conclude that the 1983 Determination Order was substituted for the 1981 Determination Order and that all payments made under the former order that exceed the compensation due under the latter order were "permanent disability payments prematurely made."

The insurer does not argue that it received authorization from the Workers' Compensation Department to take an offset. It sought the offset authorization from the Referee and now seeks it from the Board. In Forney v. Western States Plywood, supra, the court stated:

> "The offset is provided by [ORS 656.268(4)] only for determinations 'under this subsection,' which deals exclusively with determinations 'under the director's supervision' or by the Evaluation Division. ORS 656.268(6) provides that any interested party may request a hearing on a determination made under subsection (4). Thus, a referee and the Board have the authority to authorize offsets.

"We do not interpret ORS 656.268(4) to provide the only circumstance in which an insurer or self-insured employer may obtain authorization to recover overpayments from future compensation. That statute relates only to proceedings leading to a determination order and permits an employer or insurer to obtain authorization to recover overpayments in that proceeding. If, for example, an employer should discover an overpayment after a determination has become final, but while future compensation, subject to reduction, is owed, the employer may request a hearing . . . ." 66 Or App at 159.

We conclude that the insurer in this case could have requested authority from the Evaluation Division to offset overpaid compensation, if any, resulting from the redetermination of claimant's claim. However, such a request is not an insurer's exclusive remedy. In this case, as in many, if not most, similar cases, the prospect of an overpayment was not apparent until after the Department actually issued its redetermination. The insurer then sought authorization to offset the overpayment through the hearing process, a procedure both authorized and encouraged by Forney. The recovery of overpaid permanent disability compensation in this case is expressly authorized by statute and the insurer sought authority to recover the overpayment through the correct procedure. The authority to recover the overpayment should have been granted.

ORDER

The Referee's order dated June 19, 1984 is affirmed in part and reversed in part. That portion of the Referee's order that denied the insurer authorization to offset permanent disability payments made pursuant to the January 26, 1981 Determination Order against future awards of permanent disability compensation is reversed. The insurer is authorized to recover an amount equal to payment for 80 degrees of unscheduled permanent partial disability for this injury out of future awards of permanent partial disability for this injury, if any, except that the insurer shall not be authorized to recover any payments made pursuant to ORS 656.313(1). The remainder of the Referee's order is affirmed.

ROY L. MORRIS, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-05170
February 7, 1986
Order of Dismissal

The Referee's order in this case was mailed to the parties on February 25, 1985. On November 8, 1985 the SAIF Corporation wrote to the Board inquiring as to the status of a request for Board review of the Referee's order, which allegedly was mailed on March 7, 1985. The request was not received by the Board. We solicited comments from the parties as to their respective positions on the question whether the Board has jurisdiction to review the Referee's order. See Knapp v. Employment Division, 67 Or App 231, 233 (1984) (reviewing body required initially to determine its own jurisdiction). Neither party responded within the time allowed.

ORS 656.289(3) provides in relevant part that, "[A Referee's] order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295." ORS 656.295 provides in relevant part:

> "(1) The request for review by the board of an order of a referee need only state that the party requests a review of the order.
>
> "(2) The requests for review shall be mailed to the board and copies of the request shall be mailed to all parties to the proceeding before the referee."

Reading ORS 656.289(3) together with ORS 656.295(2), it is clear that a request for review, in order to invest the Board with jurisdiction, must be mailed to the Board within 30 days of the date the Referee's order is mailed.

OAR 438-11-005(1) and (2) read:

> "(1) The time and manner of filing for Board review is [sic] found in ORS 656.289 and 656.295.
>
> "(2) The 30 days of ORS 656.289(3) is satisfied upon mailing the request to the Board." (Emphasis added.)

Although ORS 656.295(2) does not use the word "filing," the administrative rule equates "filing" and "mailing." Cf. ORS 656.298(3) (notice of appeal to court must be "filed" with the court.) "Filing" is defined by OAR 438-05-040(4), which in relevant part provides:

> "(4) 'Filing' means:
>
> "(a) the receipt of a document by the Board at any office of the Board; or
>
> "(b) date of mailing. If the date of mailing is relied upon as the date of filing, there must be acceptable proof from the post office of the mailing date. Acceptable proof from the post office shall be a receipt stamped by the post office showing the date mailed and the certified or registered number."

We apply the rule strictly, because the Court of Appeals has firmly held that compliance with ORS 656.295 is "an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983), quoting from Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 284 (1977), and Nollen v. SAIF, 23 Or App 420, 423 (1975), rev den (1976). See also William H. Kahl, 38 Van Natta 93 (WCB Case Nos. 82-10923 & 83-00907, decided this date); Brett A. Stevens, 38 Van Natta 110 (WCB Case No. 84-12337, decided this date).

Because the SAIF Corporation has not come forward with proof of mailing as required by OAR 438-05-040(4), we conclude that timely filing of a request for review has not been established. We are, therefore, without jurisdiction to review the Referee's order.

ORDER

The SAIF Corporation's request for Board review of the Referee's order dated February 25, 1985 is dismissed.

DEBRA A. REESE, Claimant
Vick & Associates, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-09574
February 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of those portions of Referee Pferdner's order which: (1) awarded temporary total disability compensation from August 22, 1983 through May 25, 1984 less time worked and amounts paid in addition to the Determination Order dated August 7, 1984 which awarded temporary total disability compensation from July 24, 1983 through August 21, 1983 and temporary partial disability compensation from August 22, 1983 through August 28, 1983; (2) awarded 25% of the compensation payable from July 25, 1983 through August 26, 1983 as a "penalty for unilateral termination of temporary total disability compensation, constituting unreasonable delay in the payment of compensation"; (3) awarded 25% of the compensation payable from July 25, 1983 through August 26, 1983 as a "penalty for unreasonable delay in seeking closure of the claim, thus resulting in an unreasonable delay in the payment of compensation"; and (4) awarded $1,250 in penalty-associated attorney fees. Claimant cross-requests review of that portion of the Referee's order which found that claimant had not proven any permanent disability as a result of her industrial injury. The issues on review are temporary total disability, penalties and attorney fees, and extent of unscheduled permanent partial disability.

On July 20, 1983 claimant injured her low back while installing air conditioning units in new pickups. On July 21, 1983 claimant signed a claim form to report the injury. The employer noted that it suspected the claim was filed in retaliation for denial of time off. On July 22, 1983 claimant was examined by Dr. Holman, chiropractor, who advised her not to return to work because of a low back injury. Claimant notified the employer of the chiropractor's recommendation and the employer sent claimant to Dr. Caron, dermatologist, for an independent medical examination. Dr. Caron reported a normal physical examination with a diagnosis of mild low back sprain. On the reporting form, he checked the boxes that indicated that the injury was work-related, that claimant was not medically stationary, that the injury would not cause permanent impairment, and that claimant was "released" to return to regular work. He recommended symptomatic treatment.

Claimant told Dr. Holman what Dr. Caron recommended and Dr. Holman told claimant not to return to work. Claimant then told the employer that her attending physician advised her not to return to work and the employer invoked a provision of its union contract and referred claimant to Dr. Moore, family practitioner, for another independent medical examination. On July 26, 1983 Dr.

Moore examined claimant and reported a normal physical examination but he recommended light duty work for two weeks. Dr. Moore also recommended that claimant reduce her weight.

On July 29, 1983 Dr. Holman signed a certificate that claimant had been disabled since July 22, 1983. On the same date, the employer amended a July 12, 1983 "fourth step" discipline letter and notified claimant that she was to be suspended from work without pay for two weeks from August 22, 1983 through September 2, 1983 for failure to return to work on July 27, July 28, and July 29, 1983 according to the releases approved by two of three examining doctors. Claimant was also notified that she was to report to work until the date the suspension was to begin. Claimant did not return to work. On August 1, 1983 the claim was accepted as a nondisabling injury. On August 3, 1983 claimant was terminated from employment for failure to return to work. On August 19, 1983 Dr. Holman released claimant to return to her regular work beginning August 22, 1983. He opined that if it should develop that claimant could not physically perform the work that she ought to have light duty for a week.

On September 21, 1983 the insurer denied temporary disability compensation because claimant refused to return to work and to accept light duty work which the employer had available. On September 28, 1983 claimant requested a hearing. Referee Knapp's Opinion and Order was not part of the record, but the parties agreed that the issue at the first hearing was classification of the claim as disabling or non-disabling. The Referee dismissed the hearing request because the Hearings Division was without jurisdiction and the Board affirmed and adopted the Referee's order on September 27, 1984.

On May 25, 1984 Dr. Holman issued a certificate of release to return to regular work with no permanent impairment and a release to return to work modified by restrictions on bending, heavy lifting, and long sitting. In July 1984 the insurer requested a Determination Order and on August 7, 1984 the Evaluation Division of the Workers' Compensation Department issued one that awarded temporary total disability from July 24 to August/21, 1983 and temporary partial disability from August 22, to August 23, 1983. The insurer paid the temporary disability compensation award on August 23, 1984. On September 10, 1984 the Board received claimant's request for a hearing on the issues of temporary and permanent disability and penalties and attorney fees.

On March 5, 1985 Dr. Holman reported his opinion that claimant:

> "[W]ill experience a minor to moderate permanent impairment to her sacroiliac articulation. When a joint such as this one misaligns on a regular basis it stretches the ligaments beyond their normal capacity and will cause future arthritic condition to this joint, therefore ligamentous damage to the sacroiliac joint results, creating pain in this area.
>
> "Yes, you are correct in interpreting the August 22, 1983 release as a modified work

release only, as [claimant] never returned to her regular work activities."

Claimant testified that she thought that she could have returned to her regular work at the time of the August 22, 1983 release, but that the employer would not let her return because she had been fired. Claimant obtained unemployment compensation while unemployed.

The employer or insurer must pay temporary total disability compensation to an injured worker whose disability claim is in open status until the worker returns to regular work, is released by the attending physician to return to regular work or "until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division." ORS 656.268(2); Volk v. SAIF, 73 Or App 643 (1985); Jackson v. SAIF, 7 Or App 109 (1971); Joel I. Harris, 36 Van Natta 829 (1984), aff'd mem., 72 Or App 591 (1985).

Claimant was released by her attending physician to return to work without limitation on August 22, 1983. We find that the release was neither ambiguous nor conditional. The fact that there was no work for claimant to return to at the time of the release is irrelevant. Cf. Dan L. Householder, 37 Van Natta 1583 (1985); Melvin L. O'Brien, 37 Van Natta 1478 (1985); and Ramon Robledo, 36 Van Natta 632 (1984) (the job at date of injury was no longer available when claimant was released to return to regular work). There is no evidence in the record that circumstances that justified termination of compensation no longer existed due in material part to the industrial injury after August 29, 1983. See David Cheney, 35 Van Natta 21 (1983).

According to the record in this case, the first time that the claim was classified as disabling was the Determination Order dated August 7, 1984. No payment for disability compensation was due until the claim was classified as disabling. The insurer relied on the opinions of the independent medical examiners that claimant could return to work and never began payment of temporary disability compensation. Cf. ORS 656.005(8)(b) (disabling compensable injury) and (8)(c) (nondisabling compensable injury). Because we find the classification of the claim as nondisabling, which was separately litigated, was reasonable, although incorrect, we are persuaded that the insurer did not unreasonably resist or deny compensation. Therefore, penalties and attorney fees should not have been awarded for improper unilateral termination of temporary total disability compensation.

The Referee also found that the insurer had unreasonably delayed closing the claim. He relied on the administrative rule that requires an insurer to submit an open disability claim for closure within ten days of receipt of the closing report by the attending physician. The insurer submitted the claim for closure approximately 50 days after it received Dr. Holman's closing report. Because the claim was not an open disability claim, the insurer was not under a duty to submit the claim to the Evaluation Division for a Determination Order to close it. ORS 656.268(3); Garland Combs, 37 Van Natta 756 (1985). Because we find that the classification as nondisabling was reasonable and claimant did not request a determination of the classification by the Evaluation Division, there was no basis upon which to refer to the administrative rule and statute for closure of a disabling injury

claim. Closure of the claim could have been effected by the permissive issuance of a Notice of Closure, or by Determination Order, or the claim could have been closed without official notice. ORS 656.268(3); Garland Combs, supra. Consequently, there was no basis to award penalties and attorney fees for unreasonable delay.

The insurer paid the temporary disability compensation awarded by the Determination Order on the sixteenth day after it issued, which was two days late. We find that the two day delay in payment of the compensation awarded by the Determination Order was not so unreasonable as to merit an award of penalties and attorney fees for unreasonable resistance to payment of compensation. See Robert L. Youngblood, 37 Van Natta 1710 (1985).

Claimant's attending physician issued multiple and conflicting work releases. He released claimant to return to regular work without limitations; to return to work with limitations on heavy lifting, prolonged sitting, and bending; and rated claimant's permanent impairment as none and minor to moderate based on possible future changes. Claimant continues to receive palliative chiropractic treatment.

It is claimant's burden to prove that the injury caused impairment and loss of earning capacity. The contradictory opinions of the chiropractor and claimant's personal assessment are not persuasive that claimant suffered permanent impairment or loss of earning capacity. We find that claimant has not proven that she suffered permanent impairment or loss of earning capacity as a result of her industrial injury and, therefore, she is not entitled to an award for permanent partial disability.

ORDER

The Referee's order dated April 10, 1985 is reversed. The Determination Order dated August 7, 1984 is reinstated and affirmed.

JERRY W. SARGENT, Claimant
Evohl F. Malagon, Claimant's Attorney
Moscato & Byerly, Defense Attorneys

WCB 84-02567
February 7, 1986
Order on Reconsideration

The self-insured employer has requested reconsideration of the Board's Order on Review dated November 25, 1985. We abated our order to allow claimant an opportunity to respond to the employer's contention that claimant did not suffer a new low back injury in December 1983, but instead sustained an aggravation of his compensable 1975 low back injury. On reconsideration, we find that claimant did not sustain a new low back injury. Consequently, we reverse the Referee's order which set aside the employer's denial of claimant's low back injury claim.

Claimant was about 39 years of age at the time of hearing. Since approximately 1965, he has performed a variety of duties for this employer, a plywood mill. In June 1975 he compensably injured his low back while pulling lumber off the green chain. A myelogram revealed a probable low back defect, but no definite disc herniation was detected. A September 1975 Determination Order closed the claim without an award of permanent disability. Following several reopenings and reclosures, claimant received a 30 percent unscheduled permanent disability by virtue of a February 1983 Referee's order.

Since his 1975 injury claimant has experienced fluctuations of low back pain and radiating symptoms which are generally dependent upon the extent of his physical activities. His treating orthopedist, Dr. McHolick, has suggested that he avoid pulling activities such as those he would encounter on the green chain or on the dry belt. Subject to occasional disabling exacerbations, claimant has continued to work for the employer, primarily as a clipper operator.

In May 1983 claimant experienced increased back pain after pulling on a "plug up" of wood. Dr. McHolick concluded that claimant's condition represented another flareup of a degenerative disc protrusion. Dr. Rosenbaum, neurosurgeon, diagnosed chronic lumbosacral strain. Dr. Gilsdorf, orthopedist, did not recommend a lumbar fusion, but suggested weight loss and, subsequently, a reconditioning program. The employer's de facto denial of claimant's new injury claim was set aside by a Referee's order. However, the Board reversed, finding that the evidence failed to establish a new industrial injury. See Jerry W. Sargent, 36 Van Natta 1717 (1984), aff'd 76 Or App 212 (1985).

In early December 1983 claimant returned to work for the employer. He initially worked four hour days as a clipper operator. Within a few weeks he was working a regular eight hour shift, half as a security guard and half as a clipper operator. His low back and radiating symptoms continued. However, he was able to perform his duties with the aid of medication, a back brace, a heating pad, and by continuing to follow his exercise and weight reduction program.

In late December 1983, while working as a clipper operator, claimant fell through an approximately five foot hole in a roller/conveyor device. He struck his left leg and, in attempting to stop his fall, jerked his back. Claimant immediately experienced an increase in his back pain, left work, and has not returned since. The employer accepted claimant's "bruised left leg" claim, but denied his claim for a "sore back."

In February 1984 claimant was reexamined by Dr. Gilsdorf. Inasmuch as claimant's chronic low back disability continued, even after weight reduction and exercise, Dr. Gilsdorf recommended that claimant undergo a lumbar fusion.

In March 1984 Dr. McHolick opined that claimant's complaints were an ongoing problem attributable to his 1975 injury. Dr. McHolick further concluded that claimant's recent flareup should not be considered a new and acute injury.

In March 1984 Dr. Wichser examined claimant. Dr. Wichser subsequently concluded that claimant had incurred a new injury in December 1983. The basis for Dr. Wichser's opinion was claimant's reference to a recent change in his complaints from the left side to the right. However, claimant's medical record indicates that he has periodically experienced right side complaints since 1980, with these complaints escalating following his May 1983 exacerbation.

In April 1984 claimant was reexamined by Dr. Rosenbaum. Claimant had last seen Dr. Rosenbaum in June 1983. Diagnosing chronic lumbosacral strain and pars interarticularis defect at the L-4 level, Dr. Rosenbaum opined that surgery was a reasonable

approach. Dr. Rosenbaum further concluded that the proposed surgery was related to claimant's 1975 injury and that the May 1983 and December 1983 injuries were not significant contributors.

In May 1984 Dr. Wade, orthopedist, performed an independent medical examination. Dr. Wade had previously examined claimant in August 1983. Dr. Wade concluded that claimant's symptoms were consistent with a spondylolisthesis condition. Noting that progressive symptoms were to be expected, Dr. Wade opined that claimant's continued symptomatology was not particularly attributable to any additional injury.

In May 1984 claimant was also examined by Dr. Pasquesi, orthopedist. Concluding that claimant suffered from an instability in the region of the left lumbosacral area, Dr. Pasquesi stated that claimant's December 1983 fall should not be construed as the only cause of claimant's current back problems. In Dr. Pasquesi's opinion claimant's fall had caused some worsening of his discomfort. However, Dr. Pasquesi was uncertain whether claimant's pathological condition had worsened.

Claimant credibly testified that he experienced right, left, and middle back pain following the May 1983 incident. This discomfort was still plaguing him when he returned to work in December 1983. Before the December 1983 incident claimant had difficulty standing and sitting on hard objects for prolonged periods. His pain also limited his twisting and leaning activities. Following the December 1983 incident his back "felt like I tore myself apart." Claimant desired surgery before the December 1983 incident and was reducing his weight in preparation for the operation. Dr. Gilsdorf eventually performed the surgery in August 1984.

The Referee found that the December 1983 incident was a material contributing cause of claimant's current disability. Consequently, the employer's denial of a new injury claim was set aside. The Referee reasoned that the December 1983 incident exacerbated or worsened claimant's preexisting symptom complex, resulting in his temporary disability and need for further medical treatment.

In our prior order we affirmed the Referee's order, concluding that claimant need not prove a worsening of his underlying condition to establish a compensable industrial injury. See Jerry W. Sargent, 37 Van Natta 1595 (1985). We further noted that it was possible for the employer to be obligated for claimant's symptomatic worsening attributable to his injury and not necessarily be obligated for the underlying condition. We relied on Roy L. Bier, 35 Van Natta 1825 (1983).

Claimant's burden of proof remains as it has always been. That is, to establish compensability, claimant must prove that his December 1983 injury was a material contributing cause of his existing disability. Barrett v. D & H Drywall, 300 Or 325, 328-29 (1985); Hutcheson v. Weyerhaeuser Co., 288 Or 51 (1979); Harris v. Albertson's, Inc., 65 Or App 254 (1983).

Following reconsideration of the medical and lay evidence, we conclude that claimant has failed to meet his burden of proof. Although the December 1983 incident prompted claimant's search for additional medical treatment, the preponderance of the

evidence indicates that his current complaints are attributable to his 1975 injury and residuals. At most, the December 1983 incident merely increased claimant's ongoing symptoms which were related to his underlying condition.

Upon further reflection, we conclude that our previous order's reliance on Bier was misplaced. Bier is distinguishable. In Bier, a worker with a long history of minor back injuries, sustained a twisting injury. His condition was diagnosed as sciatica, probably secondary to stenosis. We set aside SAIF's denial of the injury claim insofar as it denied the twisting incident. We found that SAIF was only responsible for the worker's symptoms caused by the injury and not for the underlying degenerative condition because the evidence failed to establish that the condition had been worsened by the injury. Here, claimant also has a long history of back complaints. However, unlike the worker in Bier, claimant's underlying condition has previously been determined to be attributable to a prior compensable injury. Moreover, claimant has already received a significant award of permanent disability for this condition. Finally, the evidence fails to persuasively delineate between the continuing symptomatology from claimant's underlying condition and his symptoms purportedly attributable to the December 1983 work incident.

In reaching our conclusion, we rely upon the opinions of Drs. McHolick, Rosenbaum, and Wade. Dr. McHolick opined that the December 1983 incident represented a flareup of claimant's ongoing problem which began with the 1975 injury. Inasmuch as Dr. McHolick has treated claimant since his 1975 injury, we accord his opinion as treating physician great weight. See Weiland v. SAIF, 64 Or App 810, 814 (1983). Both Dr. Rosenbaum and Dr. Wade shared Dr. McHolick's opinion. Dr. Rosenbaum concluded that the December 1983 incident did not play a significant role in claimant's need for surgery. Dr. Wade opined that claimant's complaints were consistent with his underlying condition and that his recent "injury" was not a particular cause of his continuing symptoms. Like Dr. McHolick, both Drs. Rosenbaum and Wade had the opportunity to examine claimant before and after the December 1983 incident. The advantage of observing claimant at these relevant times lends further credence to these examining physicians' opinions. See Faye L. Ballweber, 36 Van Natta 303, 304 (1984).

The opinions of Drs. Pasquesi and Wichser can be interpreted to support claimant's contention that he sustained a new injury in December 1983. However, we find them unpersuasive when compared to the medical opinions detailed above. Although Dr. Pasquesi concluded that the December 1983 incident worsened claimant's symptoms, he was uncertain whether the pathological condition had worsened. Furthermore, Dr. Pasquesi was certain that a December 1983 incident was not the only cause of claimant's present problems. This opinion fails to persuade us that a material contributing cause of claimant's current disability is the December 1983 incident. Moreover, the opinion lends further support to the employer's contention that claimant's present complaints are attributable to his preexisting condition. Dr. Wichser supported claimant's contention that he suffered a new injury in December 1983. However, as was the case with Dr. Pasquesi, Dr. Wichser did not have the benefit of examining claimant prior to the December 1983 incident. More important, his

opinion was based on the erroneous assumption that claimant experienced right side complaints for the first time following the December 1983 incident.

This discussion resembles a responsibility analysis in determining whether claimant sustained a new back injury in December 1983. However, application of the "last injurious exposure rule" would be inappropriate. Claimant has worked for the same employer throughout the course of his claims. Furthermore, the employer has been self-insured at all relevant times. Therefore, since employer/insurer responsibility is not at issue, it follows that the "last injurious exposure rule" is inapplicable.

Finally, we reinstate and affirm the employer's Notice of Closure and the September 15, 1984 Determination Order which closed claimant's left leg injury claim. Concluding that claimant had established a new back injury and that his ongoing back condition was part of the December 1983 incident, the Referee found that the left leg injury claim had been prematurely closed. Considering our conclusion regarding the compensability of claimant's back injury claim, it follows that his left leg injury claim was not prematurely closed.

ORDER

On reconsideration, the Board's Order on Review dated November 25, 1985 is set aside and replaced by this Order on Reconsideration. The Referee's order dated May 14, 1985 is reversed. The self-insured employer's denial of claimant's "sore back" claim, issued March 1, 1984, is reinstated and upheld. The Notice of Closure dated July 30, 1984 and the Determination Order dated September 15, 1984 are reinstated and affirmed.

JAMES D. STENBERG, Claimant
Grant, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Frohnmayer, et al., Attorneys

WCB 85-01167 & 85-01168
February 7, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Brown's order which: (1) upheld the SAIF Corporation's denial of claimant's claim for an alleged August 14, 1984 industrial injury to his low back; (2) upheld St. Paul Fire and Marine's denial of claimant's claim for an alleged November 1, 1984 industrial injury to his low back; and (3) declined claimant's request that penalties and attorney fees be awarded against St. Paul for unreasonably denying his claim. SAIF contends that the Referee properly ruled that the claim for the alleged August injury was not timely filed and that it was prejudiced thereby.

The Board affirms and adopts those portions of the Referee's order relating to claimant's claim for the alleged August 1984 injury.

Claimant, 41 years of age, was employed as a delivery person for a furniture store. He had suffered prior back injuries in 1959 and 1975, but testified that he was experiencing no difficulties when he started working for St. Paul's insured in June 1984. Although he subsequently experienced back complaints

which he related to an alleged August 1984 work incident, he sought no medical treatment and lost no time from work as a result.

About noon on November 1, 1984 claimant stumbled and fell as he was walking backward, carrying one end of a 200- to 300-pound hide-a-bed. His left buttock hit a four-inch high pallet resting on a cement floor. Claimant testified that he had immediate pain in his back and legs, but later said that most of the pain was in his buttocks and passed within a half hour. The co-worker who was carrying the other end of the hide-a-bed testified that claimant was down for about 15 minutes after the injury and that he helped claimant to claimant's car within 30 to 45 minutes after the injury. He said that at that time claimant was having trouble walking.

Claimant testified that by late that afternoon the pain became worse. His boss testified that he saw claimant limping about 6 p.m. on November 1, 1984, and that claimant then said he thought he had hurt his leg. The boss also testified that the co-worker had had a recent head injury affecting his memory.

The next morning claimant could not move his lower body. He was taken to a hospital and seen by Dr. James, an orthopedic surgeon. Dr. James reported the following history:

> "This is a 40-year-old white male who for about ten days has had some very mild aching sensation in his left lower extremity. Previous history of mild pains off and on in the left leg and low back occasionally, but nothing of any severity. Two days ago he began having increasing pain with some numbness into the lateral aspect of his left lower leg and dorsal aspect of his left toe and pain became so acute that no matter what position he was in over the last 24 hours he was unable to alleviate it. He did lift some furniture yesterday and didn't notice anything at the time, but within the next 2 or 3 hours was when the pain started becoming more severe in his left lower extremity."

Claimant testified that while he was talking with Dr. James, an ambulance came in and the interview was interrupted.

Claimant was contacted by an insurance claims representative on November 9, 1984. Claimant denied stiffness, soreness or other problems in the affected back area before November 1984. He also denied that any physician had treated his back before the November injury.

Dr. James performed an L5-S1 laminectomy and discectomy on November 27, 1984. A very large free disc fragment was found, as well as multiple smaller fragments. Claimant made an excellent recovery.

On December 4, 1984 St. Paul denied that claimant's back condition was caused or significantly aggravated by the November 1, 1984 injury. On December 7, 1984 claimant's boss wrote a letter to his insurance agent in support of claimant's claim. The boss described claimant's injuries and stated that

since claimant was hired, he had demonstrated outstanding character and honesty in fulfilling his work duties.

Dr. James opined that the August 1984 injury probably initiated claimant's disc rupture. He also noted that the condition was not severely symptomatic or causing motor loss until after the November 1, 1984 injury. Dr. James feels that the November injury aggravated the original injury and that the two incidents contributed equally to claimant's disc herniation.

The Referee stated that, based on demeanor, he had no reason to disbelieve any of the witnesses. He noted evidentiary inconsistencies but stated that the inconsistencies preponderate neither in favor nor against claimant. He nonetheless held that claimant failed to sustain his burden of proof.

We review the record de novo. ORS 656.295. Viewing the St. Paul claim as being for a single new injury, claimant must prove by a preponderance of the evidence that the November 1, 1984 injury was a material contributing cause of his subsequent disability and/or need for medical services. See Hutcheson v. Weyerhaeuser Co., 288 Or 56 (1979); Patitucci v. Boise Cascade Corp., 8 Or App 503 (1972); ORS 656.005(8)(a). Viewing this as a claim for successive injuries, claimant must prove by a preponderance of the evidence that his disability was caused by successive work-related injuries, whereupon it must be determined whether claimant's condition is a continuation of a prior injury or whether the November 1984 incident independently contributed to claimant's condition. See Stanley C. Phipps, 38 Van Natta 13 WCB Case Nos. 84-01838 and 84-02301 (January 14, 1986).

We find that claimant's November 1, 1984 injury materially contributed to claimant's low back condition and subsequent need for surgery. Although claimant's back may previously have been symptomatic, until the November 1, 1984 injury he was able to engage in a strenuous occupation without time loss and without medical services. Although there are inconsistencies in the record, the lay and medical evidence as a whole persuades us that the November 1, 1984 injury occurred and that it markedly worsened claimant's condition. Accordingly, we find the St. Paul claim to be compensable. We do not find the denial to have been unreasonable, however, and award no penalty.

ORDER

The Referee's order dated June 13, 1985 is affirmed in part and reversed in part. That portion of the Referee's order which upheld St. Paul Fire and Marine's December 4, 1984 denial is reversed, and the denial is set aside. The Referee's order is affirmed in all other respects. Claimant's attorney is awarded $1,000 for services at hearing and $650 for services on Board review, to be paid by St. Paul Fire and Marine.

BRETT A. STEVENS, Claimant
Joseph T. McNaught, Claimant's Attorney
Carey & Joseph, Defense Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 84-12337
February 7, 1986
Order of Dismissal

The Referee's order in this case was mailed to the parties on July 25, 1985. On November 19, 1985 the attorney for the alleged noncomplying employer wrote to the Board inquiring as to the status of a request for Board review of the Referee's

order, which allegedly was mailed on August 12, 1985. The request was not received by the Board. We solicited comments from the parties as to their respective positions on the question whether the Board has jurisdiction to review the Referee's order. See Knapp v. Employment Division, 67 Or App 231, 233 (1984) (reviewing body required initially to determine its own jurisdiction).

ORS 656.289(3) provides in relevant part that, "[A Referee's] order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295." ORS 656.295 provides in relevant part:

> "(1) The request for review by the board of an order of a referee need only state that the party requests a review of the order.
>
> "(2) The requests for review shall be mailed to the board and copies of the request shall be mailed to all parties to the proceeding before the referee."

Reading ORS 656.289(3) together with ORS 656.295(2), it is clear that a request for review, in order to invest the Board with jurisdiction, must be mailed to the Board within 30 days of the date the Referee's order is mailed.

OAR 438-11-005(1) and (2) read:

> "(1) The time and manner of filing for Board review is [sic] found in ORS 656.289 and 656.295.
>
> "(2) The 30 days of ORS 656.289(3) is satisfied upon mailing the request to the Board." (Emphasis added.)

Although ORS 656.295(2) does not use the word "filing," the administrative rule equates "filing" and "mailing." Cf. ORS 656.298(3) (notice of appeal to court must be "filed" with the court.) "Filing" is defined by OAR 438-05-040(4), which in relevant part provides:

> "(4) 'Filing' means:
>
> "(a) the receipt of a document by the Board at any office of the Board; or
>
> "(b) date of mailing. If the date of mailing is relied upon as the date of filing, there must be acceptable proof from the post office of the mailing date. Acceptable proof from the post office shall be a receipt stamped by the post office showing the date mailed and the certified or registered number."

We apply the rule strictly, because the Court of Appeals has firmly held that compliance with ORS 656.295 is "an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a

case." Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983), quoting from Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 284 (1977), and Nollen v. SAIF, 23 Or App 420, 423 (1975), rev den (1976). See also William H. Kahl, 38 Van Natta 93 (WCB Case Nos. 82-10923 & 83-00907, decided this date); Roy L. Morris, 38 Van Natta 99 (WCB Case No. 84-05170, decided this date).

Because the alleged noncomplying employer has not come forward with proof of mailing as required by OAR 438-05-040(4), we conclude that timely filing of a request for review has not been established. We are, therefore, without jurisdiction to review the Referee's order.

ORDER

The alleged noncomplying employer's request for Board review of the Referee's order dated July 25, 1985 is dismissed.

YVONNE WEISER, Claimant
Enver Bozgoz, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-09826
February 7, 1986
Order of Dismissal

The self-insured employer has moved the Board for an order dismissing claimant's request for Board review of Referee Holtan's order dated November 19, 1985. Claimant's written request was received by the Board on December 18, 1985, and was, therefore, timely. However, the evidence considered solely for the purpose of determining our jurisdiction establishes that claimant did not mail a copy of the request for review to the self-insured employer or its attorneys. The self-insured employer's first notice of claimant's request for Board review was in the form of receipt by its attorney's on January 9, 1986 of our acknowledgement of receipt of the request for review.

ORS 656.295(2) requires that a copy of the request for review be mailed to the Board and all parties to the hearing within 30 days of the date of the Referee's order. Strict compliance with the statute is jurisdictional. Argonaut Insurance v. King, 63 Or App 847, 852 (1983). The employer party to the hearing in this case was not provided with a copy of claimant's request for review in a timely manner and did not receive actual knowledge of the request within the statutory 30 days. We, therefore lack jurisdiction to review the Referee's order, which has become final by operation of ORS 656.289(3).

The self-insured employer's motion to dismiss claimant's request for Board review is allowed. The request is dismissed.

IT IS SO ORDERED.

CLARK H. WILLARD, Claimant
Evohl F. Malagon, Claimant's Attorney
Cowling & Heysell, Defense Attorney

WCB 83-00576
February 7, 1986
Order on Reconsideration

We issued our Order on Review on February 28, 1985. The self-insured employer requested that we reconsider our Order on Review toward clarifying the award of permanent partial disability granted therein and on the point of our having affirmed the Referee's award of an attorney fee for having successfully resisted the employer's request for an offset at the hearing. We abated our order to allow full reconsideration. On our own motion, we have also further reconsidered the question whether an

employer or insurer is entitled to recover by offset permanent disability payments made pursuant to a Determination Order when the Determination Order award is later reduced by a redetermination after termination of a program of vocational assistance.

We considered and decided the offset issue raised by the insurer in this case in Debbie A. Monrean (Kahn), 38 Van Natta 97 (WCB Case No. 83-07570, decided this date). In that case, we concluded that prematurely paid permanent disability compensation results when a later Determination Order issued after termination of vocational assistance grants a reduced disability award in lieu of a previous, higher, award. We held that although an employer or insurer could request authority from the Workers' Compensation Department prior to issuance of the Determination Order to recover the overpayment, ORS 656.268(4), in most cases the employer or insurer would seek authorization through the hearing process. See Forney v. Western States Plywood, 66 Or App 155, 159 (1983), aff'd, 297 Or 628 (1984).

The issue we decided in Monrean (Kahn) is the issue we previously held to be mooted in this case by our conclusion that claimant is presently entitled to an award for permanent partial disability that is equal to the 45 percent award he received by means of the first Determination Order. The result of this conclusion, which we adhere to, is that there has been no overpaid permanent disability compensation in this case. Because of our decision that the offset issue is moot, we should also have reversed that portion of the Referee's order that awarded an employer paid attorney fee for prevailing on the offset issue. Our order will be modified accordingly.

The insurer has also asked that we clarify whether our award of 45 percent (144 degrees) permanent partial disability entitles claimant to only those sums not yet paid pursuant to the original award. By using the phrase "in lieu of all prior awards made in this claim . . . ," when granting the 45 percent award, we meant that our award was to be substituted for both the original 45 percent award and the 30 percent awarded after redetermination. It could be argued that unless we specify that the employer is entitled to a credit for all permanent disability payments previously made, the employer would be obligated to pay another full 144 degrees. Such was not and is not our intent. Our order will be modified to make the point clear. See Debbie A. Monrean (Kahn), supra

ORDER

The Order portion of our Order on Review dated February 28, 1985 is withdrawn and replaced by the following:

"ORDER

"The Referee's order dated August 17, 1984 is modified in part and reversed in part. Claimant is awarded 144 degress for 45 percent unscheduled disability for his low back in lieu of all prior awards made in this claim. The insurer is authorized to credit permanent disability payments made pursuant to the Determination Order dated December 16, 1982 against the compensation ordered herein. That portion of the Referee's order that awarded claimant an attorney fee for defending against the

insurer's effort to obtain an offset is reversed. That portion of the Referee's order that denied the insurer's request for offset is vacated as moot. Claimant's attorney is allowed a reasonable fee of 25 percent of the additional compensation granted by this order, not to exceed $3,000."

PATRICIA A. REES, Claimant
David C. Force, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-09458
February 11, 1986
Order on Reconsideration

The self-insured employer has requested reconsideration of the Board's Order on Review dated January 28, 1986.

The Board's order stated that the Board was persuaded by the concurring opinions of the attending physician and the employer's examining physician that claimant's last industrial injury contributed to claimant's permanent disability. The finding that claimant's permanent disability is total was based on the record as a whole weighing the factors according to law, with reference to Barrett v. D & H Drywall, 300 Or 325 (1985), and applying the principle of synergism as required by Arndt v. National Appliance Co., 74 Or App 20 (1985) and Deborah L. Jones, 37 Van Natta 1573 (1985).

The request to reconsider is allowed. On reconsideration, we adhere to and republish our former order, effective this date.

IT IS SO ORDERED.

DONALD A. VAHALA, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 84-09255 & 84-11376
February 11, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee T. Lavere Johnson's order which awarded compensation for permanent total disability in addition to the Determination Order dated October 10, 1984 which awarded only temporary disability compensation for injury to claimant's left forearm and the Determination Order dated July 26, 1984 which awarded 60 degrees for 40 percent scheduled permanent partial disability for injury to claimant's right knee. Claimant had prior awards totalling 90 degrees for 60 percent scheduled permanent partial disability for injury to his left forearm. The issues on review are extent of scheduled permanent partial disability of claimant's left forearm, extent of scheduled permanent partial disability of claimant's right leg, and permanent total disability.

The Board affirms the order of the Referee with the following comment. We find that claimant has made a reasonable attempt to return to work and that it would be futile for him to continue to seek work or attempt retraining in identified skill areas. We conclude that claimant is permanently and totally disabled based on consideration of impairment due to his industrial injuries and relevant social and vocational factors. See Gettman v. SAIF, 289 Or 609 (1980); Madaras v. SAIF, 76 Or App 207 (1985); Harman v. SAIF, 71 Or App 724 (1985); Pournelle v. SAIF, 70 Or App 56 (1984).

ORDER

The Referee's order dated June 26, 1985 is affirmed. Claimant's attorney is awarded $800 for services on Board review, to be paid by the self-insured employer.

MARY E. WILLIAMS, Claimant
Francesconi & Cash, Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 84-09596
February 11, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Pferdner's order that set aside its denial of claimant's stress-related occupational disease claim. The issue is compensability.

Claimant's claim resulted from her employment as an office assistant with the Multnomah County Corrections and Health Services Divisions. Claimant worked for the Health Services Division for approximately one year beginning in August 1980, for the Corrections Division for over two years beginning in August 1981, and again for the Health Services Division for approximately seven months beginning in November 1983. Claimant's claim is not based upon stress associated with her employment duties per se; she testified that she did not find the kind of work that she was doing stressful. Instead, claimant's claim is based upon a series of disputed events relating to claimant's relationship with her supervisors.

According to claimant, when she first reported to work in the Corrections Division her immediate supervisor allegedly made a statement to the effect of "I told them not to send me people who weren't trained." This greatly upset claimant and she soon began to perceive that her supervisor was discriminating against her. Claimant detailed a number of alleged instances of such discrimination. Claimant alleges that she was given unfavorable work hours and duties, was neglected when she asked for training and was singled out for disciplinary action.

After she was transferred to the the Health Services Division in November 1983, claimant alleged that her immediate supervisor informed her that his supervisor wanted claimant out of his Division because she was a "trouble-maker." Her supervisors then allegedly harassed her in an attempt to make her quit her job. Claimant suspected that her former supervisors in Corrections ultimately were behind her troubles in Health Services. In July 1984 claimant sought psychological treatment and was diagnosed as severely depressed. Claimant left work on July 5, 1984 and has never returned to work.

In McGarrah v. SAIF, 296 Or 145, 164-65 (1983), the court stated that in order for a stress-related mental disorder to be compensable, the events or conditions producing the stress must be "real" and not merely imagined or perceived by the worker. The Court explained the distinction between real and imaginary perceptions as follows:

> "A worker may honestly believe that the employer plans to kill him and as a result of that fear cannot work, but if that

> belief emanates only from the worker's own paranoia and there was no evidence the employer had any such plan, no stress condition factually existed on the job and the resulting impairment would not be compensable. On the other hand, a worker with a non-disabling paranoid personality may lapse into a totally disabling psychotic paranoia if managers pile too heavy a workload on such a susceptible employe. Honest perception exists in both cases, but workers' compensation would be properly denied in the first case and properly allowed in the second." 296 Or at 164.

In Leary v. Pacific Northwest Bell, 67 Or App 766 (1984), the Court of Appeals applied McGarrah to the perceptions of a worker whom the court characterized as "suspicious" and "irascible." The court concluded that most of the events and conditions at work alleged to have produced stress were imagined or exaggerated by the claimant and thus were not real. Because of this the court found the claimant's claim noncompensable.

The medical and psychiatric evidence in the instant case presents claimant as an insecure, hypersensitive, suspicious and easily offended person. At one point claimant's treating psychiatrist stated that claimant was "unable to differentiate positive and negative communications." He also related several occasions on which claimant questioned whether her problems stemmed from her own distortion or exaggeration of events. Claimant also had a history of psychological problems prior to her employment with Multnomah County.

The employer either denied or gave reasonable explanations for all of the allegedly discriminatory actions against claimant. Claimant's supervisor at Corrections stated that when claimant began working in Corrections, the whole department recently had moved from one building to another and its operations were not well organized. She also stated that they were short-staffed and were unable to do as much training as they would have liked. She testified that claimant was not singled out for disciplinary action, but that all employes were warned about such things as taking extended breaks and lunches and excessive use of sick leave. This fact was corroborated by other witnesses. Claimant's supervisor also testifed that claimant's work duties and hours were determined either by agreement with claimant, by regular rotations applicable to all employes or by claimant's objective qualifications.

The Referee concluded that the events described by claimant "occurred and are therefore real." The Referee then stated that claimant's perception that she had been singled out for unfavorable treatment was contrary to the evidence and thus was not real. The Referee nonetheless found claimant's claim compensable, apparently concluding that the actual events of claimant's employment, rather than claimant's perception that she had been singled out for unfavorable treatment, was the cause of claimant's mental disorder.

We agree with the Referee's conclusion that claimant's

perception that she had been singled out for unfavorable treatment is not supported by the record. We disagree, however, with the Referee concerning the cause of claimant's mental disorder. We conclude from the record in this case that claimant's mental disorder was precipitated by her perception that she was being singled out for unfavorable treatment, not by the actual events of her employment. Given claimant's preexisting personality deficiencies and the employer's reasonable explanation of events which claimant perceived as discriminatory, we conclude that the perceptions which caused claimant's stress were not real within the meaning of McGarrah. We conclude, therefore, that claimant's claim is not compensable. See Leary v. Pacific Northwest Bell, supra, 67 Or App at 769-70.

ORDER

The Referee's order dated May 14, 1985 is reversed and the employer's denial dated August 31, 1984 is reinstated.

BETTY J. McMULLEN, Claimant
Malagon & Moore, Claimant's Attorneys
Foss, Whitty & Roess, Defense Attorneys

WCB 83-08212
February 12, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 15, 1986. The SAIF Corporation requested review of a portion of the Referee's order which had found that it was responsible for claimant's current psychiatric treatment. Claimant cross-requested review, contending that her $900 attorney fee award should be increased. Neither party filed a brief on Board review.

Our memorandum order affirmed the Referee's order. We awarded no attorney's fee, concluding that "[I]nasmuch as claimant submitted no brief to assist us in conducting our review, she is not entitled to an attorney fee. Richard N. Conturier [sic], 36 Van Natta 59 (1984)." Claimant contends that she is entitled to an attorney fee pursuant to ORS 656.382(2). On reconsideration, we modify our Order on Review.

Where claimant's compensation is not disallowed or reduced following an insurer-appeal, the insurer shall be required to pay a reasonable attorney's fee in an amount set by the Referee, Board or court. ORS 656.382(2). The amount of a reasonable attorney fee shall be based on the efforts of the attorney and the results obtained. OAR 438-47-010(2); 438-47-055.

Factors which generally enter into our attorney fee calculus are: (1) the time devoted to the case; (2) the complexity of the factual and legal issues presented; (3) the skill and standing of counsel; (4) the fact that attorneys in this forum are not required to operate within the constraints of technical or formal rules of evidence or procedure; (5) the relative informality of the briefing and review process; and (6) the extent to which the attorney has already been compensated for services rendered at and before the hearing, including the relative certainty of payment for those services. See Barbara A. Wheeler, 37 Van Natta 122, 123 (1985); Francisco M. Hernandes, 37 Van Natta 1455 (1985). 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 our order are not carefully considered in each and every case where the issue is relevant. Kenneth E. Choquette, 37 Van Natta 927, 928 (1985).

Claimant argues that ORS 656.382(2) mandates an award of attorney fees in that the statute provides that the employer/insurer "shall be required" to pay a reasonable attorney's fee. However, the statute also delegates the authority to set the fee to the Referee, Board, or court. Pursuant to this delegation of authority, the Board bases its award of a reasonable attorney's fee on the attorney's efforts expended and the results obtained. See OAR 438-47-010(2); 438-47-055.

Upon further reflection, we conclude that claimant is entitled to a reasonable attorney's fee. Our earlier reliance on Couturier was unfortunate in that we find this case distinguishable. In Couturier, the insurer had apparently filed a brief in support of its appeal. When the Board affirmed the Referee's order, it declined to award an attorney's fee since claimant's respondent's brief was filed approximately three months late and had not been considered during the review process. Here, inasmuch as SAIF did not file an appellant's brief, there was nothing to which claimant could respond.

Although claimant's attorney chose to dispense with the filing of a respondent's brief, we are mindful that SAIF's appeal necessitated further services which otherwise would not have been required. SAIF's failure to provide an appellant's brief to which claimant may respond should not prevent claimant from receiving a reasonable attorney's fee when the Referee's order is subsequently affirmed. Consequently, we conclude that where the insurer has not filed an appellant's brief to which claimant may respond and claimant's compensation is not disallowed or reduced, claimant is entitled to a reasonable attorney's fee. Of course, under these circumstances the award will likely be minimal. Moreover, results obtained in the form of additional medical services are generally considered to be rather modest. Derry D. Blouin, 35 Van Natta 570 (1983).

Considering the nature of the practice in general and the facts and circumstances of this case in particular, we conclude that $150 is a reasonable award for claimant's attorney's services on Board review.

ORDER

The Board's Order on Review dated January 15, 1986 is modified in part. Claimant's attorney is awarded a reasonable attorney's fee of $150 for services on Board review, to be paid by the SAIF Corporation. The remainder of the Board's order is adhered to and republished, effective this date.

ARTHUR D. ROPPE, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-00227
February 12, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 15, 1986. The SAIF Corporation requested review of a portion of a Referee's order which set aside its denial of claimant's request for authorization for surgery. Although claimant filed no respondent's brief on review, his counsel submitted several letters requesting that review be expedited, as well as objecting to SAIF's request for an extension of time to file its brief. Our memorandum order affirmed the Referee's order and awarded claimant a $250 attorney's fee. Claimant requests an increased award of attorney fees.

When the Board affirms the Referee's order following an employer/insurer appeal, claimant's attorney is entitled to a reasonable attorney's fee based on the effort expended by the attorney and the results obtained. ORS 656.382(2); OAR 438-47-010(2); 438-47-055. Factors which generally enter into our attorney fee calculus are: (1) the time devoted to the case; (2) the complexity of the factual and legal issues presented; (3) the skill and standing of counsel; (4) the fact that attorneys in this forum are not required to operate within the constraints of technical or formal rules of evidence or procedure; (5) the relative informality of the briefing and review process; and (6) the extent to which the attorney has already been compensated for services rendered at and before the hearing, including the relative certainty of payment for those services. See Barbara A. Wheeler, 37 Van Natta 122, 123 (1985); Francisco M. Hernandes, 37 Van Natta 1455 (1985). 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 our order are not carefully considered in each and every case where the issue is relevant. Kenneth E. Choquette, 37 Van Natta 927, 928 (1985).

Claimant's attorney was awarded an insurer-paid attorney's fee for overturning the denial of his medical services claim at the hearing level. The Referee awarded claimant's attorney $1,000 for the services rendered and the results obtained. Claimant's attorney has also meaningfully participated on Board review. However, the participation has taken the form of requests for expedited review and objections to SAIF's requests for extensions. Thus, the participation has pertained to procedural matters and has not addressed the substantive issue presented on Board review. Furthermore, results obtained in the form of additional medical services are generally considered to be rather modest. Derry D. Blouin, 35 Van Natta 570 (1983).

Considering the nature of the practice in general and the facts and circumstances of this case in particular, we conclude that $250 is a reasonable award for claimant's attorney's services on Board review.

Accordingly, claimant's request for reconsideration is granted. On reconsideration, the Board adheres to and republishes its former order, effective this date.

IT IS SO ORDERED.

ROBERT B. WILLIAMS, Claimant
Yturri, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB TP-85007
February 12, 1986
Third Party Order

The insurer has requested that the Board exercise its authority pursuant to ORS 656.593(3) to resolve a conflict between the insurer and claimant as to what is a just and proper distribution of settlement proceeds obtained through the settlement of an action against a third party. ORS 656.154. We previously issued our Interim Order of Partial Distribution. 37 Van Natta 711 (1985). The remaining issue is whether the insurer is entitled to assert as a part of its lien, ORS 656.580(2), the present value of reasonably to be expected future claim costs pursuant to ORS 656.593(1)(c). We conclude that a record sufficient for judicial review of our decision has been compiled. See Blackman v. SAIF, 60 Or App 446 (1982).

FINDINGS OF FACT

Claimant sustained compensable industrial injuries on April 16, 1983. He elected to seek damages from a third party. See ORS 656.154; 656.578. The insurer continued to provide workers' compensation benefits pursuant to ORS 656.580(1). In late summer 1984 the attorney representing claimant in his third party action advised the insurer that settlement negotiations were being undertaken. On August 7, 1984 the insurer advised claimant's attorney in writing that "the final figures on our lien are . . . $18,760.50." This figure was broken down into allocated expense, medical expense and temporary disability compensation.

In the spring of 1985 claimant was hopeful of settling his third party case for the available insurance policy limits of $100,000. There is evidence that the insurer's adjuster with primary responsibility for claimant's workers' compensation claim, who is a law school graduate with approximately 13 years experience in multiple lines claims adjusting, estimated that a reasonable settlement would be in the $60,000 range. The preponderance of the evidence establishes that the adjuster represented on several occasions that the insurer's lien as of March 1985 was approximately $19,000.

On or about March 28, 1985 claimant's attorney and the insurer's adjuster discussed settlement over the telephone. The attorney advised the adjuster that an offer had been made to fully settle claimant's third party case for $80,000. On March 29, 1985 the insurer's adjuster wrote to claimant's attorney, as follows:

> "This will confirm our conversation of 3-28-85.
>
> "You have our approval to proceed with respect to settlement of [claimant's] claim.
>
> "As you know, we have a workers' compensation lien in the amount of $19,467.55 to be considered."

On April 4, 1985 claimant executed a settlement and release. On the same day, claimant's attorney sent a form for approval of the settlement by the paying agency to the insurer. On or about April 11, 1985 the adjuster consulted with an attorney. On April 30, 1985 the adjuster wrote claimant's attorney, as follows:

> "As you know, we have asserted a lien for benefits and expenses already incurred in the amount of $19,467.55.
>
> "We have calculated future expenditures for this claim to be reserved in the amount of $29,500.
>
> "Please forward the balance of the settlement monies so that we may hold them for the anticipated future expenditures associated with this claim.
>
> "As you know, papers have been filed with the Workers' Compensation Board to resolve any differences relating to the lien.

"Please advise."

The insurer's adjuster had in her possession prior to March 29, 1985 all of the information she later used to calculate the claimed reserves. Claimant relied upon the insurer's representation as to the amount of its lien when he executed the settlement document for less that the available third party liability insurance policy limits.

PRELIMINARY RULINGS

In addition to the resolution of the ultimate question, we have before us motions by both parties. The insurer has moved for an order to show cause why claimant's workers' compensation benefits should not be suspended for failure to abide by the earlier interim order. The insurer alleges that claimant's attorney has already disbursed all proceeds of the settlement. Because of the result we reach, this motion is moot. We do not consider whether we would have the statutory authority to allow such relief.

Claimant has moved for an order setting aside the interim order. Because of the result we reach, this motion, as well, would be moot, but for the fact that the motion raises a question of our jurisdiction. Three grounds for granting claimant's motion are argued: (1) the Board lacks jurisdiction because this matter does not involve a dispute as to a "just and proper distribution"; (2) the Board lacks jurisdiction to enter an order of partial distribution because of the "injunctive" nature of such an order; and (3) that the order should be set aside because it was issued without affording claimant an opportunity to be heard.

The matter of our jurisdiction to decide disputes regarding the just and proper distribution of settlements of third party claims is clear from ORS 656.593(3) and has been established in case law. Schlecht v. SAIF, 60 Or App 449, 454 (1982). We conclude that this is such a dispute. As to the authority of the Board to issue an interim order of partial distribution of undisputed funds and stay further action on the disputed matters, we have long taken a position contrary to claimant's assertion, and continue to conclude that such partial distributions are both authorized by statute and in the best interests of all parties. See George Bedsaul, 35 Van Natta 695 (1983); John J. O'Halloran, 34 Van Natta 1101 (1982). As to the opportunity to be heard, we conclude that claimant's attorneys were aware that the insurer had requested relief under ORS 656.576 through 656.595 at least six weeks prior to the entry of our order. That claimant elected not to come forward based upon the mistaken belief that we lacked jurisdiction was beyond our control. Claimant's motion will be denied.

CONCLUSIONS

In Denton v. EBI Companies, 67 Or App 339, 341 n. 1 (1984) and Schlect v. SAIF, supra, 60 Or App 455-56 n. 5, the court noted in passing a distinction between ORS 656.593(1) and 656.593(3), being that the former relates to the allocation between claimants and insurers of damages, while the latter relates to the allocation of proceeds of settlements. We conclude that the distinction is relevant in this case. In relevant part, ORS 656.593 provides:

"(1) . . . The proceeds of any damages recovered from an employer or third person by the worker or beneficiaries shall be subject to a lien of the paying agency for its share of the proceeds as set forth in this section and the total proceeds shall be distributed as follows:

"(a) Costs and attorney fees incurred shall be paid, such attorney fees in no event to exceed the advisory scheduled of fees established by the board for such actions [not in excess of 33 1/3 percent of the gross recovery, OAR 438-47-090].

"(b) The worker or the beneficiaries of the worker shall receive at least 33 1/3 percent of the balance of such recovery.

"(c) The paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid or other medical, surgical or hospital service, and for the present value of its reasonably to be expected future expenditures for other costs of the worker's claim under ORS 656.001 to 656.794. Such other costs include assessments for reserves in the Administrative Fund, but do not include any compensation which may become payable under ORS 656.273 or 656.278.

"(d) The balance of the recovery shall be paid to the worker or the beneficiaries of the worker forthwith. Any conflict as to the amount of the balance which may be retained by the paying agency shall be resolved by the board.

"(2) The amount retained by the worker or the beneficiaries of the worker shall be in addition to the compensation or other benefits to which such worker or beneficiaries are entitled under ORS 656.001 to 656.794.

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

". . . . ."

The statutory scheme for the allocation of damages is precise. ORS 656.593(1) spells out in detail exactly how the damages are to be allocated and in what order payments shall be made. The section contemplates receipt of a specific sum of money prior to implementation of the statutory distribution scheme. Our role is likewise specifically defined and limited to resolving any conflict as to the amount of the balance of money that may be retained by the paying agency.

In dealing with settlements, the legislature was less precise. Although ORS 656.593(3) mandates that the injured worker receive the same minimum amounts that he or she would be entitled to receive out of an award of damages, the statute provides that the paying agency's share of settlement proceeds be "just and proper." Where there is conflict between the injured worker and his or her industrial insurer as to what is a "just and proper" share, our role is to resolve that conflict. We view ORS 656.587 as significant in resolution of such conflicts. That statute provides:

> "Any compromise by the worker or other beneficiaries or the legal representative of the deceased worker of any right of action against an employer or third party is void unless made with the written approval of the paying agency or, in the event of a dispute between the parties, by order of the board. ORS 656.236 does not apply to compromises and settlements under ORS 656.578 to 656.597."

By virtue of ORS 656.587, the paying agency has complete control over the worker's ability to compromise and settle a third party action. Because approval of the paying agency is an absolute requirement, we conclude that an injured worker has the right to rely completely upon such an authorization in making the decision to compromise and settle a third party claim. In this case, the insurer gave its express, written authorization to settle the third party claim for $80,000, with knowledge that the settlement would be for less than the available liability limits. The insurer was in possession of all information necessary to calculate any claimed reserves. In giving that authorization, the insurer expressly stated the amount claimed as its lien. We hold that claimant had the right to, and did, rely upon the insurer's March 29, 1985 statement of its lien as an expression of its "just and proper" share of the settlement proceeds in this case and proceeded to execute the settlement release on that basis.

In SAIF v. Parker, 61 Or App 47 (1982), the court resolved a similar situation in a similar way. In distributing proceeds of a third party claim, SAIF failed to retain reserves sufficient to cover its reasonably to be expected future claim costs, instead deducting only its then-current claim costs and paying over the remainder of the monies to the claimant. The court held that, by failing to retain the reserve as specified by ORS 656.593(1)(c), SAIF had lost any further lien rights on the proceeds. 61 Or App at 55. See also Denton v. EBI Companies, supra, 67 Or App at 347. We find this situation analagous. We hold that because the insurer expressly stated the amount of its lien in a manner that claimant was entitled to and did construe as a final statement of what the insurer viewed as its "just and

proper" share of settlement proceeds, it would be unjust and improper to permit the insurer to claim further lien rights in this case.

ORDER

The proceeds of the third party settlement in this case shall be distributed as follows:

Gross Settlement	$80,000.00
Litigation Costs	$ 421.46
Claimant's Attorney's Fee (25% by agreement)	$20,000.00
Insurer's Just and Proper Share	$19,467.55
Balance to Claimant	$40,110.99
Total	$80,000.00

DANA R. DENTON, Claimant
Schwabe, et al., Defense Attorneys

WCB 84-09173
February 14, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Nichols' order which: (1) upheld the insurer's denial of his neck injury claim; (2) found that he was not entitled to interim compensation; and (3) declined to assess penalties and accompanying attorney fees for an allegedly unreasonable denial and failure to pay interim compensation.

While preparing this case for review, the Board learned that a "letter-form brief" from claimant was apparently in existence, but was not in the record. Therefore, on December 11, 1985 the Board requested that claimant forward his "letter-form brief" within 14 days. To date, the Board has neither received the brief nor a response of any kind from claimant. Since the 14 day period has long since elapsed, we have proceeded with our review.

After conducting our de novo review of the record, we affirm the order of the Referee with this additional comment concerning claimant's entitlement to interim compensation. We conclude that the insurer denied claimant's injury claim within 14 days of notice or knowledge of the claim. Consequently, the insurer was not obligated to pay interim compensation. ORS 656.262(4).

ORDER

The Referee's order dated March 27, 1985 is affirmed.

GLEN D. DOVER, Claimant
Ringo, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10400
February 14, 1986
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Lipton's order which: (1) increased his award of unscheduled permanent disability for a low back injury from 55 percent (176 degrees), as awarded by a September 21, 1984 Determination Order and prior orders, to 80 percent (256 degrees); and (2) increased his award of scheduled permanent disability for loss of use of his left leg from 5 percent (7.5 degrees) to 25 percent (37.5 degrees). On review, claimant contends that he is entitled to an award of permanent total disability, or in the alternative, that he is entitled to an award of scheduled permanent disability for loss of use of his right leg, as well as a further increase in his prior awards.

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

Following our de novo review of the medical and lay evidence, including claimant's credible testimony concerning his pain and limitations, we agree with the Referee's assessment of claimant's permanent disability.

Furthermore, we are not persuaded that claimant's less than total physical incapacity combined with his non-medical conditions have permanently incapacitated him from regularly performing work at a gainful and suitable occupation within his physical limitations and vocational aptitudes. Consequently, we conclude that claimant has failed to establish entitlement to permanent total disability pursuant to the so-called "odd lot" doctrine.

ORDER

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

Board Member Lewis Dissenting:

Because I believe that claimant is permanently and totally disabled, I respectfully dissent from the majority's opinion.

I view this claimant as currently incapable of "regularly performing work at a gainful and suitable occupation." ORS 656.206(1). As identified in the statute, a "suitable" occupation is one the worker has the ability and training to perform, or an occupation that the worker is able to perform after rehabilitation. First, I do not believe that claimant is physically capable of regularly performing work. He credibly testified that he is plagued by ongoing and severe pain in the back and legs. He must regularly lie down, and even menial tasks can result in his being bedridden for up to three days. It is difficult for me to imagine a worker suffering from such significant disability "regularly" performing gainful work. In his last report, claimant's treating doctor stated, as he had throughout this claim, that claimant was totally disabled from engaging in wage-earning activity. I accept the doctor's opinion.

Second, I do not believe that claimant has been vocationally retrained to perform alternative employment. In fact, vocational efforts have ended in failure due to claimant's debilitating physical problems. Although a telephone sales job has been suggested for claimant, he had neither experience nor training in that field as of the time of the hearing. We are to gauge permanent total disability status as of the time of the hearing; we are not free to speculate on whether claimant will be able, after the hearing, to perform a job for which he has yet to be trained. Gettman v. SAIF, 289 Or 609 (1980). In my opinion, there was no persuasive evidence that claimant was capable of regularly performing telephone sales work as of the time of the hearing.

In any event, I am not persuaded that telephone sales represents "suitable and gainful" employment for this claimant. I believe his severe physical problems would require him to regularly leave his work station in order to lie down, and there is a strong likelihood that if he were to exert himself even moderately, he would be off the job for extended periods. In my view, employment under those circumstances is neither suitable nor gainful. See Wiley v. SAIF, 77 Or App 486 (filed January 29, 1986); Pykonen v. SAIF, 3 Or App 74 (1970). I, therefore, respectfully dissent.

BETHANY A. EIDE, Claimant
Elliott Lynn, Claimant's Attorney
Moscate & Byerly, Defense Attorneys

WCB 83-08513
February 14, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Mulder's order which set aside its denial of claimant's occupational disease claim for intestinal problems. On review, the insurer contends that claimant failed to establish that her work activities were the major contributing cause of any worsening of her underlying condition. We agree and reverse.

Claimant was 32 years of age at the time of hearing. In June 1983 she filed her claim, alleging that her recent stomach and colon problems were attributable to her five-year employment as a city code enforcement officer. Following a battery of tests, Dr. Heinonen, gastroenterologist, reported that claimant probably had diarrhea due to giardiasis. Dr. Heinonen also related claimant's abdominal pain to mucosal peptic disease, a form of gastritis and esophagitis.

Claimant has an extensive medical history of abdominal complaints dating from 1973. In addition to sharp pain and cramping, her complaints have included indigestion, gas, heartburn, constipation, diarrhea, and bloody stools. She has received several diagnoses, including gastroenteritis and spastic colon. Her medical history also refers to marital and family problems, depression, "nerves", smoking in excess of one pack of cigarettes a day, and daily drinking eight cups of coffee.

In July 1982, approximately one year before claimant filed her claim, Dr. Miller reported that claimant was complaining of intense, almost constant, epigastric pain and persistent headaches. Her medical history included colitis with rectal

bleeding at the age of 19. In addition, in 1979 she underwent a sphincterotomy and dilation for anal stricture. Claimant was smoking two packs of cigarettes per day, taking "copious quantities" of aspirin, and experiencing considerable emotional tension. However, since her fourth marriage and a recent weight loss her condition had been improving.

In October 1983 Dr. Heinonen reported that stress from claimant's very demanding job as a city enforcement officer appeared to increase her symptoms. Claimant's smoking and her coffee drinking would also aggravate her condition. Consequently, Dr. Heinonen conceded that it was "very hard to give hard and fast answers" concerning the relationship between claimant's stress and her mucosal peptic disease. However, Dr. Heinonen concluded that it was "certainly fair to say that her work aggravated her condition" because her symptoms became worse during stressful times at work.

Also in October 1983 Dr. Ironside, internist, performed an independent medical examination. There is no indication that Dr. Ironside reviewed claimant's medical record. Claimant reported that she dealt with a great deal of hostility and paper work in her job as a code enforcement officer. However, she enjoyed the job's diversity. She complained of continued soreness in the epigastric region and alternating bouts of constipation and diarrhea. Claimant's condition was diagnosed as follows: (1) irritable bowel syndrome; (2) small hiatal hernia with reflux esophagitis and mild gastritis by history; and (3) type A personality. Dr. Ironside concluded that it was "highly probable that the cause of her symptomatology lies largely within her stressful work situation." Although claimant had experienced considerable marital distress in her three previous marriages, Dr. Ironside did not consider them significant factors given her currently stable marriage. Finally, Dr. Ironside doubted that claimant's caffeine intake or use of salicylates were major etiologic factors.

In December 1983 Dr. Dick, internist, reviewed claimant's medical record and performed an independent medical examination. Claimant's medical history suggested that she had suffered from chronic gastrointestinal problems for many years. Considering claimant's prior traumatic marital distress and her admission that she enjoyed her job, Dr. Dick concluded that claimant's employment "probably played little or no part" in her condition. Dr. Dick agreed with Dr. Heinonen that claimant's job made her preexisting condition symptomatic. However, Dr. Dick opined that claimant's work activities did not cause a pathological change in her condition.

In February 1985 Dr. Heinonen testified by way of deposition. Claimant's condition was diagnosed as mucosal peptic disease and spastic colon. Her condition had improved since she was taken off work in November 1983. However, Dr. Heinonen conceded that claimant continued to experience epigastric pain. Referring to claimant's pre-1982 medical history as isolated episodes of gastrointestinal complaints, Dr. Heinonen would not consider claimant's condition preexisting. Dr. Heinonen acknowledged that claimant's condition could be caused by alcohol, aspirin, cigarette smoking, caffeinated beverages, very spicy foods, and stress. He was aware that claimant smoked cigarettes

and was involved in a child custody dispute, in addition to her workers' compensation litigation. However, assuming these factors were present, Dr. Heinonen continued to opine that claimant's stress at work was the major contributing cause of her condition.

Claimant credibly testified that she began working for the city in 1978 as a police dispatcher. She gradually moved into her position as a code enforcement officer. The job involved a great deal of public contact, generally through correspondence, telephones, or "walk in traffic." Claimant encountered a great deal of anger and considered her job stressful.

Claimant's stress markedly increased in the summer of 1982, when many of the city ordinances were rewritten. It was at this time that she noticed her abdominal symptoms. During this time, claimant was taking "lots of aspirin" and drinking a great deal of coffee and Pepsi. In addition, she was receiving counselling along with her two children, stemming from a May 1981 altercation with her third husband. Apparently, her husband had held the family at gunpoint and relented only after the arrival of a SWAT team. By the time claimant's abdominal symptoms appeared in mid-1982 she had remarried and was not experiencing any marital stress. Claimant feels much better since she was taken off work in November 1983. She presently works part-time primarily as a bookkeeper for her husband's business.

Claimant's former coworker testified that claimant had complained of stomach problems for the five years that they had worked together. According to the coworker, claimant kept medicine in her desk for use when "things started getting a little stressful." The coworker also observed claimant indulge in the following activities on a daily basis: (1) smoke approximately a "pack and a-half" of cigarettes; (2) drink one to two cups of coffee; and (3) drink a big glass of Coke or Pepsi.

Dr. Heinonen's opinion notwithstanding, we are persuaded that claimant's abdominal condition preexisted her employment. The record is replete with references concerning claimant's complaints which have been generally diagnosed as gastroenteritis and colitis. Inasmuch as we consider claimant's condition preexisting, to establish her occupational disease claim she must prove that work conditions caused a worsening of her underlying condition producing disability or the need for medical services. Weller v. Union Carbide, 288 Or 27 (1979). In addition, she must establish that her work conditions were the major contributing cause of the worsening of her preexisting condition. Dethlefs v. Hyster Co., 295 Or 298 (1983); SAIF v. Gygi, 55 Or App 570, rev den 292 Or 825 (1982).

The Referee found that claimant's job stress had resulted in her need for medical treatment. Citing Weller and Gygi, the Referee implicitly concluded that claimant's underlying condition had been worsened by her work conditions. Although we agree that claimant occasionally experienced stressful conditions while at work, we are not persuaded that these conditions were the major contributing cause of any worsening of her abdominal condition. At most, claimant's employment temporarily increased her symptoms, but did not provide a major contribution to any worsening of the condition.

There are a number of plausible explanations for any worsening of claimant's condition, none of which is related to her work. Claimant has an extensive medical history of abdominal complaints for which she has received a variety of treatments, including surgery. She also was a heavy smoker, consumed significant quantities of caffeine, and formerly digested "copious quantities" of aspirin. These habits can either cause, or significantly contribute to any worsening of, the conditions currently plaguing claimant. Furthermore, when claimant's most recent symptoms arose she was still receiving counselling stemming from a violent altercation with her ex-husband. Finally, her symptoms have continued, albeit on a lesser scale, since she left her work as a code enforcement officer.

Dr. Heinonen acknowledged the significant effect these non-work related factors could have on an abdominal condition such as claimant's. However, Dr. Heinonen continued to maintain that claimant's work conditions were the major contributing cause of her condition. Moreover, Dr. Heinonen refused to term claimant's condition preexisting. As noted earlier, given the extent and variety of claimant's abdominal complaints, we agree with Dr. Dick's opinion that claimant's condition was indeed preexisting. Inasmuch as we disagree with one portion of Dr. Heinonen's opinion, we find the remainder of his opinion unpersuasive as well, particularly when we consider the number and significance of other potential contributors to claimant's condition.

Dr. Ironside's opinion also supported the compensability of claimant's current condition. However, we find this opinion conclusory. Furthermore, unlike Dr. Dick's opinion, there is no indication that Dr. Ironside had reviewed claimant's extensive medical record. Considering claimant's lengthy medical history and the presence of other possible significant contributors to any worsening of her preexisting abdominal condition, we agree with Dr. Dick's assessment that claimant's employment may have made her condition symptomatic, but it had not caused a pathological change in her condition.

ORDER

The Referee's order dated April 23, 1985 is reversed. The insurer's denial is reinstated and upheld.

KENNETH M. FRANK, Claimant
Lindsay, et al., Defense Attorneys

WCB 84-02229
February 14, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of that portion of Referee Wasley's order which upheld the insurer's partial denial of compensability of various conditions allegedly due to neurological conditions incidental to a pre-injury stroke.

Claimant attaches to his brief copies of two medical reports and a physician's bill. ORS 656.295(5) requires that we base our review on the hearing record, however, we can remand for further evidentiary development if we find that the case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee. We treat claimant's submissions as a request for remand.

The Board has a restrictive policy regarding remands. Casimer Witkowski, 35 Van Natta 1661 (1983). We allow remand only when relevant evidence is discovered which could not reasonably have been discovered and produced before the hearing. Id. at 1663. One of the medical reports claimant now submits, Dr. Bertrand's letter, was admitted at the hearing. It has been considered by the Board in its de novo review. The other report, Dr. Puziss's February 22, 1985 letter, was offered at the hearing but withdrawn by claimant following the insurer's objection. At the hearing claimant's attorney conceded that Dr. Puziss's letter is not relevant to the issue presently before us. We agree. The physician's bill submitted with claimant's brief is also irrelevant. We find that the hearing record was properly, completely and sufficiently developed.

We affirm the opinion of the Referee with the following comments. The insurer's August 22, 1984 denial letter stated in pertinent part:

> "Subsequent to your surgery involving a left medial meniscectomy performed February 21, 1984, you began developing symptoms involving a left-sided hypesthesia, occurring left front, and irritation and numbness in the distribution of the sciatic nerve. Treatment for these specific conditions diagnosed variously as vascular insufficiency left distal leg, possibility of traumatic Baker's cyst, possibility of post-traumatic autonomic neuropathy with secondary increased sympathetic autonomic tone with subsequent small vessel vasoconstrictive tendencies, probable presence of hypofunctioning sympathetic nervous system with associated vasospasm which is part of a post-traumatic causalgia, and thalmic syndrome. These conditions are being specifically denied relative to the strain injury to the left knee occurring November 1, 1983, but rather are more likely due to the neurologic disability incidental to your stroke occurring in August of 1983. Therefore, without waiving other questions of compensability, this formal partial denial is made."

We agree with the Referee that claimant's November 1, 1983 work injury has not affected the conditions denied by the insurer. Although Drs. Kopp and Tanabe have noted that due to the underlying neurological conditions, the left knee injury may have caused more pain, these opinions relate to disability, not the compensability of the neurological conditions. Disability is not an issue presently before us.

ORDER

The Referee's order dated March 6, 1985 is affirmed.

JILL E. FRANKIE, Claimant
Vick & Associates, Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys
SAIF Corp Legal, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 85-01031, 85-00674 & 84-06416
February 14, 1986
Order on Review (Remanding)

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Knapp's order which set aside its denial of claimant's aggravation claim and upheld denials by the former self-insured employer and EBI Companies. The issue is responsibility.

Our de novo review leads us to question the completeness of the record transmitted to us. The parties' briefs refer to numbered exhibits that we do not have, particularly 69A, 77 and 79. We are unable to determine why these exhibits were omitted.

Pursuant to ORS 656.295(5) the Board may remand a case to the Referee for further evidence taking, correction or other necessary action where we determine that a case has been improperly, incompletely or otherwise insufficiently developed or heard. We conclude that the unexplained absence of the above-listed exhibits constitutes improper, incomplete or otherwise insufficient development of the case.

Accordingly, we remand to the Referee to reconsider this matter in light of our discovery. Should the Referee conclude that a hearing is necessary to settle the record, he is directed to inititate the appropriate proceedings. The Referee is further directed to issue an Order on Reconsideration indicating any additions made to the record and their effect, if any, on the original order.

ORDER

The case is remanded to the Referee for further action consistent with this order.

RAYMOND C. NORGAARD, Claimant
Pozzi, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-10649
February 14, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of Referee Pferdner's order which awarded claimant permanent total disability, whereas an October 3, 1984 Determination Order and prior orders had awarded 60 percent (192 degrees) unscheduled permanent disability for a low back injury and 10 percent (15 degrees) scheduled permanent disability for loss of use of the left leg. On review, the employer contends that claimant is not entitled to an award of permanent total disability.

Following our de novo review of the medical and lay evidence, we are persuaded that the combination of claimant's compensable injuries and social/vocational factors preclude him from "regularly performing work at a gainful and suitable occupation." See ORS 656.206(1)(a); Wilson v. Weyerhaeuser, 30 Or App 403, 409 (1977). The evidence establishes that claimant could not obtain a "regular" gainful job in a competitive labor market undistorted by his employer's sympathy or his efforts to rise

above his crippling handicaps. See Harris v. SAIF, 292 Or 683, 695 (1984). The employer's proffered position, and claimant's rejection of it, does not preclude him from an award of permanent total disability. See Wiley v. SAIF, 77 Or App 486 (decided January 29, 1986). Furthermore, we find that it would be futile for him to attempt the proffered position or to have otherwise sought work as required by ORS 656.206(3). See Phillips v. Liberty Mutual, 67 Or App 692, 697 (1984). Accordingly, we agree with the Referee that claimant has established entitlement to an award of permanent total disability.

ORDER

The Referee's order dated June 6, 1985 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the self-insured employer.

JULIAN E. POURNELLE, Claimant
Quinton B. Estell, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-04317
February 14, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. The court's order remanding states:

> "Respondent has moved for a remand of this case to the Worker's Compensation Board to make 'monetary adjustments' that may be required as to amounts paid or payable resulting from the Court's decision in this case. Petitioner has not opposed the motion. The motion is allowed, subject to the caveat that the remand shall not be interpreted as indicating whether any 'monetary adjustments' are necessary in law or in fact."

After a hearing, the Referee granted claimant an award of 75% unscheduled permanent partial disability. The Referee's order was entered February 16, 1983. The Board affirmed the Referee's order and claimant sought judicial review in the Court of Appeals. The court granted claimant an award of permanent total disability effective April 12, 1982. Pournelle v. SAIF, 70 Or App 56, 61 (1984).

ORS 656.313(1) requires that compensation ordered paid by a Referee must be paid pending Board or court review of the Referee's decision. We presume that SAIF complied with the statute. SAIF now moves the Board to allow it to offset partial disability benefits already paid pursuant to orders of the Referee and Board against the total disability benefits ordered by the court.

We have concluded that such an offset is permitted. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28, 32 (1983). Cf. ORS 656.313(2). By raising the issue promptly once an award for permanent total disability was granted by the court, SAIF is not precluded from claiming the offset by not having raised the issue previously. Donald W. Wilkinson, 37 Van Natta 937 (1985).

The SAIF Corporation is authorized to offset permanent

partial disability compensation paid subsequent to April 12, 1982 against the permanent total disability compensation ordered by the Court of Appeals.

IT IS SO ORDERED.

DAVID L. WAASDORP, Claimant
Robert J. Guarrasi, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-02453
February 14, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated January 28, 1986, reiterating his contention that the Hearings Division has jurisdiction to consider the issue of whether the SAIF Corporation failed to comply with an Own Motion Order. Consequently, claimant reasserts that the Referee's order dismissing his hearing request was erroneous.

The request is granted. On reconsideration, the Board continues to conclude that the appropriate forum for issues emanating from the Own Motion Order is the Board itself and not the Hearings Division. Accordingly, we adhere to and republish our former order, effective this date.

IT IS SO ORDERED.

WILLARD E. HARMON, Claimant
Evohl F. Malagon, Claimant's Attorney
Lindsay, et al., Defense Attorneys
David O. Horne, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-05620, 84-10045, 84-10046, 84-10047, 84-10048 & 84-10049
February 18, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Argonaut Insurance Company requests review of Referee Quillinan's order that directed that it be held responsible for diagnostic medical services under the provisions of ORS 656.245. The issue is responsibility.

Claimant has six accepted injury claims dating from 1974, all to his low back, although some of the claims involve other body parts in addition to the low back. The first claim was accepted by Wausau Insurance, the next four by the SAIF Corporation, and the final claim in 1982 by Argonaut. The medical services now at issue were provided in April 1984 and relate only to the low back. The medical evidence establishes that the 1982 injury, in which claimant fell approximately ten feet from the top of a truck, contributed to claimant's need for further diagnostic services. The Referee correctly applied the rule of Industrial Indemnity Co. v. Kearns, 70 Or App 583, 587 (1984), to the record in this case in arriving at the conclusion that Argonaut be held responsible for the services in dispute.

Argonaut questioned whether the diagnostic services were reasonable or necessary with respect to any of claimant's accepted claims. Claimant's participation was, therefore, necessary both at hearing and on Board review, and claimant's attorney is entitled to a reasonable insurer-paid attorney fee.

ORDER

The Referee's order dated April 29, 1985 is affirmed. Claimant's attorney is awarded $350 as a reasonable attorney fee for services on Board review, to be paid by Argonaut Insurance Company.

TERRY L. HUNTER, Claimant
Bischoff & Strooband, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-13275
February 18, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Foster's order that directed it to pay "interim compensation" previously ordered paid by Referee Quillinan and assessed a penalty and attorney fee for unreasonable resistance in payment of compensation. The issue is whether "interim compensation" pursuant to the Court of Appeals decision in Bono v. SAIF, 66 Or App 138 (1983), rev'd, 298 Or 405 (1984), ordered paid by a Referee may be stayed pending Board review of the Referee's decision.

The parties stipulated to the relevant facts. Claimant made a claim for an occupational disease on January 19, 1984. The insurer issued its formal denial of claimant's claim on March 7, 1984. Between the date the claim was filed and the date that it was denied, claimant worked full time at his regular salary. The insurer did not pay any compensation.

Claimant requested a hearing on the denial. On October 25, 1984 Referee Quillinan issued an order that upheld the denial and awarded claimant "interim compensation" during the period February 2, through March 6, 1984, pursuant to the Court of Appeals opinion in Bono v. SAIF, 66 Or App 138 (1983), which required payment of temporary disability as "interim compensation" beginning 14 days after a claim was made, whether or not a claimant was working. Both parties requested Board review of Referee Quillinan's order.

Pending Board review, the insurer did not pay the "interim compensation" ordered by Referee Quillinan. On December 14, 1984 claimant requested a hearing on the issue of the insurer's failure to pay "interim compensation" pursuant to Referee Quillinan's order. On December 28, 1984 the Supreme Court reversed the Court of Appeals decision in Bono v. SAIF, 298 Or 405 (1984), holding that a claimant is entitled to temporary disability compensation as "interim compensation" only if the claimant left work as the phrase is used in ORS 656.210(3), i.e. on account of an injury or disease. On May 31, 1985 we affirmed that portion of Referee Quillinan's order that found the claim not compensable. We reversed, however, that portion of the Referee's order that directed the payment of "interim compensation," on the ground that claimant had not left work on account of injury or disease, relying upon the Supreme Court's Bono case.

Initially, we reject the insurer's argument that Referee Quillinan did not have jurisdiction to order the payment of "interim compensation." Referee Quillinan had jurisdiction to decide any "matter concerning a claim." ORS 656.283(1).

Entitlement to "interim compensation" is unquestionably a matter concerning a claim, and the Referee decided that question according to the then most current interpretation of the law by the Court of Appeals. In any event, the correctness of Referee Quillinan's order is not an issue in this proceeding. ORS 656.313(1); see Hutchinson v. Louisiana-Pacific, 67 Or App 577, 581 n.4 (1984).

We also reject the insurer's argument that the Court of Appeals' Bono case was not the law, because no mandate was ever issued by that court. While the insurer is technically correct that the judgment of the Court of Appeals was never enforceable as to the litigants in the Bono case, ORS 19.190(1); ORAP 11.03(3), the court's opinion was, as noted above, the most current, published interpretation of the law by a superior tribunal. The Board was, therefore, bound to follow it.

The insurer's principal argument is that it was not required to pay "interim compensation" ordered by the Referee pending review because "interim compensation" is not included within the definition of "compensation" for the purposes of ORS 656.313. In relevant part, that statute states:

> "(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 a claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.
>
> ". . . . .
>
> "(4)Notwithstanding ORS 656.005, for the purpose of this section, 'compensation' means benefits payable pursuant to the provisions of ORS 656.204 to 656.208, 656.210 and 656.214 and does not include the payment of medical services."

Subsection (4) of ORS 656.313 was added to the statute by 1979 Oregon Laws, Chapter 673, section 1. Prior to the 1979 amendment, the general definition of "compensation," ORS 656.005(9), applied to ORS 656.313. See Jones v. Emanuel Hospital, 280 Or 147, 151 (1977) ("Compensation" includes "interim compensation"). Since the 1979 amendment, ORS 656.313(4) provides that only certain kinds of compensation need be paid pending review of a Referee's order. These are death benefits (ORS 656.204), permanent total disability benefits (ORS 656.206), benefits due on account of death during permanent total disability (ORS 656.208), temporary total disability benefits (ORS 656.210) and permanent partial disability benefits (ORS 656.214). The statute goes on to specifically exclude payment of medical services as compensation to be paid pending review. Claimant points out that the legislature did not exclude "interim compensation" from the definition of compensation to be paid pending review. We conclude that the legislature clearly and

unambiguously stated what compensation is to be paid pending review of a Referee's order. An unambiguous statute needs no interpretation to determine legislative intent. Fletcher v. SAIF, 48 Or App 777, 781 (1980).

The remaining question is whether the "interim compensation" ordered in this case, i.e. compensation ordered paid pursuant to the Court of Appeals' Bono decision during a period when the claimant was working, equates with temporary total disability under ORS 656.210, which unquestionably must be paid pending review of a Referee's decision. We conclude that it does not. In Stiennon v. SAIF, 68 Or App 735 (1984), the Court of Appeals discussed the distinction between temporary total disability benefits and "interim compensation." Quoting from its Bono decision, subsequently reversed, the court noted that "interim compensation" was a court-created device designed to protect claimants against unreasonable delay in claims processing and "not really payment for compensable loss." Id. at 738. The court pointed out further that while "interim compensation" was payable regardless of a claimant's work status, temporary total disability benefits were payable only where a claimant actually lost wages because of disability as a result of a compensable injury. Id. In Stiennon, the court affirmed the Board's decision that held the claimant not to be entitled to temporary total disability benefits because he had retired prior to the time he was unable to work. See also Cutright v. Weyerhaeuser Co., 299 Or 290 (1985).

We conclude that the "interim compensation" ordered paid in this case was payable solely by virtue of the Court of Appeals' interpretation of ORS 656.262(4) regardless of claimant's work status, and was not temporary total disability compensation due under ORS 656.210. Such compensation, which since the Supreme Court's decision in Bono v. SAIF no longer exists under the Oregon Workers' Compensation Law, is not the type of compensation that must be paid under ORS 656.313(4) pending further review. The insurer, therefore, was within its rights to stay payment of that compensation pending review of the Referee's decision.

ORDER

The Referee's order dated September 20, 1985 is reversed. Claimant's request for hearing is dismissed.

DAWN G. MELLIS, Claimant
Pozzi, et al., Claimant's Attorneys
Breathouwer, et al., Defense Attorneys

WCB 83-00058
February 18, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Mellis v. McEwen, Hanna, Grisvold, 74 Or App 571, rev den, 300 Or 249 (1985). The court has ordered that claimant's industrial injury claim be accepted. Therefore, the insurer's formal denial dated December 22, 1982 is set aside and claimant's claim shall be accepted and processed according to law.

IT IS SO ORDERED.

ERICA E. MORENO, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-0572M
February 18, 1986
Own Motion Order

Claimant has petitioned the Board to reopen her February 21, 1974 industrial injury claim for the payment of benefits for temporary disability arising out of elective low back surgery performed in August 1985. Claimant's aggravation rights have expired.

The self-insured employer disputes whether it is obligated to pay for the surgery under the provisions of ORS 656.245. Referee Foster ordered that the surgery was reasonable and necessary and the employer requested review of that order. We have this date issued our Order on Review in WCB Case No. 85-00367 in which we have reversed the Referee's order and remanded this matter to the Hearings Division for further proceedings relating to a determination whether the surgery was reasonably required by the nature of the injury or the process of recovery. ORS 656.245(1).

The final determination of the compensability of the surgery must be made before we consider whether it is appropriate to reopen claimant's claim for payment of temporary disability compensation. If the surgery is not compensable, neither is the temporary disability arising therefrom. In addition, if the surgery is compensable, temporary disability compensation may or may not be due, depending upon claimant's working status immediately prior to the surgery. See Stiennon v. SAIF, 68 Or App 735 (1984); Vernon Michael, 34 Van Natta 1212 (1982). This situation demonstrates the rationale behind OAR 438-12-005(1)(a), which provides that the Board will not take jurisdiction of a case under ORS 656.278 while a claimant has other remedies that remain unexhausted. Accordingly, claimant's request for additional compensation under the provisions of ORS 656.278 is denied.

IT IS SO ORDERED.

ERICA E. MORENO, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-00367
February 18, 1986
Order on Review (Remanding)

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 for elective low back surgery and ordered the payment of temporary disability compensation commencing as of the time claimant enters the hospital and continuing until reclosure of the claim. The issues are entitlement to medical services and temporary disability compensation.

Subsequent to the Referee's order, claimant underwent the requested surgery. Claimant has now offered into evidence post-surgical medical reports. The reports are somewhat vague and conclusory; however, their thrust is that the L5-S1 discectomy and interbody fusion performed in August 1985 has afforded claimant relief from symptoms. We have considered the proferred medical reports solely for the purpose of ruling upon claimant's request that this matter be remanded to the Hearings Division for further development of the record. ORS 656.295(5); Bailey v. SAIF, 296 Or 41, 45 (1983); Muffett v. SAIF, 58 Or App 684, 687 (1982).

In Parmer v. Plaid Pantry #54, 76 Or App 405 (1985), the claimant's request for additional elective surgery was denied and the Referee and Board affirmed that denial. After issuance of our order affirming (albeit for different reasons), the Referee's decision, claimant submitted a conclusory medical report that was arguably probative of the issue in dispute relating to the relationship between claimant's alleged need for surgery and her industrial injury. We declined to remand the case. The court held that our failure to remand the case for additional evidence was error. 76 Or App at 409.

We see no meaningful distinction between the procedural posture of this case and that of Parmer, supra. Although we recognize that remanding this case will not likely change the result reached by the Referee, under the rationale of Parmer, supra, the record in this case is insufficiently.developed. We, therefore, will remand this case to the Hearings Division for further proceedings relating to the effect of the August 1985 surgery on claimant's condition.

We will, however, rule at this time on that portion of the Referee's order that directed the employer to pay temporary disability compensation. The Referee erred in ordering such benefits under the circumstances of this case. Claimant sustained the industrial injury that gives rise to this claim on February 21, 1974. The claim was accepted as disabling and first closed by a Determination Order issued June 2, 1975. Claimant's aggravation rights, therefore, expired in June 1980. ORS 656.273(4)(a). Claimant is no longer entitled to temporary disability compensation as a matter of right. Such compensation would only be payable under the provisions of ORS 656.278; i.e., if voluntarily paid by the employer or ordered paid by the Board in the exercise of its discretion. Claimant has petitioned the Board to order payment of temporary disability compensation under the provisions of ORS 656.278. We have this date issued a separate Own Motion Order in WCB Case No. 85-0572M.

The Referee also erred by ordering by implication that claimant's claim ultimately be closed under the provisions of ORS 656.268. Claimant's claim can at this time only be reopened under the provisions of ORS 656.278 and could only be reclosed under the same authority.

ORDER

The Referee's order dated June 17, 1985 is reversed. This matter is remanded to the Hearings Division for further proceedings consistent with this order.

JEFF E. NOBLE (Deceased), Claimant
Pozzi, et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 84-06490
February 18, 1986
Order of Dismissal

Claimant had previously requested review of that portion of Referee Pferdner's order which upheld the insurer's denial of several physical and psychological conditions. However, by letter dated November 26, 1985 claimant's attorney has notified the Board of claimant's recent death. Inasmuch as claimant was unmarried and left no dependents, his attorney has asked that the request for Board review be dismissed.

Relying upon the above-mentioned representations that claimant is not survived by a statutory beneficiary and having received no objection from the insurer, we grant the request for dismissal.

ORDER

Claimant's request for Board review is dismissed. The Referee's order is final by operation of law.

STEVEN E. PACE, Claimant
Vick & Associates, Claimant's Attorneys
Meyers & Terrall, Defense Attorneys
Mitchell, et al., Defense Attorneys

WCB 83-06016 & 83-11178
February 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Ideal Mutual Insurance Company (Ideal) requests review of that portion of Referee T. Lavere Johnson's order which set aside its denial of a May 17, 1983 low back injury as a new injury and upheld the denial of the self-insured employer, Loomis Armored Car (Loomis), of an aggravation claim. Loomis cross-requests review of that portion of the order which set aside its denial of a July 24, 1982 low back aggravation claim and requests affirmance of the remainder of the order. Claimant cross-requests review of that portion of the order which denied his request for penalties and attorney fees from GAB Services (GAB), processing agent for Loomis while self-insured, for an unreasonable delay in processing his 1982 aggravation claim and his 1983 aggravation claim. The issues on review are responsibility for the 1983 injury claim, responsibility for the 1982 injury claim, and penalties and attorney fees against a processing agent for a self-insured employer.

Claimant injured his low back in the course of his employment on March 9, 1981. The employer was self-insured and accepted the claim. Claimant was released to return to regular work on May 3, 1981 and the treating chiropractor declared claimant medically stationary on February 9, 1982 with minor residuals. Claimant continued to receive infrequent palliative chiropractic care.

On August 2, 1981 Ideal became the employer's insurer. Ideal used Crawford & Company (C & C) to process its claims.

On July 23, 1982 GAB requested closure of the 1981 claim by the Evaluation Division of the Workers' Compensation Department. On July 24, 1982 claimant suffered a sudden increase in pain in his low back while at work. He required medical services and lost time from work. The Department issued a Determination Order on August 5, 1982 which awarded only temporary disability compensation for the 1981 claim. On August 6, 1982 claimant signed a claim form for the July 24, 1982 injury. Someone at Loomis wrote across the face of the form, "it is valid," and, "This is an aggravation of old original injury." The employer submitted the claim to C & C which denied responsibility for the injury because it was an aggravation but did pay interim compensation from July 24, 1982 through September 2, 1982. Claimant did not request a hearing. Claimant was off work from August 2 through August 8, 1982. The treating chiropractor declared claimant medically stationary on September 27, 1982.

Claimant was told by his supervisor that the chiropractor's bills would be paid. GAB paid the treating chiropractor's bills.

Claimant continued to receive infrequent palliative chiropractic care. On May 16, 1983 claimant was examined by Dr. Bolin, chiropractor, at the request of C & C. Dr. Bolin found claimant had preexisting scoliosis and disc degeneration which required chiropractic treatment but that the effects of the 1982 incident had resolved and were not contributing to claimant's need for treatment at that time.

On May 17, 1983 claimant suffered another sudden increase of pain in his low back while working. He required daily chiropractic treatment for two weeks and lost time from work from May 20 through May 30, 1983. The employer signed the claim form on May 25, 1983 and claimant signed the claim form on May 27, 1983. The claim was submitted to C & C which paid interim compensation from May 20 through May 30, 1983 and denied the claim. C & C's denial characterized the claim as for an aggravation of the 1982 injury claim, which C & C had denied, without waiving other questions of compensability.

Claimant requested a hearing. At the first hearing Referee Seymour found that Loomis and GAB were necessary parties and ordered that they be joined. See Inkley v. Forest Fiber Products Co., 288 Or 337 (1980). Loomis and GAB were represented by one attorney. At the second hearing, May 29, 1984, Loomis and GAB orally denied the 1982 and 1983 aggravation claims and new issues were introduced. Referee Seymour ordered the hearing rescheduled. On July 27, 1984 GAB denied the 1982 and 1983 claims by denial letters with appeal rights notices. On November 9, 1984 a hearing was held before Referee Johnson.

On the issue of responsibility for the 1983 injury claim, the Board affirms the order of the Referee. Claimant had a preexisting condition for which he required only infrequent palliative care to continue working full-time. On May 17, 1983 in the course of his employment, claimant suffered a sudden increase in his low back pain which required medical services and necessitated time loss. We agree with the Referee's analysis that this was a new injury for which Ideal was responsible for compensation.

On the issue of responsibility for the 1982 claim, the Referee found that GAB's payment of chiropractor's bills from July 1982 through March 1983 was a de facto acceptance which could not later be denied and ordered GAB to pay compensation for medical services and temporary disability between July 1982 and May 17, 1983. We disagree with the Referee's reasoning although we agree with the conclusion. Mere payment of medical bills does not constitute an acceptance of a claim. ORS 656.262(9). It was the employer's responsibility to process or insure processing of the claim. The employer characterized the 1982 claim as an aggravation and stated that it was valid. The employer was self-insured for the original claim and was, therefore, directly responsible for processing the 1982 aggravation claim. When C & C denied responsibility for the 1982 claim as a new injury, had the employer wanted to avoid responsibility for the claim, the appropriate processing action would have been to deny responsibility and join C & C in a request for an order under ORS 656.307(1)(b). See Inkley v. Forest Fiber Products Co., supra; Giordano Zorich, 36 Van Natta 1599 (1984); Quinten S. Hargreaves, 35 Van Natta 156 (1983).

That the processing agent paid the medical bills, whether as compensation for an aggravation or as continuing care related to the original injury or even as a voluntary payment in spite of de facto denial, is immaterial to the issue whether the 1982 event was an aggravation or a new injury. Claimant was left in the peculiar position of having received all of the medical and disability compensation to which he might reasonably be entitled without anyone having accepted his claim. C & C denied responsibility for processing the claim, and the denial became final. The employer was responsible for compensation regardless of whether it provided for its responsibility through a guaranty contract or as a self-insurer. The original industrial injury continued to be a material contributing cause of claimant's disability according to the treating chiropractor. In these circumstances, we agree with the Referee's conclusion that the 1982 claim should be remanded to the self-insured employer for processing as an aggravation of its accepted industrial injury claim.

On the issue of penalties against GAB for unreasonable claims processing, we first note that the Workers' Compensation Law does not provide a statutory basis for an award of penalties against a processing agent. The contractual arrangement between the self-insured employer and its processing agent regardless of its terms, could not transfer the primary responsibility for claims processing away from the self-insured employer. The law provides for penalties against employers who are responsible for claims processing and claimant's request for penalties and attorney fees will be considered as made against the employer. ORS 656.382 through 656.455.

The employer knew that an aggravation claim had been made in August 1982 and the claim was neither accepted nor validly denied by the employer until the denial letter of July 27, 1984. Claimant missed only one week of work due to the 1982 aggravation and is, therefore, only entitled to one week's interim compensation. Bono v. SAIF, 298 Or 405 (1984). However, each potentially responsible insurer owed claimant interim compensation for the period in which he was off work due to his industrial injury, whether as an aggravation or a new injury, unless it denied the claim within 14 days of the appropriate notice. ORS 656.262(4); Bono, supra; Jones v. Emanuel Hospital, 280 Or 147 (1977); Martin J. Ridge, 37 Van Natta 768 (1985); Giordano Zorich, supra; Darrell Messinger, 35 Van Natta 161 (1983). For a party who might be responsible on a claim of aggravation, the relevant period to pay or deny compensation was 14 days after medical verification of inability to work due to worsening of the accepted condition. ORS 656.273(6). Thus, claimant had the right to receive interim compensation from each insurer for the period he was off work due to the 1982 injury without offset for payments made pending denial until authorized by Determination Order. The employer must pay the interim compensation because it is a self-insurer.

The Referee ordered GAB to reimburse C & C for the interim compensation C & C paid claimant on the July 1982 claim and allowed GAB to offset that payment against any amounts due claimant. The Referee relied on Petshow v. Portland Bottling Company, 62 Or 614 (1983), for the proposition that claimant was not entitled to double payment of interim compensation and that the offset could be assumed.

In Petshow, the claimant made an aggravation claim and a new injury claim. The aggravation insurer commenced temporary disability compensation payments. The new injury insurer delayed accepting or denying the claim and delayed payment of interim compensation. After the new injury insurer commenced payment of interim compensation, an order issued pursuant to ORS 656.307 which designated a paying agent pending hearing. The court stated, "The worker is not entitled to recover double the statutory sums [referring to temporary total disability compensation, ORS 656.210] simply due to uncertainty as to which insurer is responsible for compensation," but concluded, "It was not error, therefore, to require that an eventual determination order awarding permanent partial disability include an offset for excessive TTD benefits."

We read Petshow to allow the recovery of overpaid temporary disability compensation paid as interim compensation out of permanent disability compensation awarded by Determination Order, when and if a Determination Order is issued. We do not read it as authority to allow an insurer to unilaterally circumvent the orderly statutory process provided by ORS 656.307 for designation of a single paying agent pending determination of responsibility between or among insurers when compensability is not denied.

In the recent case of Fischer v. SAIF, 76 Or App 656 (1985), the court held that when one insurer was paying temporary total disability compensation for a wrist injury and claimant then sustained a disabling foot injury with the same employer, claimant is not entitled to double payment of compensation even though the injuries were sustained in separate accidents. The court affirmed the Board's order which allowed SAIF to avoid an overpayment by unilaterally suspending payment on one claim while paying temporary total disability compensation on another claim. There was no doubt that SAIF was responsible for payment of claimant's temporary disability compensation because claimant had two accepted injuries and SAIF was responsible for compensation for both. See also Carl R. Osborn, 37 Van Natta 55 (1985), 36 Van Natta 1648 (1984), aff'd mem, 77 Or App 567 (CA A34772, February 5, 1986) (one employer and one insurer; one injury claim and one unrelated occupational disease claim; the insurer was allowed to pay only the amount of temporary disability compensation authorized by the statute without double payment and subsequent offset).

The situation in this case is more like that in Petshow than that in Fischer. In this case, there is one employer but two insurers; the employer as self-insurer and a guaranty contractor. When the guaranty contractor began payment of interim compensation, the employer did nothing. When the claim was denied by the guaranty contractor, the employer paid medical bills, but did not provide claimant with either a notice of denial or acceptance. Therefore, because both the guaranty contractor and the employer owed claimant the duty to pay interim compensation based on time loss due to an admittedly compensable injury once the appropriate notice was received, we conclude that the employer (or GAB) should not reimburse C & C (or Ideal) the interim compensation C & C paid pending denial of the 1982 claim. The employer should pay claimant the temporary disability compensation due him for the week he was disabled in addition to the interim

compensation paid by C & C subject to offset in the future against a permanent disability award if authorized by Determination Order. We also find that the employer's delay of almost two years unreasonably delayed payment of compensation and the employer should pay claimant a penalty in addition to compensation of 25 percent of the amount due for temporary total disability for the one week claimant was off work due to his injury in 1982.

On the issue whether the employer should pay a penalty for unreasonable processing of the 1983 claim, it had notice of the claim on May 20, 1983 when claimant was unable to work and on May 25, 1983 when it signed the claim form. Again it had the duty to pay claimant interim compensation for that period which claimant was off work due to the injury as verified by his doctor unless it denied compensability or responsibility within 14 days of the verification. Bono, supra; Jones v. Emanuel Hospital, supra. It had medical verification of claimant's inability to work when it received a claim letter dated December 8, 1983 which included the treating chiropractor's report of disability or at the very latest by February 17, 1984 when it received C & C's medical file.

No interim compensation was paid. No denial letter with appeal rights was issued until July 27, 1984. The employer's first denial of responsibility, according to the record, was at the second hearing in this case, May 29, 1984. Claimant received actual notice of the denial and had already sought a hearing on the issue of responsibility for compensation, therefore we find that substantial compliance with the notice-of-denial requirement was met at the second hearing. Cf. Zurich Ins. Co. v. Diversified Risk Management, 300 Or 47 (1985); Stroh v. SAIF, 261 Or 117 (1982) (actual notice by mailing is sufficient compliance with statute to achieve purpose of statute in spite of technical violation of statute). Claimant was entitled to compensation for temporary disability from the employer for the time he was off work due to his industrial injury in May 1983 subject to offset for overpayment by the responsible insurer if authorized by Determination Order as previously discussed. We find that the employer unreasonably delayed compensation by its failure to deny the claim in a timely fashion and that it should pay claimant a penalty in addition to compensation of 25 percent of the amount due as interim compensation for the 1983 claim.

This resolution achieves substantial justice among the parties and follows the statutory system for resolving responsibility disputes. The duty of proper claims processing is placed on the employer and its agents rather than on the claimant. The simple statutory procedure for resolving payment responsibility disputes pending hearing, if followed, prevents a windfall to the claimant. However, failure to follow the statute results in needless payment of compensation by at least one entity with a future opportunity to recoup the overpayment dependent on authorization of an award for permanent disability and authorization of an offset for the overpayment. The employer's and insurer's remedy of resort to a .307 order retains its vitality as a tool to promote prompt and reasonable claims processing through the designation of a paying agent by the Department rather than leaving the onus of payment of compensation to the first insurer who correctly and reasonably responds to the claim. The risks of claims processing properly lie with the insurer and employer rather than on the claimant pending resolution of the responsibility question.

The employer requested that the Board affirm the Referee's order other than that portion which found it responsible for the 1982 condition as an aggravation. The Referee ordered GAB to reimburse C & C for its claims costs relative to the 1982 claim. We agree with the Referee's reasoning, but because we find that the employer and not GAB was responsible for processing the claim under the statute, we modify the Referee's order to substitute the employer for GAB.

Because our resolution of the issues involving claimant's claim does not involve claimant's right to compensation, and the employer (or GAB) does not otherwise seek relief from the order, we affirm the remainder of the Referee's order. The employer's responsibility to reimburse C & C (or Ideal) is separate and in addition to its responsibility to pay claimant the compensation awarded by this order.

ORDER

The Referee's order dated March 20, 1985 is reversed in part, modified in part, and affirmed in part. Those portions of the order which: (1) allowed GAB to offset payment of interim compensation by Crawford and Company against temporary total disability compensation owed by GAB; and (2) denied claimant's request for penalties, are reversed. Loomis Armored Car shall pay claimant temporary disability compensation as interim compensation for the periods of disability related to the injuries of July 24, 1982 and May 17, 1983 and in addition to compensation shall pay claimant 25 percent of the compensation as a penalty. Loomis shall pay $250 penalty associated attorney fees for services related to the July 24, 1982 penalty claim and $250 for services related to the May 17, 1983 penalty claim to claimant's attorney in addition to compensation and penalties. Loomis shall not offset payment of interim compensation by Crawford and Company or Ideal Mutual Insurance Company against temporary total disability compensation owed by Loomis pursuant to this order. Wherever the Referee ordered GAB Business Services, Inc. to perform some function, the order is modified to order Loomis Armored Car to perform that function. The remainder of the order is affirmed.

DARRELL L. RAMBEAU, Claimant
Bennett, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB TP-85011
February 18, 1986
Third Party Order

Claimant has petitioned the Board to resolve a dispute as to the just and proper distribution of the proceeds of a settlement of an action against a third party. We have jurisdiction pursuant to ORS 656.593(3). See Denton v. EBI Companies, 67 Or App 339 (1984). The only issue is whether the insurer is entitled to include within its statutory lien, ORS 656.580(2), the cost of an independent medical examination and the cost of payments made in connection with claimant's vocational assistance program.

We have previously held that the cost of an independent medical examination is not properly includable in a paying agency's lien against a third party recovery. Shaun Cutsforth, 35 Van Natta 515, 517 (1983). Our reasoning was that the independent medical examination was not shown to have any purpose other than preparation for litigation. There is, in this case, no showing

that the examination served any purpose other than litigation preparation, and we adhere to our reasoning in Cutsforth.

The insurer seeks to include within its lien the sum of $1,847.65, representing payments it made to claimant's vocational assistance provider and temporary disability compensation paid to claimant during the vocational assistance program. These costs have been reimbursed to the insurer by the Workers' Compensation Department. The insurer acknowledges that it is required to reimburse the Department if it is permitted to include the costs within its lien.

In Raymond D. Taylor, 37 Van Natta 1082 (1985), we held that, under the law as it then existed, funds paid by the Department to reimburse paying agencies for vocational assistance expenditures were not properly a part of the paying agencies' lien against third party recoveries. We reached this conclusion because of the restrictive definition of "paying agency" of ORS 656.576, which does not include the Workers' Compensation Department.

Effective January 1, 1986, ORS 656.593 was amended to include a new subsection (4), which broadens the definition of "paying agency" for the purpose of distribution of third party proceeds to include the Department "with respect to its expenditures from the Rehabilitation Reserve or the Administrative Fund in reimbursement of the costs of another paying agency for vocational assistance." 1985 Or Laws, Chapter 600, section 12. Also effective January 1, 1986, ORS 656.202 was amended to add a new subsection (5), which provides that that section does not apply to vocational assistance benefits. 1985 Or Laws, Chapter 600, section 6. We conclude that the amendment of ORS 656.593 to allow the Department to recover its vocational assistance reimbursement costs, together with removal of vocational assistance benefits from the application of ORS 656.202(2) which provides for benefits under the law in force at the time of injury, result in a new procedure for the allocation of vocational assistance costs among all parties, including the public.

Procedural statutes apply to pending actions, regardless of the time of accrual or filing of the action. Smith v. Clackamas County, 252 Or 230, 234 (1969). This new procedure prevents windfalls both to claimants and paying agencies at the expense of the Rehabilitation Reserve or the Administrative Fund. Applying the current law to this case, we conclude that the insurer's just and proper share of claimant's third party settlement should include the $1,847.65 in vocational assistance costs that it has acknowledged must be repaid to the Rehabilitation Reserve.

The insurer has withdrawn its request for inclusion in its lien of any sums representing the present value of reasonably to be expected future claim costs.

We hold that the insurer's just and proper share of the proceeds of claimant's third party settlement is $11,021.51, itemized as follows:

Temporary Disability Compensation	$ 5,384.01
Medical Expense	$ 3,789.85

Vocational Assistance Expense	$ 1,847.65
Total	$11,021.51.

The Parties shall make the necessary financial adjustments and effect distribution of the settlement proceeds consistent with ORS 656.593 and this order.

IT IS SO ORDERED.

STANLEY C. STANCHFIELD, Claimant
Troisi & Birnbaum, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-12187
February 18, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Pferdner's order that set aside its denial of claimant's bilateral arm and hand condition. In the alternative, the employer requests remand to permit the deposition of Dr. Nathan.

Claimant has worked for the employer primarily as a mechanic since 1976. His work requires the heavy use of large hand tools. On September 26, 1981 claimant twisted his wrist while using a heavy-duty drill. The resulting symptoms quickly resolved.

Claimant visited Dr. Leveque in August 1984 complaining of numbness and pain in both arms. Carpal tunnel syndrome and thoracic outlet syndrome were suspected. On October 17, 1984 claimant was examined by Dr. Nathan, a hand surgeon, who felt that claimant indeed suffered from carpal tunnel syndrome, but that it was unrelated to claimant's twisting injury. Dr. Nathan recommended carpal tunnel release surgery but found no evidence of thoracic outlet syndrome. Carpal tunnel surgery was performed on October 29, 1984.

In January 1985 Dr. Leveque stated that he could not attribute claimant's problems to any acute event or sequence of events occurring within the last year. He felt, however, that most or all of claimant's work activities are known to cause carpal tunnel syndrome. He disagreed with Dr. Nathan that claimant's claim was idiopathic. Dr. Leveque also felt it probable that claimant's condition was an outgrowth of his years of mechanic work.

Claimant offered all of the medical reports presented at hearing. The employer subsequently notified the Referee that it had planned to present the testimony of Dr. Nathan and had discussed the matter with claimant's attorney. The employer requested that the record be left open. On questioning by the Referee, the employer's attorney admitted that he had known for nearly a month that Dr. Nathan would not be available at the time of the hearing.

After admonishing counsel to advise the Referee before the hearing of counsel's intention to request a continuance, the Referee denied counsel's request. The employer then objected to the admission of Dr. Nathan's and Dr. Leveque's reports,

contending that medical reports are prima facie evidence only if opposing counsel is allowed an opportunity to cross-examine the author of the report or the author is made available for cross-examination. The Referee overruled the employer's objection and admitted the pertinent medical reports. On review, the employer asks that we remand for the taking of Dr. Nathan's deposition.

We may remand if we determine that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee. ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). The employer contends that the case was improperly heard. It argues that for the reports offered by claimant to be admissible under ORS 656.310(2), the employer must be allowed an opportunity for cross-examination. The employer contends that the Referee abused his discretion in refusing to hold the record open for the deposition of Dr. Nathan.

ORS 656.310(2) provides that medical and surgical reports are prima facie evidence of the matters contained therein, provided that the authors are willing to submit to cross-examination. The statute suggests that a willingness to be deposed or answer written questions is sufficient. Nothing in the statute appears to preclude deposition or interrogatory prior to hearing.

Although claimant offered Dr. Nathan's report, of greater consequence is the fact that Dr. Nathan's report clearly favors the employer's position. There is no indication that the doctor would not have cooperated had the employer sought additional information or a deposition before hearing. Assuming without deciding that the present employer is entitled to cross-examination under these circumstances, the employer has failed to show that it was denied its opportunity. Accordingly, we find that the Referee's refusal to hold the record open was not inconsistent with his statutory obligation to conduct the hearing in a manner that will achieve substantial justice. See ORS 656.283(6).

We exercise our discretion to remand only if we find that material evidence was not available despite counsel's due diligence before hearing. See Delfina P. Lopez, 37 Van Natta 164, 170 (1985). The present employer has neither demonstrated diligence in seeking additional information from Dr. Nathan nor suggested the nature of the additional evidence it now wishes to to present. Remand is not appropriate.

We next consider the compensability of claimant's bilateral arm and hand condition. First, we note that the Referee rejected Dr. Nathan's opinion in this case solely on the basis of the physician's opinions offered in other cases. We agree with the employer's contention that the Referee was not at liberty to consider information not introduced at this hearing. Groshong v. Montgomery Ward Co., 73 Or App 403, 408 (1985); SAIF v. Carter, 73 Or App 416 (1985).

We base our de novo review on the record developed before the Referee. See 656.259. Where the record contains medical opinions, we weigh each to determine its persuasiveness. We rely on the parties to fully develop the record, including the medical evidence. Richard L. Manley, 37 Van Natta 1469 (1985). The reasoning supporting the medical opinions is generally of primary assistance to us.

In the present case Dr. Leveque opines that claimant's condition is work-related. Dr. Nathan opines that the condition is idiopathic. The record does not contain a physiological explanation of the basis for either doctor's opinion. A doctor's conclusion regarding causation is entitled to little weight when it is accompanied by no basis with which to judge the persuasiveness of the conclusion. Moe v. Ceiling Systems, 44 Or App 429 (1980).

Claimant has the burden of proving the compensability of his claim. We have considered the record as a whole, including claimant's testimony, and find the evidence to be in equipoise. Accordingly, claimant has not carried his burden of proof. We reverse the Referee and reinstate the self-insured employer's denial.

ORDER

The Referee's order dated April 30, 1985 is reversed.

RICKEY A. STEVENS, Claimant
Michael S. Fryar, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 84-00419
February 18, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Galton's order that upheld the insurer's denial of claimant's injury on the ground that claimant was a sole proprietor who had failed to elect coverage pursuant to ORS 656.128 and, therefore, was not a subject worker. Claimant contends that, under an equitable estoppel theory, he should be considered a subject worker entitled to benefits under the Act.

We agree with the Referee's conclusion that claimant is not a subject worker. Although we affirm the Referee's order, we do so under a different approach.

At all times material herein, claimant was a self-employed painter. He formerly was a partner in a partnership engaged in the business of painting. During that period, the partnership did not have workers' compensation coverage but did have private disability income insurance.

When the partnership dissolved, claimant inquired of his Farmers Insurance agent concerning workers' compensation coverage for himself. Claimant was informed that Farmers would not issue such a policy, and the price quote obtained from the SAIF Corporation seemed inordinately expensive.

Upon the advice of his bookkeeper, claimant contacted the Jack Titus Insurance Agency in early February of 1983. He spoke to Mr. Henry on the telephone. The facts are disputed as to exactly what conversation took place. Claimant testified that he informed Mr. Henry that he would be performing work as a sole proprietor without employes, and that his expected net income was $27,000. Mr. Henry testified, and a workers' compensation insurance application reflects, that claimant told Mr. Henry that he was interested in purchasing workers' compensation insurance as

a sole proprietor with four employes whose combined salaries were expected to equal $27,000 a year. At the end of the telephone conversation, Mr. Henry apparently informed claimant that he had workers' compensation coverage.

Although Mr. Henry took claimant's order, Mr. Titus himself completed the application form. This application was forwarded to the insurer herein, Continental Insurance Company, and the insurer thereafter issued a guaranty contract indicating that claimant had coverage as an individual with four employes, effective February 4, 1983. The guaranty contract reflects that a non-subject worker election of coverage had not been made.

This guaranty contract was immediately forwarded to the Workers' Compensation Department, which thereafter issued a Notice of Compliance certifying that claimant was "complying with the workers' compensation law."

Claimant was billed $250 as a deposit for his workers' compensation policy, the estimated annual premium for which was $3,814 including tax assessment. The testimony is conflicting concerning whether this deposit was ever paid. Claimant testified that he borrowed $250 in cash and delivered this payment to an office in Beaverton. The Titus Insurance Agency is located in southwest Portland, and they have no record that payment was made.

Claimant never saw the guaranty contract, nor did he ever obtain his workers' compensation insurance policy. Mr. Titus testified that four or five weeks after claimant ordered workers' compensation insurance, claimant contacted the insurance agency and indicated that he would not require coverage until sometime after May of that year. Therefore, Mr. Titus attempted to contact the Continental office responsible for writing the policy and inform them that the order had been cancelled. This effort was unsuccessful, however, and when the policy arrived in Mr. Titus' office, he immediately returned it to the insurance company with instructions to cancel it.

Claimant was injured on June 22, 1983 while acting in the course of his regular employment as a painter. He was traveling in a motor vehicle from one job to another when his automobile was rear-ended. As a result, claimant sustained injuries diagnosed as cervical, thoracic and lumbar strain, head lacerations, concussion and a right arm strain. Claimant's attending physician, Dr. Gray, completed a Farmers Insurance attending physician's report form. Claimant completed a health insurance claim form.

Claimant testified that he called Jack Titus' office the week that he was injured. He spoke with a woman on the phone, told her he had sustained an injury, and that he had workers' compensation coverage "from their office." After being placed on hold for a while, claimant was informed that the office had no file and no records concerning the alleged coverage, and that he had the wrong office. As a result, he felt that he did not have workers' compensation coverage.

By notice dated August 12, 1983, Continental Insurance Company advised claimant that his workers' compensation policy and the related guaranty contract was cancelled effective February 4, 1983. The reason given for cancellation was stated as, "Replaced." Claimant testified that he never received this notice of termination.

In October of 1983 Continental sent claimant a workers' compensation employe and employer contribution report. Claimant may have understood that this was a bill for payment; alternatively, he in fact received a billing from Continental at or about this time, but the billing was not submitted in evidence. (The record does contain May 1 and May 11, 1984 billings from Continental in the approximate amount of $1,800 for workers' compensation coverage for the period February 4, 1983 to September 16, 1983.) In any event the document received from Continental prompted claimant to call the insurance company in order to ascertain the amount of the premium. He spoke to a Mr. Jolly, who apparently informed him that the premium was $3,600. (We note that at all times material, including the time of hearing, claimant's address in Portland has remained the same. Although he apparently received some document from Continental Insurance in October of 1983, he testified that he did not receive the August 12 notice of cancellation. Both documents are addressed to claimant's residence.) Claimant testified that when Mr. Jolly informed him of the amount of the premium, claimant informed him that the company could deduct that amount from "what they owed me when I was injured on June 22nd." After placing claimant on hold, Mr. Jolly came back on the line and, according to claimant, stated, "'Mr. Stevens, due to the circumstances, let's forget that you had a policy, you don't owe us anything, and we don't owe you anything.'"

Claimant thereafter filed his claim for workers' compensation benefits by completing a Form 801 dated October 28, 1983. By formal denial dated November 15, 1983, Underwriters Adjusting Company, in behalf of Continental Insurance Company, denied the claim on the grounds that claimant was a sole proprietor who had failed to elect coverage for himself, and that the claim was not filed in a timely manner. At the hearing the timeliness defense was withdrawn.

The Referee resolved all disputed facts and discrepancies in the witnesses' testimony in claimant's favor based upon his finding that claimant, claimant's Farmers' Insurance agent and Ms. Childs, a representative of Continental Insurance Company, were "entirely credible and reliable witnesses," and that Messrs. Henry and Titus were "totally lacking in credibility and reliability." He went on to conclude as follows:

> "Claimant forcefully and convincingly contends that Continental should be estopped to deny coverage for claimant in light of the facts found above and since it caused the issuance of a Notice of Compliance in the face of claimant's request for elective coverage as a sole proprietor. Although the equities overwhelmingly preponderate in claimant's favor, I find I am unable to extend coverage to claimant under an estoppel theory based upon the errors, misrepresentations and omissions of the Titus Insurance Agency. Had claimant consulted and contracted directly with UAC [Underwriters Adjusting Company] and/or Continental, I would strongly be inclined

> to find coverage based upon estoppel. But to impose coverage upon UAC/Continental by virtue of estoppel against the Titus Insurance Agency would be to exceed my authority."

Our approach to this case is somewhat different. ORS 656.027(7) provides (as it did on the date of claimant's injury) that sole proprietors are nonsubject workers. ORS 656.128 provides (as it did on the date of claimant's injury) that sole proprietors may elect coverage in order to be entitled to the benefits of the workers' compensation law. Subsection (1) provides:

> "A person who is a sole proprietor . . . may make written application to an insurer to become entitled as a subject worker to compensation benefits. Thereupon, the insurer may accept such application and fix a classification and an assumed monthly wage at which such person shall be carried on the payroll as a worker for purposes of computations under this chapter." (Emphasis added.)

Subsection (2) states that when the insurer accepts the sole proprietor's application for coverage, "such person thereupon is subject to the provisions and entitled to the benefits of this chapter."

Subsection (3) states:

> "No claim shall be allowed or paid under this section, except upon corroborative evidence in addition to the evidence of the claimant."

Subsection (4) provides that a sole proprietor who has elected coverage may cancel the election by giving written notice to the insurer.

Thus, the statute requires that an election to obtain coverage as a sole proprietor be in writing and contemplates that the election continues in effect until it is cancelled by a written notice to the insurer. Furthermore, the statute provides that "the evidence of the claimant," presumably, the claimant's testimony, standing alone is insufficient evidence of coverage under the statute.

The undisputed facts in this case are that claimant never completed a written application for workers' compensation insurance, let alone an application for personal election. Nor did claimant sign an application form completed by the insurance agency's office. All of the dealings were over the telephone. If the legislature had any scenario in mind when it enacted ORS 656.128 and the provision requiring a written application, it must have been one similar to that presented in this case.

In SAIF v. D'Lyn, 74 Or App 64, 68 (1985), the court affirmed our holding that the claimant had effectively elected coverage for herself by completing the insurer's general application for workers' compensation insurance. We held that

claimant's written application for workers' compensation insurance, together with the notations written on the application by the insurer's employe, constituted a sufficient written application pursuant to ORS 656.128. We also concluded that the insurer accepted the application when it cashed claimant's check for a deposit and fees.

The differences between this case and D'Lyn, where there was a written application and independent evidence corroborating the claimant's testimony that she had elected coverage, are obvious. Claimant's testimony that he informed the insurance broker that he desired to obtain coverage for himself as a sole proprietor is insufficient to sustain his burden of proving that he made the personal election required by ORS 656.128. The testimony concerning the conversations and transactions between claimant and his Farmers Insurance agent are not sufficiently corroborative to sustain claimant's burden of proof. Considering the requirements of ORS 656.128, claimant cannot be deemed to be a subject worker under an equitable estoppel theory. Accordingly, we affirm the Referee's order upholding the insurer's denial.

ORDER

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

VERNITA V. THOMPSON, Claimant
Michael B. Dye, Claimant's Attorney
Beers, Zimmerman & Rice, Defense Attorneys

WCB 84-04284
February 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of that portion of Referee Peterson's order which awarded claimant permanent total disability in lieu of the Determination Order dated April 5, 1984 which awarded 96° for 30% unscheduled permanent partial disability for injury to claimant's shoulders and cervical and lumbosacral spine. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

Claimant was a primary care provider for invalid in-laws for thirty years before obtaining employment at a nursing home. She worked at the nursing home for three years before sustaining strain injuries to her neck, shoulders and low back while assisting a resident of the nursing home on May 20, 1983. She received conservative care. Her attending physician ultimately released claimant to return to work with no lifting in excess of 20 pounds.

The employer had no job for claimant which fit within her doctor's prescribed limitation. Claimant obtained her community college certification as a Home Health Care Aide with the assistance of a private vocational rehabilitation agency while working part time as a home health care provider through two placement agencies. Claimant's attending physician, through the registered nurse practitioner who was under his supervision, authorized claimant's return to work and approved the job description of Home Health Care Aide.

Claimant's limitations were known to the placement agencies at which claimant registered. Claimant obtained a few

placements through two agencies as a home health care aide, but the jobs required her to lift in excess of her prescribed limits. In July 1984 claimant was unable to continue working because she injured a foot. The foot injury was unrelated to employment. Claimant obtained no further employment after the foot injury.

In September 1984 claimant was examined by a neurosurgeon, Dr. Cruickshank. Dr. Cruickshank reported his opinion that claimant's complaints were exaggerated and unsupported by the physical examination findings. He recommended continuing supportive conservative care. In October 1984 Dr. Leavitt, general practitioner, wrote a cryptic letter with the conclusion that claimant will never do manual labor again. There is nothing else in the record from Dr. Leavitt.

Claimant testified that she would like to return to work as a home health care aide but that she thinks no one would hire her. She has not returned to the Upjohn agency because someone there said they would not refer her out on jobs if she could not do lifting work. Claimant was supposed to notify the Quality Care agency that she was again available for referrals after she completed moving her household, but she had not called the agency by the time of the hearing.

The Upjohn agency had accepted claimant for referral knowing that she had a restriction on her lifting ability. Whether they were unable or merely unwilling to place claimant in jobs within her limitations is not settled by the record. The record contains only claimant's uncorroborated representation of the statement of an unnamed person.

The Referee ruled that he would consider the disability resulting from claimant's subsequent unrelated foot injury in determining the extent of permanent disability. It was error to consider the subsequent injury because it was not related to claimant's industrial injury. Emmons v. SAIF, 34 Or App 603 (1978); Ellen Lankford, 37 Van Natta 1146 (1985).

In order to meet the burden of proving that she is permanently and totally disabled, claimant must establish that she is unable to perform work at a gainful and suitable occupation. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Although claimant is substantially disabled, she is not totally incapacitated. Because she is capable of performing some work, she can succeed in the claim for permanent and total disability only if she can prove that she 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 physical impairment 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 she is willing to seek regular gainful employment and that she 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 claimant 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 was capable of regularly performing work at a gainful and suitable occupation at the time of the hearing, but had not met the seek work requirements of ORS 656.206(3) nor had she proven it would be futile for her to attempt to find employment as a result of her industrial injury. It appears that claimant has voluntarily withdrawn from the work force as a result of her subsequent unrelated foot injury. Because we find that claimant is not permanently and totally disabled, we then determine the extent of claimant's unscheduled permanent partial disability.

Extent of permanent 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 (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).

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 436-30-380, et seq.; Howerton v. SAIF, 70 Or App 99 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

Claimant was 55 years old, had an eighth grade education, and had extensive experience as a home health care provider and is now certified as a home health care aide through a community college program. Her attending physician has released her to return to light work and has approved the job description of home health care aide. Considering the impairment and the relevant social and vocational factors, we conclude that claimant would be adequately compensated by an award of 160 degrees for 50 percent unscheduled permanent partial disability.

No offset for compensation paid pursuant to the Referee's award of compensation for permanent total disability will be authorized. SAIF v. Casteel, 74 Or App 566 (1985).

ORDER

The Referee's order dated February 28, 1985 is modified. Claimant is awarded 160 degrees for 50 percent unscheduled permanent partial disability in lieu of all prior awards. Claimant's attorney fees shall be adjusted accordingly.

DANIEL J. SABOL, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-11114
February 19, 1986
Second Order on Reconsideration

Claimant has asked that we award an additional insurer-paid attorney fee for services before the Board in response to the SAIF Corporation's request for reconsideration of our Order on Review dated December 17, 1985. We abated that order and requested further briefs from the parties. On January 21, 1986 we issued our Order on Reconsideration in which we republished our previous order. We conclude that claimant's request for additional attorney fees is well-taken. The additional proceedings arising

out of SAIF's request for reconsideration required additional effort by claimant's attorneys and resulted in a second full review of the case.

ORDER

Claimant's motion for additional attorney fees on reconsideration is allowed. The Order on Reconsideration dated January 21, 1986 is modified to award claimant's attorney a reasonable attorney fee for services before the Board on reconsideration in the sum of $300, payable by the SAIF Corporation in addition to compensation and in addition to all other attorney fees awarded in this case. As modified, the Order on Reconsideration is republished effective this date.

DAVID A. BERKEY, Claimant
Vick & Associates, Claimant's Attorneys
Roberts, et al., Defense Attorneys
Beers, Zimmerman & Rice, Defense Attorneys

WCB 83-05108 & 83-10234
February 20, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer, Publishers Paper Company, requests review of those portions of Referee Seifert's order that set aside its denial of claimant's aggravation claim and upheld EBI Companies' denial of claimant's new injury claim. Claimant cross-requests review of those portions of the Referee's order that affirmed the Determination Order that awarded 32 degrees for 10 percent unscheduled permanent partial disability for injury to the low back and approved Publishers' recovery of overpaid temporary disability compensation. The issues are responsibility between subsequent employers, extent of disability and offset of overpaid compensation.

The Board affirms and adopts those portions of the Referee's order that address the issues of responsibility and extent of disability. We also affirm the Referee's order on the issue of offset of overpaid compensation; however, because this case presents a question not previously addressed by us, we wish to make clear our reasons for approving the offset in this case.

The facts relating to the offset issue are uncomplicated. Claimant was injured on December 12, 1982. The claim was first closed by a Determination Order mailed May 18, 1983, which was amended in respects not relevant to this issue on May 27, 1983. The Determination Orders awarded temporary disability compensation through April 13, 1983, but did not grant a permanent disability award. The employer overpaid temporary disability compensation for the period April 13, 1983 through May 18, 1983.

Claimant was injured again on April 29, 1983, while employed by EBI's insured. Both EBI and Publishers conceded that claimant's condition was as the result of a compensable injury or aggravation, but both denied responsibility. Publishers was designated as paying agent by the Compliance Division pursuant to ORS 656.307. Claimant again became medically stationary and on April 6, 1984 his claim was closed under the Publishers claim, the responsibility question remaining unresolved. The April 6, 1984 Determination Order awarded temporary disability compensation from April 29, 1983 through March 21, 1984 and granted claimant 32 degrees for 10 percent unscheduled permanent partial disability for injury to his low back.

The combination of the three Determination Orders' awards of temporary disability compensation resulted in overpaid compensation during the periods April 13 through April 28, 1983 and March 21 through April 6, 1984. Publishers offset the overpaid temporary disability compensation against the permanent disability award granted by the April 6, 1984 Determination Order and presumably paid the remainder to claimant. Claimant does not dispute the fact of overpaid compensation nor the amount thereof. His contention is that the procedure used by Publishers to collect the offset was contrary to the rule of Forney v. Western States Plywood, 66 Or App 155, 160 (1983), aff'd, 297 Or 628 (1984).

In Forney, the Court of Appeals invalidated a Workers' Compensation Department rule (former OAR 436-54-320) that purportedly authorized insurers and employers to reduce benefits without prior authorization from the Evaluation Division, on the ground that the rule was an attempt to expand the precise language of ORS 656.268(4) and 656.325(6). The former statute, in relevant part, authorizes adjustments in compensation by the Department and the latter provides for hearings upon the request of any party on a matter concerning reduction of benefits. The court reasoned that an employer or insurer could obtain authorization from the Department to recover overpaid compensation in the processing that results in a Determination Order, or could obtain authorization from a Referee or the Board thereafter by requesting a hearing, but that former OAR 436-54-320 appeared to authorize reduction of benefits without following the procedures provided by either ORS 656.268(4) or ORS 656.325(6).

We conclude that the problem that existed in the Forney case does not exist in this case. The April 6, 1984 Determination Order in this case contains the following typewritten statement: "DEDUCTION OF OVERPAID TEMPORARY DISABILITY FROM PERMANENT DISABILITY IS APPROVED." ORS 656.268(4) provides in relevant part:

> "Any determination under this subsection may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid. . . ." (Emphasis added.)

The adjustment in compensation made by the employer -- overpaid temporary disability against permanent disability -- is expressly authorized by ORS 656.268(4) and is expressly authorized by the language inserted by the Evaluation Division into the individualized "findings" portion of the Determination Order issued on April 6, 1984.

We have concluded in Robert L. Poague, 38 Van Natta 157 (WCB Case No. 83-12181, decided this date), that the preprinted language chosen by the Evaluation Division and included in every Determination Order issued by the Workers' Compensation Department is not adequate authorization to an employer or insurer to offset overpaid temporary disability payments against permanent disability awards pursuant to ORS 656.268(4). Our distinction is based upon the fact that the preprinted language serves only as an obscure notice in the "fine print" that a claimant's disability award might be subject to some adjustment. We held that such language is not sufficient to authorize a specific offset in a specific case. In this case, the

language authorizing the offset appears in bold type in the portion of the order that is directed at this specific claimant and this specific award. We conclude that the Evaluation Division authorized this offset specifically, in response to the employer's specific request for an offset of overpaid temporary disability.

ORDER

The order of the Referee dated July 27, 1984 is affirmed.

ROBERT L. POAGUE, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, Whitty & Roess, Defense Attorneys

WCB 83-12181
February 20, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Podnar's order that disallowed an offset of overpaid temporary disability compensation out of a permanent disability award on the ground that the offset was taken without prior authorization of the Evaluation Division of the Workers' Compensation Department. The issue is the propriety of the offset. The facts are not disputed.

Claimant suffered an industrial injury in January 1982. His treating physician declared him to be medically stationary as of November 12, 1982. On January 18, 1983 a Determination Order was issued closing claimant's claim with an award of temporary disability compensation through November 12, 1982 and an award of 48 degrees for 15 percent unscheduled permanent partial disability for injury to the low and mid back. Because SAIF continued to pay temporary disability compensation after claimant was medically stationary until the issuance of the Determination Order, ORS 656.268(2), an overpayment of $1,829.43 in temporary disability compensation resulted. Claimant does not dispute the fact of the overpayment nor the amount thereof. SAIF deducted the overpayment from claimant's permanent disability award and paid the remainder to claimant.

The Referee concluded that the manner in which SAIF collected the overpayment was in violation of Forney v. Western States Plywood, 66 Or App 155 (1983), aff'd, 297 Or 628 (1984), because SAIF did not have previous authorization from the Evaluation Division of the Workers' Compensation Department to collect the overpayment by offset. SAIF asserts that it did have prior authorization to collect the overpayment by offsetting it against the permanent disability award, by virtue of the following language that is printed as a part of every Determination Order issued by the Workers' Compensation Department: "Also, any temporary total disability payment you might have received after the termination date specified will be treated as an advance payment on your award, if any."

In Forney v. Western States Plywood, supra, the Court of Appeals invalidated a Workers' Compensation Department rule (former OAR 436-54-320) that purportedly authorized insurers and employers to reduce benefits without prior authorization from the Evaluation Division, on the ground that the rule was an attempt to expand the precise language of ORS 656.268(4) and 656.325(6). The former statute, in relevant part, authorizes adjustments in compensation by the Department and the latter provides for hearings upon the request of any party on a matter concerning

reduction of benefits. The court reasoned that an employer or insurer could obtain authorization from the Department to recover overpaid compensation in the processing that results in a Determination Order, or could obtain authorization from a Referee or the Board thereafter by requesting a hearing, but that former OAR 436-54-320 appeared to authorize reduction of benefits without following the procedures provided by either ORS 656.268(4) or ORS 656.325(6).

ORS 656.268(4) provides in relevant part:

> "Any determination under this subsection may include necessary adjustments in compensation paid or payable prior to the determination, including disallowance of permanent disability payments prematurely made, crediting temporary disability payments against permanent disability awards and payment of temporary disability payments which were payable but not paid. . . ." (Emphasis added.)

The adjustment in compensation made by SAIF -- overpaid temporary disability against permanent disability -- is expressly authorized by ORS 656.268(4). We are, however, unable to accept SAIF's assertion that the above-quoted "boilerplate" language contained in all Determination Orders constitutes sufficient authority to allow a specific offset from a specific claimant. We find and hold that, at best, the quoted language serves only as a relatively obscure notice that the claimant's permanent disability award might be subject to some adjustment.

We have this date decided David A. Berkey, 38 Van Natta 155 (WCB Case Nos. 83-05108 & 83-10234), in which we have held that language similar to that contained in the preprinted portion of all Determination Orders is sufficient to authorize an offset if it appears in bold-faced type in the individualized "findings" portion of a Determination Order. We have based this distinction on the prominence of the typed language and the fact that it appears in the portion of the order directed at the individual claimant.

ORDER

The Referee's order dated May 17, 1984 is affirmed. Claimant's attorney is awarded $575 as a reasonable attorney fee for services on Board review, to be paid by the SAIF Corporation in addition to compensation.

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

WCB 82-08886 & 83-07686
February 20, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review dated January 24, 1986, to the extent that the order did not allow a fee for claimant's attorney. The request for reconsideration is allowed.

In our previous order, we reversed that portion of the Referee's order that set aside an August 17, 1982 Determination

Order that awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability. We determined that, considering that claimant withdrew his request for hearing on the 1982 Determination Order and the employer did not request a hearing within one year of the order, the Referee was without jurisdiction. Claimant now urges that his attorney is entitled to a fee under the provisions of ORS 656.386(1).

ORS 656.386 provides in relevant part:

> "(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 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 the board shall allow a reasonable attorney fee. . . . Attorney fees provided for in this section shall be paid by the insurer or self-insured employer.
> "(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." (Emphasis added.)

This proceeding does not involve a denied claim and does not involve any of the situations provided for in ORS 656.382. Therefore, there is no statutory authority for an award of an employer-paid attorney fee. This, then, is one of the "all other cases" in which any attorney fee authorized by the Board must be paid "from the claimant's award of compensation . . . ." By rule, the Board has established that such a fee shall be 25 percent of increased compensation, over that awarded by the Referee, not to exceed $3,000 for services at hearing and on Board review. OAR 438-47-040(1). The $3,000 maximum is a guideline; the actual attorney fee award must be based upon the efforts of counsel and the result obtained for the claimant. OAR 438-47-010(2).

Based upon the effort of counsel and the result obtained for claimant in this case, we conclude that claimant's attorney should be allowed a reasonable attorney fee of 25% of the increased compensation awarded by the Board (64 degrees unscheduled permanent partial disability), not to exceed $1,000, for services at hearing and on Board review, payable out of and not in addition to claimant's compensation. We allow this attorney fee with full awareness that the compensation has already been paid to claimant.

ORDER

Our Order on Review dated January 24, 1986 is modified to allow claimant's attorney a reasonable attorney fee for services at hearing and on Board review of 25 percent of the increased compensation awarded by our previous order, not to exceed $1,000, payable out of and not in addition to claimant's compensation. As modified, the Order on Review dated January 24, 1986 is republished effective this date.

JAN D. WALKER, Claimant
Royce, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-03771
February 20, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee St. Martin's order that upheld the SAIF Corporation's denial of claimant's industrial injury claim for the left leg. The sole issue on review is whether claimant's injury arose out of and in the course of her employment.

At the time of her injury claimant was an administrative assistant employed by the Oregon Health Sciences University, a facility within the Oregon Department of Higher Education system. Claimant was also enrolled at Portland State University, taking classes toward an undergraduate degree in a health-related field. Because one of claimant's university classes was held during work hours, she asked for and received permission from her employer to rearrange her work schedule to allow her to attend class. Claimant came to work early so that she could leave to attend her mid-morning class.

On the morning of January 12, 1984, claimant left the building in which she worked and walked to a bus stop where she waited for a city bus to take her to downtown Portland. According to claimant's testimony, the bus arrived but failed to stop for her at the designated stop. It continued around a sharp, downhill corner before the driver apparently saw claimant and stopped for her. Claimant left the bus stop and took a shortcut down a path across a grassy slope in an attempt to catch up to the bus. On the way down the path claimant fell, breaking her left leg. The grassy slope is owned and maintained by the Oregon Health Sciences University.

Claimant filed a claim, which was denied by SAIF on the ground that claimant's injury did not arise out of or in the course of her employment. The Referee affirmed SAIF's denial, holding that claimant's injuries were not compensable because they occurred while she was on a "personal mission."

On review claimant argues that her injury is compensable under the "parking lot" exception to the "going and coming rule." In the alternative, she argues that the injury is compensable under the "work-connection" analysis discussed in Rogers v. SAIF, 289 Or 633 (1980). Because we agree with claimant that her claim is compensable under the "parking lot" rule, we need not address her contentions regarding the "work-connection" test.

As a general rule, injuries sustained by a worker while going to or coming from work are not compensable. Brown v. SAIF, 43 Or App 447 (1979); Gumbrecht v. SAIF, 21 Or App 21 Or App 389 (1975); Theodore P. Brown, 36 Van Natta 51 (1984). There are exceptions to the general rule, however. One is the "parking lot" exception set forth in a series of court cases, Montgomery v. SIAC, 224 Or 380 (1960); Montgomery Ward v. Malinen, 71 Or App 457 (1984); Montgomery Ward v. Cutter, 64 Or App 759 (1983); Willis v. SAIF, 3 Or App 565 (1970), and applied most recently by the Board in Theodore C. Collier, 37 Van Natta 1205 (1985). The parking lot exception provides that an injury sustained while the worker is going to or coming from work is compensable if it occurs in an area controlled by the employer and the area is the only

practicable means by which the worker can get to or from the worksite.

In Montgomery Ward v. Malinen, supra, the claimant was returning to work from a morning of jury duty when she slipped and fell on an icy public sidewalk next to the employer's parking lot. The sidewalk represented one of two means of entering the employer's business, with the remaining means being more hazardous than the sidewalk. The employer had assumed control over the sidewalk by establishing a policy of clearing it of ice and snow when necessary. The employer denied claimant's claim on the ground that at the time of her injury, claimant was returning to work from a personal activity unrelated to her employment. The Referee set aside the denial and the Board affirmed. The Court of Appeals affirmed the Board's order, holding:

> "It makes no difference that claimant had been performing a civic duty or that she was coming to work instead of leaving it. What is controlling is that she was coming to work by the only practicable route across an area that was subject to the employer's control."

In Theodore C. Collier, supra, claimant was hired to drive dump truck by a subcontractor for a paving company. He sustained injuries when he drove his car out of the employer's parking lot on the way home from work and collided with one of the employer's trucks. The truck had been placed in the northbound lane by the employer to discourage traffic from using that newly-paved lane. The public highway upon which the accident occurred was the only thoroughfare by which claimant could travel home. Finding that the employer had assumed control over the area in which claimant was injured, the Board found the claim compensable.

In the present case it is uncontroverted that the site of claimant's injury is an area owned and maintained by the employer. It is also clear that the area in which claimant waited for her bus is a stop regularly used by patrons going to and from the Oregon Health Sciences University by bus. There is evidence that the University encourages persons traveling to or from the facility to use public transportation because of a severe shortage of parking space. Claimant testified that as best she can recall, she took the bus to work on the day she was injured.

We find that as a practical matter, claimant's only means of leaving the University campus was to go to the bus stop that she in fact went to in order to await the arrival of the downtown bus. Her injury adjacent to that stop occurred on a site controlled by the employer. Although the facts of this case are somewhat dissimilar to those of Malinen, Collier, et. al., supra, we find the differences to be insignificant, the "parking lot" rule to be applicable, and claimant's claim to be compensable.

ORDER

The Referee's order dated May 17, 1985 is reversed. Claimant's attorney is awarded $1,750 for services at hearing and $750 for services before the Board, to be paid by the SAIF Corporation.

SHARON M. DUNN, Claimant
Robert B. Johnstone, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-13386
February 24, 1986
Order of Dismissal

The Referee's order in this case was mailed to the parties on August 12, 1985. On February 10, 1986 the attorney for the claimant wrote to the Board inquiring as to the status of a request for Board review of the Referee's order, which was allegedly mailed on or about September 6, 1985. The request was not received by the Board. We must initially determine our own jurisdiction to review the Referee's order. See Knapp v. Employment Division, 67 Or App 231, 133 (1984).

We recently decided that when there is a question regarding whether a request for Board review was timely mailed to the Board, proof of such mailing must conform to the requirements of OAR 438-05-040(4)(b). See William H. Kahl, 38 Van Natta 93 (WCB Case Nos. 83-00907 & 82-10923, February 7, 1986); Roy L. Morris, 38 Van Natta 99 (WCB Case No. 84-05170, February 7, 1986; Brett A. Stevens, 38 Van Natta 110 (WCB Case No. 84-12337, February 7, 1986). That rule provides that, "If the date of mailing is relied upon as the date of filing, there must be acceptable proof from the post office of the mailing date. Acceptable proof from the post office shall be a receipt stamped by the post office showing the date mailed and the certified or registered number." Because proof of mailing is essential to determining our jurisdiction, we apply the rule strictly. See Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983); Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 284 (1971).

Although claimant has offered acceptable proof of mailing to the SAIF Corporation as required by OAR 438-05-040(4)(b), no such proof of mailing to the Board has been offered. We, therefore, conclude that timely mailing to the Board of a request for review has not been established and that we are without jurisdiction to review the Referee's order.

ORDER

The request for review of the Referee's order dated August 12, 1985 is dismissed.

RUSSELL MILLER, Claimant
Malagon & Moore, Claimant's Attorneys
Garrett, et al., Defense Attorneys

WCB 84-13597
February 24, 1986
Order on Dismissal

The Referee's order in this case was mailed to the parties on September 27, 1985. On February 6, 1986 the attorney for the self-insured employer wrote to the Board inquiring as to the status of a request for Board review of the Referee's order, which was allegedly mailed on or about October 14, 1985. The request was not received by the Board. Claimant has moved for an order dismissing the employer's request for Board review on the ground of lack of jurisdiction.

We recently decided that when there is a question regarding whether a request for Board review was timely mailed to the Board, proof of such mailing must conform to the requirements of OAR 438-05-040(4)(b). See William H. Kahl, 38 Van Natta 93 (WCB Case Nos. 83-00907 & 82-10923, February 7, 1986); Roy L.

Morris, 38 Van Natta 99 (WCB Case No. 84-05170, February 7, 1986; Brett A. Stevens, 38 Van Natta 110 (WCB Case No. 84-12337, February 7, 1986). That rule provides that, "If the date of mailing is relied upon as the date of filing, there must be acceptable proof from the post office of the mailing date. Acceptable proof from the post office shall be a receipt stamped by the post office showing the date mailed and the certified or registered number." Because proof of mailing is essential to determining our jurisdiction, we apply the rule strictly. See Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983); Albiar v. Silvercrest Industries, Inc., 30 Or App 281, 284 (1971).

The employer in this case has not come forward with proof of mailing as required by OAR 438-05-040(4)(b). We, therefore, conclude that timely mailing of a request for review has not been established and that we are without jurisdiction to review the Referee's order. Under these circumstances, claimant's attorney is not entitled to an employer-paid attorney fee. Rodney C. Strauss, 37 Van Natta 1212, 1214 (1985).

ORDER

The request for review of the Referee's order dated September 27, 1985 is dismissed.

ROGER A. SHOFF, Claimant
Olson Law Firm, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06347
February 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of those portions of Referee T. Lavere Johnson's order which: (1) set aside SAIF's partial denial of a claim for psychiatric disability; (2) set aside the Determination Order dated September 4, 1984 which awarded 48 degrees for 15 percent unscheduled permanent partial disability for injury to claimant's back; and (3) awarded compensation for permanent total disability. Claimant cross-requests review of that portion of the order which awarded attorney fees of $3,000 and denied claimant's motion to withdraw the Opinion and Order to reconsider and allow a fee petition for an extraordinary fee. Claimant alleges that the Referee abused his discretion when he refused to withdraw his opinion and allow claimant to present a fee petition and requests remand to reopen the record to submit a fee petition. The issues on review are compensability of a psychiatric disability claim, extent of permanent disability including permanent total disability, attorney fees, and whether to remand to allow presentation of a fee petition on the record.

The Board affirms the Referee with the following comment. We find the psychiatric disability claim was causally related to claimant's back injury. There is evidence that indicates that claimant's depressive disorder may have been a preexisting condition. Therefore, we make the additional finding that the effects of the injury worsened that condition. Jeld-Wen, Inc. v. Page, 73 Or App 136 (1985). We further find that the preexisting diabetes related conditions were worsened as a result of the industrial injury and the psychiatric or psychological disability. Cf. Kobayashi v. Siuslaw Care Center, 76 Or App 320 (1985). We conclude that the record establishes that claimant is permanently and totally disabled by reason of his medical condition alone.

On the issue of the attorney fees awarded by the Referee, claimant has submitted a list of services and hours. The Referee awarded attorney fees at the maximum of his discretion absent a showing of extraordinary services. See Larry J. Gildersleeve, 37 Van Natta 1671 (1985). No sworn statement was submitted to the Referee. OAR 438-47-010(2). No showing was made at hearing, nor was a request made at hearing, for an extraordinary fee. The first notice of a request for a fee for extraordinary services was claimant's request which followed the publication of the Referee's order. The request for an extraordinary fee suggested compensation at an hourly rate of $100 whereas the attorney fee agreement on record provides that claimant's attorney customarily charges $60 per hour. We deny claimant's request to modify the attorney fees awarded.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). 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). The evidence which might be obtained by remand is the attorney's representations about his services up to and including the hearing. We consider requests for fees for extraordinary services upon a sworn statement which need not be anything more than an affidavit, but may be provided by testimony at hearing. Claimant's attorney did not indicate at hearing that he believed that the Referee should consider awarding a fee for extraordinary services and no affidavit was submitted. We find the record was not improperly, incompletely, or insufficiently developed or heard and, therefore, we deny claimant's request to remand.

Claimant's attorney is awarded a fee for services on review. See Kenneth E. Choquette, 37 Van Natta 927 (1985).

ORDER

The Referee's order dated July 24, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

WILLIAM H. FLOHR, Claimant
Gary H. Jensen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 81-03508
February 26, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Cronan's order that denied his request for temporary disability compensation in addition to that awarded by the Determination Order and awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for injury to his low back. The issues are premature closure and extent of disability. The SAIF Corporation argues in its brief that the permanent disability award should be reversed. Claimant argues that this case should be remanded to the Hearings Division for a rehearing.

We may remand a matter to the Hearings Division if we find "that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee . . . ." ORS 656.295(5); see Bailey v. SAIF, 296 Or 41, 45 (1983). Claimant, who was not represented by counsel at the hearing, but is now

represented by counsel on Board review, advances several specific objections to the procedures at hearing and to the transcript of testimony.

Upon initial receipt of claimant's objections to the transcript, we remanded this case to the Presiding Referee for correction of the transcript, if necessary. Two minor problems relating to the date of the hearing and claimant's wife's correct name have been corrected. Claimant also objected to the fact that the witnesses who testified at the hearing were not sworn. The Presiding Referee correctly observed that the only persons to give testimony were claimant and his wife. SAIF has stipulated that it has no objection to our reviewing this case on the basis of the documentary evidence and the unsworn testimony. Claimant has not suggested that his or his wife's testimony was untruthful. We agree with the Presiding Referee that the custom of swearing witnesses at workers' compensation hearings is for the protection of the adverse party. We conclude that failure to swear the witnesses does not constitute an improper or incomplete hearing by the Referee under the facts and procedural posture of this case. We also note that swearing of witnesses, while customary in workers' compensation hearings, is not required by statute or administrative rule. Contra ORS 183.415(8) (not applicable to this agency by virtue of ORS 183.315(1)).

Claimant further objects to the fact that a dialogue between the Referee, SAIF's attorney and claimant was not made a part of the record. The transcript reflects the following:

> "[CLAIMANT]: I think she told me the other day on the telephone that I would not be able to discuss anything prior to the injury at the hearing. When I was talking about -- you were talking about one part there and I said I tried to establish a record of gross negligence on the part of [claimant's employer] when I was injured --
>
> "[SAIF's ATTORNEY]: I think this discussion is more appropriately off the record.
>
> "THE REFEREE: So do I. Off the record.
>
> "(Off the record discussion was had.)
>
> "(Hearing concluded.)"

There is no evidence that claimant objected to the dialogue that followed this portion of the transcript being held off, rather than on, the record. Following the conclusion of the hearing, the Referee accepted written closing argument. Although customarily claimant would have filed his closing argument first, SAIF agreed to reverse the order of presentation in this case. In his written closing argument, claimant discussed at length the evidence he wished to introduce and arguments he wished to make which were the subject of discussion during the unrecorded dialogue. We conclude that all of such evidence and argument would have been irrelevant. We, therefore, hold that the failure to record the dialogue after the hearing, if error, was harmless.

Claimant's final objection is that he was not afforded the opportunity to cross-examine the members of a four-physician panel that examined claimant upon the suggestion of his deceased treating physician's colleague, and with whose conclusions claimant takes exception. Claimant was examined by the panel of physicians in August 1982. We conclude from the record that a copy of the report was furnished by SAIF to claimant's former counsel not later than October 5, 1982. The record discloses that claimant disassociated himself from former counsel on October 26, 1982. The hearing in this case convened April 3, 1984, approximately 18 months after the report was received. Claimant voiced his objections to the report in his testimony and verbal and written argument. We conclude that 18 months is more than adequate time in which claimant could have, with due diligence, obtained the cross-examination testimony of one or all of the examining physicians. See Delfina P. Lopez, 37 Van Natta 164, 170 (1985); Robert A. Barnett, 31 Van Natta 172, 173 (1981).

Having fully considered all of claimant's assertions, we find that this matter was not "improperly, incompletely or otherwise insufficiently developed or heard by the referee . . . ." We, therefore, deny claimant's request for remand and rehearing.

On the merits of the claim, the Board affirms the order of the Referee.

ORDER

The Referee's order dated June 18, 1984 is affirmed.

MARTIN P. GERBA, Claimant
Welch, et al., Claimant's Attorneys
Rankin, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-02316 & 84-13538
February 26, 1986
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 or his attorney. In the alternative, claimant requests an extension of time within which to submit a reply brief.

Based upon our agency records and the representations of the parties and counsel, we find the following facts. SAIF's brief was filed with the Board on December 30, 1985, within the time required by OAR 438-11-010(3). Claimant is the appellant in this case. A copy of SAIF's brief was mailed to the attorney for the other employer party in this case; however, a copy of SAIF's brief was not mailed to claimant or his attorney. Once this oversight was discovered, a copy of SAIF's brief was mailed to claimant's attorney on January 3, 1986. SAIF's failure to timely mail a copy of its brief to claimant or his attorney was inadvertent.

Filing of briefs on Board review is not jurisdictional. OAR 438-11-010(3). However, briefs submitted for consideration by the Board must comply with the regulations promulgated by the Board. Id. One requirement is that copies of all documents submitted to the Board must be served upon all other parties. OAR 438-11-010(3)(c). Where there is a failure to comply with the rules relating to the filing of briefs, we will fashion remedies to achieve substantial justice. We conclude that striking SAIF's brief altogether is unduly harsh, given the inadvertent breach of the rule.

The motion to strike SAIF's respondent's brief is denied. The Board will consider a reply brief from claimant if filed within 14 days from the date of this order.

IT IS SO ORDERED.

RANDY L. JACKSON, Claimant
Quintin B. Estell, Claimant's Attorney
Schwenn, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Michael Bostwick, Defense Attorney

WCB 85-00010, 85-03014 & 85-03015
February 26, 1986
Order Allowing Motion to Strike Appellant's Brief

Respondents SAIF Corporation on behalf of employers Dorgan Logging and D & R Cutting have moved the Board for an order striking appellant United Pacific Insurance's brief on the ground that it was not filed in compliance with OAR 438-11-010(3). Appellant's brief was due January 23, 1986. The brief was received by the Board February 6, 1986 and is untimely on its face. No extension of time was requested, in writing or otherwise. See OAR 438-11-010(3)(b).

The appellant's opening brief will not be considered on Board review. The moving respondents and claimant respondent/cross-appellant shall be allowed 21 days from the date of this order to file further briefs. To the extent authorized by OAR 438-11-010, further briefs from the appellant are allowed.

IT IS SO ORDERED.

BERNARD M. KAMPEN, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-04804 & 85-08148
February 26, 1986
Order of Dismissal

The employer has requested review of Referee's order dated January 7, 1986. The request for review was filed with the Board on February 7, 1986, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

THOMAS H. McBEE, Claimant
Gatti, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-11399
February 26, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee T. Lavere Johnson's order which awarded permanent total disability, whereas an August 23, 1984 Determination Order awarded 25 percent (80 degrees) unscheduled permanent disability for a low back injury. On review, the insurer contends that claimant failed to establish entitlement to an award of permanent total disability. We agree and reverse.

Claimant was 55 years of age at the time of hearing. In October 1980, while working as a bartender, he compensably injured his low back when he slipped on some ice. His condition was diagnosed as lumbosacral strain, with a history of an August 1978

lumbar laminectomy. Following conservative treatment, claimant returned to work in December 1980. He suffered periodic exacerbations, but continued to work until March 1983, when he suffered a "lifting" injury. A myelogram revealed a significant disc protrusion. Thereafter, Dr. Campagna, neurosurgeon, performed surgery.

In September 1983 Dr. Campagna released claimant to regular work. Claimant attempted to return to his bartender duties, but his lifting and standing duties soon increased his low back and right leg complaints. Consequently, Dr. Campagna recommended vocational rehabilitation and suggested the following physical limitations: (1) lift, carry, push, and pull up to 50 pounds occasionally; (2) lift, carry, push, and pull up to 20 pounds frequently; and (3) occasionally bend, twist, crouch, and kneel. Dr. Campagna opined that claimant's permanent impairment related to his March 1983 injury was mild.

In May 1984 claimant was examined by Dr. Byers in preparation for vocational assessment. Claimant complained of an aching across his lower back with numbness involving his lower right leg and foot. Claimant also noted decreasing right ankle control. Dr. Byers diagnosed: (1) probable right L5 radiculopathy with foot drop; (2) chronic obstructive pulmonary disease; and (3) status post laminectomies times two. Recommending lifting and carrying restrictions of 20 pounds, Dr. Byers also opined that claimant could sit and stand for four hours with a break, and one hour without a break. If EMG studies and an exercise program for claimant's right foot drop proved ineffective, Dr. Byers suggested an ankle brace.

In June 1984 claimant was referred for vocational rehabilitation. He reported a high school education, with two years of general college coursework, majoring in journalism. In addition to his experience in bartending, claimant had worked as a food and beverage manager for a hotel, a sales representative, a passenger service attendant for an airline, and as a private detective. After reviewing a labor market survey with his counselor, claimant expressed an interest in motel management. Thereafter, he and his wife successfully participated in a four week authorized training program in motel management. Reports concerning claimant's attitude and performance during the program were exemplary.

In August 1984 claimant and his wife obtained a motel management position in California. However, within four days claimant was forced to terminate his position because he could not physically tolerate the prolonged standing and physical exertion required in his 18 hour workdays. The owner of the motel emphasized that claimant and his wife had given their best efforts, but he agreed that claimant's duties were too physically demanding and noted that the job had been further complicated by the previous manager's bookkeeping omissions. The owner suggested that the couple start with a smaller motel unit.

In September 1984 claimant and his wife were hired as manager trainees for a retirement center. Their duties included bookkeeping, transporting residents to various appointments, and supervising maintenance repairs. Inasmuch as the center had its own maintenance staff and since the position allowed him to alternate his standing and sitting, claimant was able to physically tolerate these duties.

In December 1984, after completing his training, claimant was transferred to a manager position for a new retirement center in Washington. Claimant and his wife resided at the center and shared equally in the manager's salary. Their duties included: (1) showing the apartments to potential renters; (2) managing the kitchen, housekeeping, and maintenance staffs; (3) supervising the assistant manager team; and (4) bookkeeping responsibilities. The constant standing and long days soon increased claimant's back and leg symptoms to the point that he left his position in March 1985.

In April 1985, approximately three weeks before the hearing, claimant returned to Oregon. Since his return he has sought work as a salesman for eight potential employers. These employers include department stores, insurance companies, and food distributors. Thus far, his reemployment attempts have been unsuccessful. Claimant has also applied for unemployment benefits, certifying that he is ready, willing, and able to return to work, as well as actively seeking work.

Claimant credibly testified that he experiences back pain whenever he leans forward. His pain increases with his physical exertion. Extended sitting will also prompt back pain and numbness in his right foot and leg. This latter symptom makes him particularly apprehensive when driving. When he stands or walks his right "foot gets heavier and heavier, because of the exaggerated knee bend to accommodate the foot." This accommodation also causes his left leg to ache. Claimant experiences muscle spasms almost every night, thereby interrupting his sleep. His symptoms have affected his formerly cheerful personality.

Following his 1978 surgery, his treating physician recommended that he avoid heavy lifting. Since his compensable injury and surgery claimant hesitates to lift anything over 25 pounds. He last received treatment for his complaints in January 1984. In addition, he does not take any medications, does not wear a back brace, and is not undergoing physical therapy. Claimant guessed that he could sit for 45 minutes at a time and walk up to 30 consecutive minutes. He felt that he could perform retail sales as long as he could alternate between sitting and standing. Since his injury claimant has curtailed, if not eliminated, most of his recreational activities. For example, he no longer plays golf and he avoids fishing from a boat.

The Referee found that claimant was entitled to an award of permanent total disability under the so-called "odd lot" doctrine. The Referee reasoned that claimant's permanent low back impairment had precluded him from returning to his regular work. Furthermore, the Referee concluded that claimant's retraining efforts had been unsuccessful inasmuch as his chronic back symptoms had prevented him from performing his duties in motel management. Accordingly, the Referee found that claimant was unable to sell his services on a reliable, regular basis in a competitive labor market.

In order to establish permanent total disability, a claimant must establish that he is unable to perform any work at a gainful and suitable occupation. ORS 656.206(a); Wilson v. Weyerhaeuser Co., 30 Or App 403 (1977). Permanent total disability may be established through medical evidence of physical incapacity or through the so-called "odd lot" doctrine, under which a disabled person may remain capable of performing work of some kind

but still be permanently disabled due to a combination of medical and non-medical disabilities which effectively foreclose him from gainful employment. Welch v. Banister Pipeline, 70 Or App 699 (1984). Whether a claimant is permanently and totally disabled must be decided on the basis of conditions existing at the time of the decision, not on the basis of a speculative future change in employment status. Gettman v. SAIF, 289 Or 609 (1980). The test is not whether claimant and his wife are employable, but whether claimant is. Allen v. Fireman's Fund Ins. Co., 71 Or App 40, 46-47 (1984).

Following our de novo review of the medical and lay evidence, which includes claimant's preexisting disability and his credible testimony concerning his physical limitations and disabling pain, we are not persuaded that he is unable to perform work at a gainful and suitable occupation. Consequently, he is not entitled to an award of permanent total disability.

The medical evidence suggests that claimant could engage in physical activities which are classified in the light to sedentary category. In order to perform these physical activities he must also be provided the opportunity to frequently change body position and alternate his sitting and standing. The vocational evidence indicates that claimant possesses the work experiences, vocational aptitudes, and interpersonal skills which could be readily transferable to several gainful and suitable occupations within his physical limitations. Specifically, we are persuaded that claimant's physical restrictions could be accommodated within the managerial duties for a small motel unit or a retirement center. In reaching this conclusion we are considering only claimant's capabilities, not the combined capabilities of claimant and his wife. See Allen v. Fireman's Fund Ins. Co., supra.

Some of claimant's assignments in motel and retirement center management have proven to be beyond his physical limitations. However, these assignments were also apparently unsuited for novices, in that they involved units which were either in a state of flux or in an embryonic stage. Moreover, claimant's ability to successfully execute the duties of an assistant manager at a retirement center lends further support to the conclusion that he possesses the requisite physical and vocational skills with which to be gainfully employed. Finally, inasmuch as claimant had only returned from his Washington assignment some three weeks before the hearing, his failure to procure further employment is not persuasive evidence of his inability to regularly perform work at a gainful and suitable occupation.

Turning to a determination of the extent of claimant's permanent disability, we find that the Determination Order's award of 25 percent should be increased. In rating the extent of claimant's permanent disability, we consider the physical impairment attributable to his compensable injury, which includes his credible testimony concerning his physical limitations and disabling pain, and all of the relevant social and vocational factors contained in OAR 436-30-380 et seq. 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 record, and considering the aforementioned guidelines, we conclude that an award of 45 percent unscheduled permanent disability would more appropriately compensate claimant for his compensable low back injury.

ORDER

The Referee's order dated May 29, 1985 is reversed. Claimant is awarded 45 percent (144 degrees) unscheduled permanent low back disability, that being an increase of 20 percent (64 degrees) unscheduled disability from the 25 percent (80 degrees) previously awarded by the August 23, 1984 Determination Order. Claimant's attorney's fee shall be adjusted accordingly.

FRANK L. MERRILL, Claimant
Samuel A. Hall, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-06850
February 26, 1986
Order of Remand

This matter is before the Board on Presiding Referee Daughtry's referral for a decision on a jurisdictional matter. We conclude that we have jurisdiction and we remand this case to the Hearings Division for further proceedings.

Based upon our own files and records and the representations of the parties and their counsel, we make the following findings of fact. As of approximately April 4, 1985 claimant had a pending request for hearing that was in inactive status. On or about that date, claimant, through his attorney, requested an extension of inactive status. That request was apparently not received by the Hearings Division. On April 30, 1985 the Presiding Referee issued an order to show cause why the request for hearing should not be dismissed as abandoned. The show cause order was apparently not received by claimant nor his attorney. On June 17, 1985 a dismissal order was issued. On June 27, 1985 claimant, through his attorney, filed a document captioned "Motion to Vacate Order to Show Cause." A copy of the document was served upon the employer. The document styled as a "motion" was intended to address the dismissal order, not the show cause order.

We conclude that, under the admittedly confusing facts of this case, the "motion" filed by claimant satisfies all of the requirements for a request for review of the Referee's dismissal order and that the request was timely filed. We, therefore, take jurisdiction over this case. On the merits, we conclude that under the circumstance present in this case the dismissal order should be reversed and this matter remanded to the Hearings Division for further proceedings.

ORDER

The Presiding Referee's order dated June 17, 1985 is reversed. This matter is remanded to the Hearings Division for further proceedings.

MARIE D. COOPER, Claimant
Roberts, et al., Defense Attorneys

WCB 85-01763
February 27, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant appears without assistance of counsel and requests review of Referee Myers' order which upheld the self-insured employer's backup denial of compensability of claimant's cervical spine condition. The cervical spine condition causes pain in claimant's neck, right shoulder, and right arm. The

employer cross-requests review of that portion of the Referee's opinion which found the employer's submission of documents to the Referee before hearing was not in accordance with the letter and spirit of OAR 438-47-005. The issues on review are compensability and compliance with administrative rules.

Claimant has the burden of proving by a preponderance of the evidence that her condition resulted from her part-time employment with the self-insured employer who is a party in this case. The evidence proves that claimant was working more than full-time at at least one other place of employment at the time her condition became symptomatic. Claimant concealed from the employer-party and from her treating doctor that she had other employment. When the treating doctor was provided with information about claimant's other job, he opined that claimant's condition was not related to her employment with the employer-party. Claimant's other evidence does not rise above a possibility that her condition was related to her part-time work with the employer-party. She has failed to meet her burden of proof. See Parker v. North Pacific Ins. Co., 73 Or App 790 (1985); Parker v. D. R. Johnson Lumber Co., 70 Or App 683 (1984); Robert D. Craig, 37 Van Natta 494 (1985); cf. Westmoreland v. Iowa Beef Processors, 70 Or App 624 (1984) (claimant's lack of credibility not fatal flaw when medical examination substantiates injury claim).

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

ORDER

The Referee's order dated May 22, 1985 is affirmed.

CHERYL FALCONE-PASQUIER, Claimant
Rosenthal & Greene, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-08156
February 27, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee Mulder's order that set aside its denial of claimant's claim for aggravation of her psychological condition. Claimant cross-requests review on the issue of penalties and attorney fees for allegedly improper claims processing. The issues are the compensability of claimant's aggravation claim and penalties and attorney fees.

Claimant sustained multiple injuries including facial lacerations, a broken thumb and a broken rib on September 9, 1979 in the course of her employment as an account executive for a cosmetics company when she was assaulted outside her hotel room by an unknown assailant. Less than two weeks after the date of the assault, claimant sought treatment from a psychiatrist, Dr. Orenstein, complaining of sleep disturbance, nightmares, loss of appetite, anxiety, lack of motivation, depression, impaired concentration, emotional instability and paranoia. Dr. Orenstein diagnosed severe post-traumatic neurosis and began treating claimant with psychotherapy and medications.

Claimant returned to work for three weeks in October 1979, but was unable to continue because of continued anxiety about her assault. Dr. Orenstein continued treating claimant and declared her medically stationary on January 1, 1980. In April 1980 he stated that claimant was without significant psychiatric

disability as a result of the assault although he thought that her psychological condition would not be in full remission for several years. Claimant's claim was closed by Determination Order dated July 7, 1980 with an award of four months temporary total disability, but with no award of permanent partial disability.

A month after the Determination Order was issued, claimant began treating with another psychiatrist, Dr. Raskin. Dr. Raskin treated claimant with psychotherapy, medications, biofeedback, hypnosis and exercise therapy.

In June 1981 claimant was examined by a consulting psychiatrist, Dr. Parvaresh. Dr. Parvaresh stated that claimant had had a neurotic disorder all of her life, but that the mugging in September 1979 had certainly worsened her condition. He thought that she had made substantial progress toward recovery, rated her psychological impairment as mild and stated that she should be returned to employment.

Dr. Raskin disagreed with much of Dr. Parvaresh's report, especially the conclusion that claimant was able to return to work. Dr. Raskin stated that claimant was too impaired to return to work and he continued psychiatric treatment.

In February 1982 claimant was examined a second time by Dr. Parvaresh. Dr. Parvaresh noted that claimant continued to complain of about the same level of symptoms as at their previous meeting six months earlier. He thought this was inconsistent with the nature of claimant's psychological condition--post-traumatic neurosis--which, he stated, tends to resolve on its own after a period of time. Dr. Parvaresh thought that secondary gain was beginning to assume a predominant role in the perpetuation of claimant's symptoms.

In November 1982 claimant was examined by another consulting psychiatrist, Dr. Stolzberg. Her conclusions were very similar to those of Dr. Parvaresh. She noted that claimant was very agitated concerning her workers' compensation claim and a pending lawsuit against the hotel at which she had been assaulted. Dr. Stolzberg concluded that claimant's symptomatology would continue until her legal proceedings were concluded. Dr. Stolzberg thought that claimant was medically stationary at the time of the examination.

In early 1983 claimant and her husband moved to California and claimant visited another psychiatrist, Dr. Sloane. Although critical of some of Dr. Parvaresh's conclusions, Dr. Sloane agreed that secondary gain was the major factor in the perpetuation of claimant's symptomatology. He reported that at one point claimant told him, "I am supposed not to know that the greater my disability the better it will be for me in the suit." Dr. Sloane thought that claimant would rapidly improve once her legal matters were settled.

Claimant's claim was closed a second time in February 1983 with an additional award of temporary total disability, but with no award of permanent partial disability. Later the same month, the insurer issued a partial denial stating that claimant's ongoing psychological treatment was not reasonable and necessary. Claimant requested a hearing on the Determination Order and the denial and in an Opinion and Order issued on December 8, 1983, she was awarded 35 percent unscheduled permanent partial disability and

the partial denial was set aside. The insurer and claimant both appealed this order and the order was affirmed by the Board in May 1984.

A few weeks after the December 1983 Opinion and Order was issued, claimant began treating with another psychiatrist, Dr. Bagheri. Dr. Bagheri wrote the insurer reporting symptoms of slight pressure of speech, depression, crying spells, irritability, insomnia, anxiety, lack of concentration and panic attacks. Dr. Bagheri wrote the insurer a second time in June 1984 stating that claimant had been unable to work since December 1983 because of her psychological condition. The insurer issued an aggravation denial in July 1984. The same month claimant began working for a cosmetics company in California.

In December 1984 claimant was examined by another consulting psychiatrist, Dr. Heffner. He noted that claimant had lost her lawsuit against the hotel and reported that she was very angry about this. At the end of his twenty-one page report, Dr. Heffner opined that claimant had experienced some waxing and waning of symptoms during the last year in connection with her new job but that her psychological condition had not worsened and that she remained medically stationary. He recommended that palliative care be continued for several months to allow claimant to further adjust to her new job.

At the hearing claimant testified that her psychological condition had worsened just before her initial visit with Dr. Bagheri. On cross-examination claimant conceded that in her previous hearing in November 1983 she had testified to essentially the same symptoms as those she later reported to Dr. Bagheri.

The Referee set aside the insurer's July 1984 aggravation denial stating that he found Dr. Bagheri persuasive and that he found Dr. Heffner equivocal.

On our de novo review of the record we conclude that claimant failed to establish that her psychological condition had worsened since the last arrangement of compensation. Claimant's testimony does not establish a worsening. She testified that her symptoms at the time of the November 1983 hearing and those she reported the following month to Dr. Bagheri were essentially the same. Dr. Bagheri's short reports do not establish a worsening. None of those reports state that claimant's condition had worsened. One of the reports states that claimant was unable to work between December 1983 and June 1984. This is not persuasive of a worsening, however, considering the fact that, before July 1984, claimant had not returned to work since her abortive attempt to do so in October 1979.

Dr. Heffner, on the other hand, after his examination of claimant and an exhaustive review of the medical record, stated that claimant's psychological condition had not worsened since the last arrangement of compensation. We find Dr. Heffner's report thorough and well-reasoned and his opinion persuasive. We do not find claimant's testimony sufficiently persuasive to overcome Dr. Heffner's opinion even in conjunction with the other medical evidence. We, therefore, reverse the Referee's order and reinstate the insurer's denial.

On the issues of penalties and attorney fees, we agree

with the Referee that penalties and attorney fees are not appropriate in this case.

ORDER

The Referee's order dated September 9, 1985 is reversed in part and affirmed in part. The insurer's denial dated July 19, 1984 is reinstated and affirmed. The remainder of the Referee's order is affirmed.

LORETTA SANDERS, Claimant
Flaxel, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-0306M
February 27, 1986
Own Motion Order on Reconsideration

Claimant, by and through counsel, has requested that we reconsider our Own Motion Order dated January 28, 1986. In that order we denied relief under ORS 656.278 on the ground that a final order existed which declared that the current condition for which claimant seeks compensation was noncompensable. We concluded that we were precluded from taking jurisdiction by ORS 656.278(5)(a).

In her request for reconsideration, claimant argues that the Referee merely held that claimant had sustained an aggravation rather than a new injury, and that the Referee recognized that claimant's entitlement to compensation for the aggravation was under the Board's sole jurisdiction. Although claimant's is one possible interpretation of the Referee's order, that interpretation overlooks the posture of the case as it went to hearing.

The hearing was requested by claimant after SAIF's formal denial of claimant's claim for payment of medical services. The right to payment of medical services continues for the life of the claimant and is a matter concerning a claim. The Referee clearly had jurisdiction to decide the medical services question. The Referee's order upheld the formal denial of claimant's claim for payment of medical services. By upholding the denial, the Referee ruled that claimant's current condition is not compensable. If claimant disagreed with the Referee's ruling, her remedy was to request Board review. Board review was not requested and the Referee's order became final. We are not authorized to change that order on our own motion, ORS 656.278(5)(a), even assuming for the sake of argument that the Referee's order was incorrect. There is nothing of record in this own motion proceeding that causes us to believe that claimant is seeking anything more than the payment of the medical services.

The request for reconsideration is allowed. On reconsideration, we adhere to our previous order, which we republish effective this date.

IT IS SO ORDERED.

L.R. SWARTZENDRUBER, Claimant
Gatti, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-04173 & 85-00437
February 27, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

CIGNA Insurance Companies (CIGNA) requests review of those portions of Referee Baker's order that: (1) set aside CIGNA's denial of claimant's aggravation claim and upheld the Commodore Corporation's (Commodore) denial of claimant's new injury claim; (2) awarded claimant 64 degrees for 20 percent unscheduled permanent partial disability for the low back; and (3) denied CIGNA's request for recovery of an alleged overpayment of temporary total disability in the amount of $2,602.07. The issues on review are responsibility, compensability, extent of unscheduled disability and CIGNA's entitlement to an offset against an alleged overpayment.

On the issue of extent, we affirm the Referee's order. We reverse on the responsibility question.

Claimant is a former production worker for Commodore Corporation, a manufacturer of mobile homes. He compensably injured his low back on December 5, 1979, while CIGNA insured Commodore. The injury resulted in muscle spasms at L5-S1 and was accepted as disabling. Claimant was off work for approximately one month before returning with restrictions. Dr. Olson became the treating physician in March 1980 and treated claimant throughout the history of the claim. He anticipated no permanent disability as a result of claimant's 1979 injury.

Claimant had occasional pain during the remainder of 1980 but was able to work on his father's farm bucking bales, driving tractor and doing other heavy farm labor. Despite this heavy activity claimant visited Dr. Olson only four times between 1980 and mid-1984. At that time claimant complained of a severe exacerbation after bending over at home and experiencing a sudden return of pain. Claimant continued to work, however, and did not return to Dr. Olson until September of 1984.

During the last week of August 1984, while Commodore was self-insured, claimant experienced a return of low back discomfort when he and several other employes moved a heavy mobile home unit. He initially felt little in the way of pain. Shortly thereafter, however, he was forced to lie down for the full week of his vacation due to low back pain and discomfort. Claimant returned to work after his vacation. Two weeks later he resigned due to severe pain. Upon visiting Dr. Olson claimant complained for the first time of numbness in the left foot.

Claimant filed claims for aggravation and new injury with CIGNA and Commodore respectively. CIGNA denied that claimant had experienced an aggravation and requested that a paying agent be designated pursuant to ORS 656.307. Commodore's processing agent denied compensability as well as responsibility, asserting that claimant did not suffer a compensable injury while employed by Commodore. Claimant timely requested a hearing.

The Referee found that claimant's second incident was no more than an exacerbation of the initial injury. He, therefore,

remanded the claim to CIGNA for processing. He further found that CIGNA had failed to produce sufficient evidence of an overpayment and denied CIGNA's request for an offset. On review CIGNA asserts that claimant's second incident independently contributed to his current disability and that responsibility, therefore, lies with Commodore. Commodore responds that claimant's second incident was an occupational disease. It argues, therefore, that claimant must prove that Commodore's employment was the major contributing cause of his current disability in order to prove compensability as against Commodore. Commodore argues that claimant has failed to meet his burden of proof in that regard.

From the outset, we note that although claimant's claim against Commodore was presented as one for occupational disease at hearing, the second incident is more properly characterized as an accidental injury. The incident was unexpected and occurred within a discrete and identifiable time period. See Valtinson v. SAIF, 56 Or App 184 (1982). We find that claimant suffered successive injuries while working for Commodore. In order to determine responsibility, therefore, we must determine whether the second injury independently contributed to claimant's disability. See Boise Cascade Corp. v. Starbuck, 296 Or 238 (1983).

The medical evidence is divided. It consists of the several reports and deposition of the treating physician, Dr. Olson, and the consultation report of Dr. Blake, an orthopedist. Dr. Blake opined that claimant's second incident was merely a recurrence of the first. Following claimant's second incident, Dr. Olson initially stated that the second injury was a "significant contributing factor" to claimant's disability. After an apparent contact from Commodore's attorney, however, Dr. Olson issued a second report in which he stated that the second incident did not represent a "new injury." Dr. Olson was then deposed.

At deposition Dr. Olson clarified his apparently inconsistent reports by testifying that while claimant's initial incident was the major cause of his current disability, the second incident did independently contribute to a worsening of claimant's low back condition. We accept Dr. Olson's opinion over that of Dr. Blake because Dr. Olson examined claimant both before and after the second incident and served as treating physician throughout the five-year history of the claim. We also find that Dr. Olson's opinion is consistent with claimant's credible rendition of the facts. Whereas claimant was able to continue working both on and off the job for several years after the initial injury, he experienced new and different symptoms following the second injury, and had to leave work soon thereafter. The independent contribution of the second incident is clear. Commodore, as a self-insured employer at the time of the second incident, is responsible.

Because we find CIGNA not responsible for claimant's current disability, the offset issue is moot. The compensability of claimant's claim against Commodore was at issue both at hearing and on Board review. Claimant's attorney is, therefore, entitled to a fee in both forums. Cf. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985).

ORDER

The Referee's order dated August 7, 1985 is reversed in part and affirmed in part. That portion of the order that set aside CIGNA's denial of claimant's aggravation claim and affirmed

Commodore Corporation's denial of the compensability of claimant's new injury claim is reversed. The claim is remanded to Commodore Corporation for processing according to law. Commodore Corporation shall reimburse CIGNA for all claim costs, if any, paid subsequent to Commodore's formal denial. The remainder of the order is affirmed. For prevailing on the issue of compensability against Commodore, claimant's attorney is awarded $1,200 for services at hearing and $500 for services on Board review, to be paid by Commodore Corporation.

KEITH A. WEAVER, Claimant
Bischoff, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-02138
February 27, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Foster's order that awarded claimant 128 degrees for 40 percent unscheduled permanent partial disability in lieu of a Determination Order award of 48 degrees for 15 percent unscheduled disability for the neck. The issue on review is extent of unscheduled disability. SAIF asked that the Determination Order be reinstated.

On August 16, 1983 claimant sustained a compensable neck injury when he was struck by a rolling log. Although the injury resulted in a concussion, a fractured sternum, and cervical and thoracic fractures, claimant was able to return to his regular work within two months. The primary residual of the injury was a markedly decreased range of motion in the cervical spine. The decreased range of motion continued as of the time of the hearing, although claimant continued to work in his previous job with restrictions.

The medical evidence consists primarily of the reports of Dr. Mooers, who was claimant's initial treating physician, and Dr. Young, a consulting orthopedist. Neither physician has indicated that claimant will suffer permanent impairment as a result of his injury. Claimant was also examined by the Ashland Orthopedic Associates in August 1984. They noted diffuse arthritic changes in claimant's neck and upper back. According to Dr. Young, however, any degenerative changes would have preexisted the industrial injury.

Claimant was age 35 at the time of the hearing. He has a high school diploma and one year of business college course work. After business school claimant worked in computer technology for approximately ten years, leaving that field in 1978. His work since that time has been heavy.

The February 14, 1984 Determination Order awarded claimant 48 degrees for 15 percent unscheduled disability. The Referee raised the award to 40 percent, apparently based on claimant's credible testimony regarding his restrictions. On review SAIF asserts that the 40 percent award is excessive. We agree and reverse the Referee's award.

Significant to us is that neither of claimant's physicians has stated that claimant will suffer permanent impairment. When we combine that factor with claimant's having returned to regular work, his relatively young age, his education and work history, we find that claimant has been adequately, if not excessively, compensated by the 15 percent awarded by the

Determination Order. Because SAIF does not request a reduction in the Determination Order award, the order shall be reinstated.

ORDER

The Referee's order dated September 13, 1985 is reversed. The Determination Order dated February 14, 1984 is reinstated.

RICHARD D. COX, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-06557 & 84-03884
February 28, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Fink's order which upheld the SAIF Corporation's June 23, 1983 denial of an aggravation claim related to an accepted non-disabling 1978 back injury and which upheld SAIF's March 1, 1984 denial of an occupational disease claim for worsening of claimant's underlying degenerative disc disease. The issues on review are aggravation and compensability.

The Board affirms and adopts the order of the Referee with the following comment. The evidence proves that claimant's condition was not worse in 1982 and 1984 as compared to his condition in 1978. That claimant's symptoms may be temporarily worsened without worsening the condition does not meet the standard of proof. Wheeler v. Boise Cascade, 298 Or 452 (1985).

ORDER

The Referee's order dated May 22, 1985 is affirmed.

BETTY E. MADARAS, Claimant
Carney, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-07509
February 28, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Madaras v. SAIF, 76 Or App 207 (1985). By virtue of the court's order, the law of the case is that claimant has shown by a preponderance of the evidence that it would be futile for her to seek work, therefore, excusing claimant from the requirement of ORS 656.206(3). This holding mandates a finding that claimant is permanently and totally disabled. The Referee's order dated February 17, 1984 is reinstated and affirmed.

The court has also remanded claimant's petition for attorney fees before the Court of Appeals. The petition is allowed. Claimant's attorney is allowed an additional attorney fee of 25 percent of the increased award granted by the court, not to exceed $1,000, in addition to all fees previously allowed in this case.

IT IS SO ORDERED.

DEBBIE A. MONREAN (KAHN), Claimant
Malagon & Moore, Claimant's Attorneys
Cowling, et al., Defense Attorneys

WCB 83-07570
February 28, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review dated February 7, 1986. In that order, we approved the insurer's request that it be authorized to offset permanent partial disability compensation paid pursuant to a first Determination Order against permanent partial disability compensation ordered paid in lieu of the first award after a redetermination pursuant to ORS 656.268(5). We based our decision upon the language of ORS 656.268(4), which allows adjustments to compensation, "including disallowance of permanent disability payments prematurely made . . . ."

As we understand claimant's position in her request for reconsideration, she asserts that, because we found that permanent disability payments were prematurely made, the initial closure of claimant's claim was a "premature closure" as that term of art is employed in view of ORS 656.268(1) and (2). She, therefore, asserts entitlement to compensation for temporary disability for periods of time between Determination Orders and commencement of vocational assistance programs, to be allowed as a credit against the offset of permanent disability compensation. The underpinning of claimant's position is as follows:

> "ORS 656.268(1) expressly provides temporary disability benefits shall not be terminated if the worker is not medically stationary or involved in vocational rehabilitation. A worker whose condition is expected to improve is not medically stationary as a matter of law. ORS 656.005(17) defines a worker to be medically stationary only if 'no further material improvement would reasonably be expected from [medical treatment, or] the passage of time.'"
>
> "An unscheduled permanent disability is based on the worker's earning capacity; this is the 'condition' which is compensated. ORS 656.214(5); see Barrett v. D & H Drywall, 300 Or 325 (1985).
>
> "Here the [Board] members found the compensation awarded by [the] previous determination order was premature and, therefore, could be adjusted by necessity in a subsequent determination. It now appears, by the operation of the Order on Review, the money ordered by the previous determination was in error due to events which transpired by passage of time."

After careful consideration of claimant's arguments, we conclude that they are wide of the mark. Claimant's position is an attempt to blur the concepts of physical impairment and loss of earning capacity. The term "medically stationary" is a notion that relates to physical impairment, and physical impairment is

but one factor in determining unscheduled permanent disability, i.e., loss of earning capacity. (We use the phrase "physical impairment" in this case because claimant's condition is physical. We recognize that compensable conditions subject to improvement from medical treatment or the passage of time may be other than physical. See, e.g., Rogers v. Tri-Met, 75 Or App 470 (1985).) ORS 656.214(5) defines the term: "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." We find no support in Barrett v. D & H Drywall, supra, or anywhere else for claimant's assertion that the "condition" which must be medically stationary is a claimant's "earning capacity." To suggest that the term "medically stationary" contemplates factors other than medical ones begs the question. There is no suggestion in this case that claimant was not medically stationary during any of the time periods in issue.

Claimant's claim was validly closed by the first Determination Order, which established a date upon which claimant was medically stationary. No temporary disability compensation was due after that date, except during the times claimant was enrolled and actively engaged in a program of vocational assistance. ORS 656.268(5). When claimant was so enrolled and engaged, she was paid temporary disability benefits. The fact that vocational assistance did as it was intended and reduced claimant's disability (but not necessarily her impairment) does not render the first Determination Order "premature" as regards claimant's medical status, which has remained essentially the same since the original determination.

The request for reconsideration is allowed. On reconsideration, the Board adheres to its previous order, which is republished effective this date.

IT IS SO ORDERED.

WILLIAM G. VAANDERING, Claimant
Joseph C. Post, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-01302
February 28, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Seymour's order that increased claimant's award of scheduled permanent partial disability for the loss of use of his right leg from the 20 percent (30 degrees) awarded by Determination Order to 50 percent (75 degrees) and awarded temporary total disability compensation computed on the basis of a 54 hour work week. The issues are the extent of disability and the computation of temporary total disability compensation.

Claimant injured his right knee on October 18, 1982 in the course of his employment as a truck mechanic when he slipped on some anti-freeze which had been spilled on the floor and fell to the ground. Claimant visited an orthopedist, Dr. Fry, the day following the accident. Dr. Fry examined claimant's right knee and noted swelling, limitation of motion and a consistent clicking and popping. Dr. Fry ordered an arthrogram which revealed a large piece of loose bone and cartilage in the joint (osteochondritis dissecans condylus medialis femoris). Dr. Fry surgically removed the loose body from the knee in November 1982.

In August 1983 claimant was examined by Dr. Gambee, an orthopedist. Dr. Gambee opined that claimant was medically stationary and rated the loss of function of claimant's right leg at 20 percent based upon the rating schedule of the American Academy of Orthopedic Surgeons. Dr. Fry reviewed Dr. Gambee's report and agreed with the 20 percent impairment rating. In December 1983 claimant was examined by another orthopedist, Dr. Duff. Dr. Duff noted flexion to 135 degrees, full extension and moderate pain on rotational stress. He agreed with Dr. Gambee's 20 percent impairment rating. Claimant's claim was closed by Determination Order dated January 23, 1984 with an award of 20 percent (30 degrees) scheduled permanent partial disability.

In March 1985 Dr. Fry completed a physical capabilities assessment of claimant. He gave claimant's limitations as 10 pounds repetitive lifting and carrying, 20 pounds occasional lifting and carrying, one hour walking or standing, no stair climbing, no kneeling, no crouching and no crawling. He also noted mild pain and instability in the knee.

In increasing claimant's scheduled disability award, the Referee emphasized the pain and instability associated with claimant's knee. On our de novo review of the record and application of the pertinent statutes and regulations, ORS 656.214(2)(c); OAR 436-30-240 through 436-30-340, we find that claimant was adequately compensated for the permanent loss of use or function of his right leg, including instability and disabling pain, by the Determination Order of January 23, 1984. We, therefore, reverse that portion of the Referee's order that awarded claimant 75 degrees for 50 percent scheduled permanent partial disability and reinstate and affirm the award by Determination Order of 30 degrees for 20 percent scheduled permanent partial disability.

On the issue of the computation of temporary total disability compensation, we affirm the order of the Referee.

ORDER

The Referee's order dated May 2, 1985 is reversed in part. That portion of the order that increased claimant's award of scheduled permanent partial disability from the 20 percent (30 degrees) awarded by Determination Order to 50 percent (75 degrees) is reversed. The Determination Order dated January 23, 1984 is reinstated and affirmed. The remainder of the order is affirmed. For services in defending claimant's rate of temporary disability compensation, claimant's attorney is awarded $250, to be paid by the SAIF Corporation.

CLARK H. WILLARD, Claimant
Malagon & Moore, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 83-00576
February 28, 1986
Second Order on Reconsideration

Claimant has requested further reconsideration of our Order on Reconsideration dated February 7, 1986. We decided this case on reconsideration with a companion case, Debbie A. Monrean (Kahn), 38 Van Natta 97 (WCB Case No. 83-07570, February 7, 1986). The issue in both cases was whether an insurer should be authorized to offset permanent disability compensation paid pursuant to an initial Determination Order against a permanent disability award made after redetermination of disability following

vocational assistance. ORS 656.268(5). In our most recent order in this case, we decided that, as a matter of fact, there had been no overpayment of compensation. Neither party has disagreed with that finding on reconsideration, and we adhere to it.

Claimant has filed identical requests for reconsideration, with the exception of relevant dates, in this case and Debbie A. Monrean (Kahn), supra, contending that the claimants are entitled to credit for temporary disability compensation payable but not paid. For the reasons set forth in our Order on Reconsideration in Debbie A. Monrean (Kahn), 38 Van Natta 180 (WCB Case No. 83-07570, Order on Reconsideration, decided this date), we conclude that no such temporary disability compensation was payable.

The request for reconsideration is allowed. On reconsideration, we adhere to and republish our former Order on Reconsideration, effective this date.

IT IS SO ORDERED.

RUBY B. CAMPBELL, Claimant
Vick & Associates, Claimant's Attorneys
Nancy Meserow, Defense Attorney

WCB 84-08036
March 6, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee T. Lavere Johnson's order that awarded 48 degrees for 15 percent unscheduled permanent partial disability in addition to the Determination Order dated July 23, 1984 that awarded 48 degrees for 15 percent permanent disability for injury to claimant's mid-back, upper back, right shoulder, and functional overlay. The issue on review is extent of unscheduled permanent partial disability.

Claimant was injured in the course of her employment as a container punch operator for a storage battery manufacturer. Her claim was initially closed with no award for permanent disability. The claim was reopened for aggravation of the injury condition and two vocational rehabilitation programs. Closure after completion of vocational rehabilitation resulted in the award of 48 degrees for 15 percent unscheduled permanent partial disability.

The Referee found that claimant was a credible witness. Claimant has chronic pain in her upper back, mid-back, and right shoulder. She is limited in her ability to bend, stoop, sit, stand, lift more than 30 pounds, or lift or reach overhead. Some of claimant's limitations are related to her small size rather than her industrial injury. Claimant was 51 years old at the time of hearing and had a high school education. She has returned to work as a quality control inspector, a position at which she has many years experience. Her present salary is less than her pre-injury salary. Dr. Colbach diagnosed a neurotic conversion disorder which contributed to claimant's mildly disabling pain symptoms and was related to the industrial injury. Dr. Colbach recommended against psychological or psychiatric treatment. Claimant works full-time although she has modified some of her recreational activities to accommodate her pain syndrome. Claimant received vocational training for a clerical occupation and turned down two clerical jobs with state agencies in favor of waiting for a quality control position.

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, "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 (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. ORS 656.214(5). 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).

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 436-30-380 et seq. Howerton v. SAIF, 70 Or App 99 (1984).

Considering claimant's impairment and 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. The Referee's order and claimant's attorney's fees shall be modified accordingly.

ORDER

The Referee's order dated March 26, 1985 is modified. Claimant shall be awarded 64 degrees for 20 percent unscheduled permanent partial disability in lieu of prior awards. Claimant's attorney fees shall be adjusted accordingly.

ALVIN L. DICK, Claimant
Churchill, et al., Claimant's Attorneys
Beers, Zimmerman & Rice, Defense Attorneys
Kelley & Kelley, Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-12168 & 84-13191
March 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Michael Johnson's order that set aside its denial of claimant's industrial injury claim for the left shoulder, both in terms of compensability and responsibility, and approved EBI Companies' denial of claimant's new injury claim based on responsibility only. The issues on review are whether claimant's left shoulder injury is compensable and, if so, which of the insurers is responsible.

The Board affirms and adopts the order of the Referee. Because the compensability of claimant's claim was at issue as against SAIF and claimant prevailed, claimant's attorney is entitled to a fee paid by SAIF. Compare Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985); Stanley C. Phipps, 38 Van Natta 13 (filed January 14, 1986).

ORDER

The Referee's order dated June 28, 1985 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the SAIF Corporation.

JOSEPH J. KOPPERT, Claimant
Haugh & Foote, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-07714
March 6, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Michael Johnson's order which upheld the insurer's denial of claimant's cervical spine condition. Claimant contends that the denial is void because it violates the rule of Bauman v. SAIF, 295 Or 788 (1983).

The Board affirms the order of the Referee with the following comment. The insurer paid for medical treatment and disability due to a low back condition for almost seven years before claimant presented a claim for a cervical spine condition. We are not persuaded that the cervical spine condition was part of the low back condition which was accepted.

ORDER

The Referee's order dated July 22, 1985 is affirmed.

ELDON G. MARLOW, Claimant
David C. Force, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 84-04673
March 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Mongrain's order which found that the claim was prematurely closed by a Determination Order dated April 5, 1984.

Claimant was a pond sawyer. He injured his low back and neck when he fell at work on May 31, 1983. On June 3, 1983 Dr. Lott diagnosed a strain. He referred claimant to Dr. Robertson, an orthopedic surgeon. Dr. Robertson diagnosed a cervical and lumbar sprain. He observed no evidence of disc herniation. He recommended further conservative treatment. Dr. Patterson performed a neurological consultation on July 12, 1983. He reported multiple complaints with no apparent organic neurological disease.

On August 4, 1983 Dr. Lott reported continuing hip, neck, shoulder and left arm pain complaints. He also stated:

> "It is significant that Drs. Donahoo and Young treated this man for a previous lumbosacral injury in 1972. He is unhappy with their care stating that they sent him back to work too soon, and refused to see him again at this time, so was referred to Eugene to Dr. Robertson.
>
> "I feel that the patient's symptoms are in

excess of his findings and the general attitude this patient displays is one of not wanting to get well on a permanent basis. The former might be a slight exaggeration, however I am very dismal about this patient's prognosis from an emotional standpoint and feel that he does not want to go back to work.

"Evaluation by Orthopaedic Consultants is in order at this time. I feel that this patient has reached a stationary point and probably will continue to deny any improvement in his pain syndrome."

Orthopaedic Consultants first examined claimant on September 2, 1983. They predicted that claimant would be stationary without significant impairment in six weeks if his symptoms continued to resolve. Dr. Lott concurred with Orthopaedic Consultants' findings and stated that he felt claimant should be improving and able to return to work; but that when he last saw claimant, claimant was complaining of severe pain in his back and hip. Dr. Lott said that claimant's symptoms were not resolving. Dr. Robertson concurred with Orthopaedic Consultants' findings and recommendations on December 6, 1983.

At Dr. Robertson's request, a lumbar myelogram and lumbar CT scan were performed in December 1983. Neither showed evidence of disc herniation. On January 5, 1984 Dr. Robertson recommended that claimant increase his activities and ask his employer for a modified job.

Claimant was reexamined by Orthopaedic Consultants on February 8, 1984. They noted that no plan for surgical treatment was entertained following the myelogram. Claimant reported that his neck pain was "almost better," and that he rarely had neck discomfort. He reported disabling low back pain, intermittent paresthesia in the left arm and headaches with blurring vision. According to their history, claimant's low back complaints had not changed in the last six to seven months. They noted inconsistencies during their physical examination and felt that there was a mild element of functional disturbance. They concluded that claimant was medically stationary with mildly moderate loss of lumbar function, the loss of function due to the injury being mild.

Dr. Robertson reported on March 12, 1984 as follows:

"He is limited functionally. He is unable to do prolonged standing or walking and is not able to go back to work on the pond. He will need job placement or retraining in a more sedentary job which does not require lifing, bending or prolonged standing."

The April 5, 1984 Determination Order awarded temporary total disability through March 12, 1984, plus 20 percent unscheduled permanent partial disability.

On April 26, 1984 Dr. Robertson stated:

"The patient went back working at his old job as a pond sawyer and predictably, lasted about

four days. He had to go home because of both back and neck pain. At present, he is complaining of stiffness in his low back, stiffness in his neck, pain radiating down both hamstring areas and problems with numbness and tingling in his left hand."

Dr. Lott again termed claimant medically stationary on June 5, 1984. Orthopaedic Consultants reexamined claimant on August 14, 1984. Claimant stated that his complaints had gradually worsened. They reported that claimant said that Dr. Robertson had told claimant, "if he was a young man he would do a spinal fusion, but that he is aging such that he would not consider it at this time." The consultants' noted severe functional disturbance characterized by inconsistencies in claimant's examination. They said:

"In our opinion his condition continues to be stationary. * * * The lifting level could be 50 lbs. but these will be difficult to achieve in view of his degree of functional overlay, which has been responsible for the worsening of his subjective symptoms in our opinion."

Claimant was treated at the Western Pain Center from September 4 through September 21, 1984. He made moderate gains. Following the program he underwent in-patient alcohol rehabilitation. On October 25, 1984 Dr. Holmes of the Pain Center stated that claimant reported that his pain had increased by at least one-third since going off alcohol. Dr. Holmes criticized claimant's levels of motivation and compliance with the Pain Center program and rated claimant's prognosis as questionable.

On December 6, 1984 Dr. Robertson indicated that claimant should think about having an L5-S1 fusion for his low back pain. In early January 1985 claimant agreed to the fusion. The claim was reopened and the surgery performed.

Dr. Robertson reported on April 18, 1985 as follows:

"I have been following [claimant] for at least two years. He was injured while working on the log pond and twisted his back and hurt his neck. Since that time he has continued to complain of low back and neck pain.

"I would agree that he has not been medically stationary during this entire period, and that his problems stem from the original injury. He did work for a period of time but he continued to be symptomatic during that period."

At the May 1, 1985 hearing, claimant testified that Dr. Smith, a neurosurgeon, planned to perform neck surgery in about three months.

To set aside a Determination Order as premature, claimant must prove by a preponderance of the evidence that his condition was not medically stationary at the time of claim closure. An injured worker is considered medically stationary when no further material improvement would reasonably be expected

from medical treatment or the the passage of time. ORS 656.005(17). See Brad T. Gribble, 37 Van Natta 92, 97 (1985). The reasonableness of medical expectations at the time of claim closure must be judged by the evidence available at the time, not by the subsequent development of the case. Alvarez v. GAB Business Services, 72 Or App 524 (1985).

Before claim closure, Dr. Lott and Orthopaedic Consultants had declared claimant medically stationary. Dr. Robertson had concurred with an earlier Orthopaedic Consultants' report predicting that claimant would be medically stationary by about mid-November 1983. His March 12, 1984 report noted functional limitations, but did not suggest that further material improvement was to be expected. Neither Pain Center treatment nor surgery was planned at that time. Although Dr. Robertson later opined that claimant was not stationary, he based that opinion on the fact that claimant continued to be symptomatic. His reports do not suggest that an expectation of material improvement existed at the time of closure. We find that claimant has not carried his burden of proof.

ORDER

The Referee's order dated July 30, 1985 is affirmed in part and reversed in part. That portion of the Referee's order which set aside the April 5, 1984 Determination Order and awarded additional temporary total disability compensation is reversed. The Determination Order is reinstated and affirmed. The Referee's order is affirmed in all other respects.

THERON W. STIEHL, Claimant
SAIF Corp Legal, Defense Attorney

Own Motion 86-0022M
March 6, 1986
Own Motion Order

SAIF Corporation has submitted the above claim to the Board for consideration of additional permanent partial disability for disability to claimant's left knee due to the June 30, 1978 injury. Claimant's aggravation rights have expired.

The last closure of this claim was by Determination Order dated March 16, 1984 at which time it was determined claimant was entitled to no further compensation for permanent disability. The Determination Order was reconsidered by the Workers' Compensation Department, apparently at claimant's request, and a second order issued on June 27, 1984. Both orders clearly outlined claimant's right to a hearing if he was dissatisfied with the results. On July 11, 1984 claimant wrote to SAIF asking for further permanent disability compensation. SAIF sent claimant to the Orthopaedic Consultants for their opinion.

In December 1985 claimant wrote SAIF two more letters asking them for a settlement on his claim. He referred to his July 1984 letter and was concerned about having heard nothing since.

The law is clear that if a worker is dissatisfied with a Determination Order he/she has one year in which to appeal the order to the Hearings Division. Claimant was dissatisfied but failed to appeal the Determination Order. The Board will not use own motion relief when claimant has other legal remedies available to him.

After thorough review of the evidence, the Board cannot find a basis upon which to grant additional permanent partial disability. The request for further relief is denied.

IT IS SO ORDERED.

MICHAEL L. HILL, Claimant
Roll, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
Bottini & Bottini, Defense Attorneys

WCB 84-03621 & 84-09229
March 7, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Mission Insurance Company (Mission) requests review of those portions of Referee Seifert's order that: (1) set aside its denial of claimant's new injury claim and affirmed the Argonaut Insurance Company's denial of claimant's aggravation claim; and (2) set aside Mission's denial of claimant's medical services claim. Claimant cross-requests review of those portions of the order that: (1) denied claimant's request for penalties and attorney fees for Mission's alleged failure to timely pay medical services, its alleged failure to timely accept or deny claimant's claim for new injury, its alleged failure to timely pay claimant's temporary total disability compensation, and its alleged failure to timely supply claimant with medical information, and; (2) affirmed the Determination Order dated October 3, 1984 that awarded no additional unscheduled permanent partial disability over the 15 percent (48 degrees) awarded by way of a prior Determination Order.

The issues on review are responsibility, medical services, extent of unscheduled disability and penalties and attorney fees.

The Board affirms the order of the Referee. Claimant requests an attorney fee for advocating that responsibility for claimant's current condition be assigned to Mission. Because the compensability of claimant's condition was not at issue at hearing or before the Board, however, claimant's attorney is entitled to no fee on the issue of responsibility. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985); Stanley C. Phipps, 38 Van Natta 13 (filed January 14, 1986).

ORDER

The Referee's order dated Febraury 28, 1985 is affirmed. Claimant's attorney is awarded $550 for service on Board review, to be paid by Mission Insurance Company.

WESLEY S. HOGLAND, Claimant
Roll, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-12570
March 7, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Holtan's order which upheld the SAIF Corporation's denial of his occupational disease claim for hypertension and depression. On review, claimant contends that his condition is compensable and that SAIF's denial was unreasonable.

With his appellant's brief, claimant has enclosed his affidavit and a letter from an attending osteopath. Claimant asks that this matter be remanded for the taking of further evidence.

We deny the motion for remand. Following our de novo review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been clearly shown that this evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

Following our de novo review of the medical and lay evidence, we agree with the Referee that claimant has failed to establish that his work activities were the major contributing cause of the worsening of his underlying condition. Accordingly, we affirm the order of the Referee.

ORDER

The Referee's order dated June 6, 1985 is affirmed.

CAROL J. LEVESQUE, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-01489
March 7, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Michael Johnson's order which: (1) increased claimant's scheduled permanent disability award for loss of use of her left arm from 5 percent (9.6 degrees), as awarded by a January 10, 1985 Determination Order, to 19 percent (36.38 degrees); (2) set aside SAIF's partial denial of claimant's cervical and thoracic conditions; and (3) awarded 10 percent (32 degrees) unscheduled permanent disability for an upper torso injury, whereas the aforementioned Determination Order had awarded no permanent disability. On review, SAIF contends that the scheduled permanent disability award should be decreased and that claimant's cervical and thoracic problems are not related to her compensable left elbow injury.

We affirm that portion of the order which awarded claimant 19 percent scheduled permanent disability for loss of use or function of her left arm. However, we reverse that portion of the order which found claimant's cervical and thoracic conditions compensable.

Claimant was 32 years of age at the time of hearing. In March 1984, while working as a nurse's aide, she suffered a compensable injury when she attempted to "turn over" a patient. Claimant felt a "slight pain", primarily in the left elbow area, but also extending into her upper arm. X-rays revealed slight degenerative spurring at the coronoid, but were otherwise normal. Dr. Willey, orthopedist, diagnosed an elbow strain.

In May 1984 Dr. Murphy, orthopedist, performed an independent medical examination. Claimant's complaints included pain in the left elbow, left shoulder, and neck. In addition to her March 1984 industrial injury, claimant reported a September 1983 motor vehicle accident in which she suffered a "whiplash" injury. Since this accident, and prior to her March 1984 injury,

she had been receiving chiropractic treatments for neck and upper back soreness. Claimant felt that the pain extending into her shoulder was due to her elbow injury. However, Dr. Murphy noted that it was difficult to determine the source of her pain between the September 1983 neck injury and the March 1984 elbow injury. Dr. Murphy diagnosed: (1) lateral epicondylitis; and (2) neck strain. In Dr. Murphy's opinion claimant's neck and shoulder complaints were due to the September 1983 accident.

Dr. Willey generally concurred with Dr. Murphy's opinion. However, Dr. Willey also mentioned a British Columbia study which indicated that chronic "tennis elbow" conditions had been improved through neck treatments. According to Dr. Willey the study involved 50 "tennis elbow" patients who had been unresponsive to standard therapies. The study apparently found that the patients' elbow symptoms improved following cervical spine traction, exercises, and other therapy regimens. In January 1985, relying on this research and claimant's unresponsiveness to standard therapy, Dr. Willey prescribed a "Philadelphia collar."

In February 1985 claimant came under the care of Dr. Leary, chiropractor. Claimant complained of a sharp pain from her neck and upper back to her shoulder and elbow. Dr. Leary diagnosed primary tendinitis with accompanying cervical and thoracic sprain/strain. The treating chiropractor also reported that claimant's shoulder joint was the "primary causative factor in her subjective complaints." In Dr. Leary's opinion, the thoracic and neck treatments were directly related to claimant's "arm pain." Furthermore, Dr. Leary concluded that it was biomechanically impractical to separate claimant's thoracic and neck complaints from her compensable injury.

In April 1985 the Western Medical Consultants performed an independent medical examination. The panel consisted of two neurologists, Drs. Ebert and Stolzberg, and an orthopedist, Dr. Scheinberg. Claimant conceded that she had been involved in a "minor" motor vehicle accident in September 1983. However, she reported that she had only suffered a headache for a few days without neck, shoulder or arm pain. The Consultants diagnosed: (1) left elbow strain, by history; (2) mild functional overlay; and (3) chronic dorsal strain, by history only, unrelated to the March 1984 injury. The Consultants disagreed with the medical study as summarized in Dr. Willey's opinion, concluding that claimant's tennis elbow was unrelated to her cervical condition. The Consultants reasoned that if claimant had a cervical condition that was producing left upper extremity symptoms, the diagnosis would not be tennis elbow.

Claimant credibly testified that approximately one month after her elbow injury she started "having stiff necks and a lot of pain in my shoulder and neck area." She described the pain as primarily centered in the lower, middle portion of her neck and upper back and radiating into her left shoulder. Her symptoms following the September 1983 motor vehicle accident were different in that she had experienced headaches and pain in the upper part of her neck.

The Referee set aside SAIF's denial of claimant's cervical and thoracic conditions. Although claimant had suffered neck complaints following the September 1983 motor vehicle accident, the Referee found that claimant's symptoms were significantly different after the March 1984 industrial injury.

Based on this change of symptoms and persuaded by Dr. Leary's analysis, the Referee concluded that the sequelae of the compensable left elbow injury had led to claimant's current upper torso problems.

Claimant is entitled to medical services for conditions which are a direct and natural consequence of the original injury. Eber v. Royal Globe Insurance Co., 54 Or App 942, 943 (1982). 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 medical opinion to resolve the issue. Uris v. Compensation Department, 247 Or 420, 424 (1967); Kassahn v. Publishers Paper Co., 76 Or App 105, 109 (1985).

Considering the complexity of the causal relationship issue, we have determined that its resolution can best be achieved through an appraisal of the medical opinions. Although we do not reject claimant's credible testimony as probative evidence, the medical opinions shall be accorded significant weight. Following our review of these opinions, and the record as a whole, we are not persuaded that claimant's current upper torso problems are causally related to her compensable left elbow injury.

In arriving at our decision we find the opinions of Dr. Murphy and the Western Medical Consultants more persuasive than Drs. Willey and Leary. Although Dr. Willey was claimant's initial attending physician, it was Dr. Murphy who elicited the history of the September 1983 motor vehicle accident and claimant's continuing neck and upper back complaints. In fact, neither Dr. Willey, nor claimant's current treating physician, Dr. Leary, provide an opinion discussing the September 1983 accident and its potential effect on claimant's current upper torso complaints. In view of the similar location of claimant's physical complaints before and after the compensable injury and the temporal relationship between the September 1983 accident and the March 1984 injury, we consider it incumbent upon the treating physicians to discuss the September 1983 accident and its potential contribution to claimant's current conditions.

Claimant contends that in attributing claimant's cervical and shoulder complaints to the September 1983 accident Dr. Murphy's opinion was based on an inaccurate portrayal of her prior complaints. We note parenthetically that Dr. Willey generally agreed with Dr. Murphy's opinion, subject to the reference to the British Columbia study. Assuming for the sake of argument that Dr. Murphy's opinion was based on an inaccurate history, the medical history provided to the Western Medical Consultants closely parallelled claimant's credible description of her complaints. Yet, the Consultants also concluded that claimant's cervical and thoracic problems were not related to her elbow injury. Moreover, the Consultants persuasively responded to Dr. Willey's summarization of the British Columbia study by reasoning that if claimant had a cervical condition which was producing left elbow symptoms, the current diagnosis of tennis elbow would be inappropriate.

Dr. Leary's opinion supported a causal relationship between claimant's upper torso problems and her compensable injury. However, Dr. Leary primarily attributed claimant's

current subjective complaints to her shoulder and directly related her current treatment to her "arm pain." The opinion did not specifically discuss the biomechanical relationship between claimant's current complaints and her compensable elbow injury. Moreover, not only did Dr. Leary fail to address the September 1983 motor vehicle accident and its potential significance, but there is no indication that he was even aware of the accident nor claimant's prior complaints.

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 discussed above, unlike Dr. Murphy and the Western Medical Consultants, neither Dr. Willey nor Dr. Leary addressed the potential effect the September 1983 motor vehicle accident had upon claimant's current cervical and thoracic condition. The lack of such an analysis reduces the probative weight to accord these attending physicians' opinions and provides us with a persuasive reason not to follow their conclusions.

Inasmuch as we have found claimant's cervical and thoracic conditions not compensable, and because we are not persuaded that claimant's compensable injury has had a disabling effect on an unscheduled area, she is not entitled to an award of unscheduled permanent disability.

ORDER

The Referee's order dated August 30, 1985 is affirmed in part and reversed in part. That portion of the order which set aside the SAIF Corporation's partial denial of claimant's cervical and thoracic conditions and which awarded an insurer-paid attorney's fee is reversed. SAIF's partial denial is reinstated. That portion of the Referee's order which awarded unscheduled permanent disability for an upper torso injury is reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $250 for services on Board review concerning the scheduled permanent disability issue, to be paid by the SAIF Corporation.

STEVEN E. PACE, Claimant
Vick & Associates, Claimant's Attorneys
Meyers & Terrall, Defense Attorneys
Mitchell, et al., Defense Attorneys

WCB 83-06015 & 83-11178
March 7, 1986
Order on Reconsideration

The self-insured employer, Loomis Armored Car, has requested reconsideration of that portion of the Board's Order on Review dated February 16, 1985 that awarded interim compensation benefits and penalties and attorney fees pursuant to claimant's request for review on those issues contained in claimant's brief on review. The issues of interim compensation and penalties and attorney fees were contested before the Referee. The employer argues that the Board was without jurisdiction to consider claimant's requests because claimant did not formally cross-request review.

The employer's argument that the Board has no jurisdiction to consider issues raised by claimant in his brief disregards longstanding case law to the contrary. Neely v. SAIF, 43 Or App 319 (1979); Jerry W. Sargent, 36 Van Natta 1717 (1984), aff'd mem., 76 Or App 212 (1985); Sharon L. James 37 Van Natta 1049 (1985) and cases cited therein.

The request for reconsideration is allowed. On reconsideration we adhere to and republish our previous order on review, effective this date.

IT IS SO ORDERED.

WILLIAM D. ANDERSON, Claimant
BETTY J. GALLUCCI, Employer
Baldwin & Brischetto, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 84-06727
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Menashe's order finding that although claimant's employer was noncomplying at the time of claimant's alleged industrial injury, the injury was noncompensable. The issue on review is compensability. The employer has not requested review of the Referee's approval of the Workers' Compensation Department's Proposed and Final Order finding the employer to be noncomplying.

We draw from the Referee's statement of the facts. In late 1983 claimant was hired by Ms. Gallucci, the noncomplying employer in this case, to serve as manager of a bed and breakfast facility leased by the employer. Claimant's duties, which he occasionally shared with his wife, included registering guests, cleaning rooms, making breakfast for guests and enforcing house regulations. Claimant also did maintenance and repair work as needed. In reality, claimant was required to do little in the way of registration or maintenance due to a scarcity of business. As remuneration, claimant received a room, utilities and a percentage of the net income from room rentals and the sale of antiques located on premises.

On the morning of December 13, 1983 claimant left the rooming house to do personal errands. During the afternoon he stopped at two local taverns, had four beers, and played pool before returning home at approximately 5:30 p.m. On arriving home claimant had an argument with his wife, who was apparently upset over claimant's being out all day. After the argument claimant went out onto the front porch of the house to have a cigarette. He testified that he started down the steps to retrieve some debris when he fell. He did not remember the details of the fall, but the medical evidence reflects that he apparently fell head first off the porch onto a nearby fence, severely injuring his right eye. As a result of the accident claimant has permanently lost the sight in the injured eye. Claimant admits that he had been drinking "too much" at the time of his injury.

Claimant signed a Form 801 on March 16, 1984, alleging that he was injured in the course of his employment. Because his employer did not carry workers' compensation insurance at the time of claimant's injury, the Workers' Compensation Department assigned the claim to the SAIF Corporation for processing pursuant to ORS 656.054. SAIF accepted the claim on May 14, 1984. It subsequently advised the employer of the acceptance and of the employer's right to request a hearing on the issue of compensability. The employer requested a hearing on July 23, 1984, more than 60 days after SAIF's acceptance of the claim.

Although the Referee found claimant to have been a subject worker at the time of his injury, he found claimant's injury noncompensable. The Referee acknowledged that claimant was technically employed at the time of his injury. He found the connection between the injury and claimant's work too tenuous to support a finding of compensability, however.

On review, claimant offers alternative arguments: First, that his injury arose out of and in the course of his employment as a rooming house manager. In the alternative, claimant argues that the Referee exceeded his authority by setting aside a claim that had been previously accepted by SAIF. Claimant cites Bauman v. SAIF, 295 Or 588 (1983), in support of his assertion. Because we find claimant's claim to be compensable on the facts, we need not address his alternative contention.

We agree with the Referee that claimant's activity at the time of his injury bore little relationship to the duties he was hired to perform. The tenuous nature of the relationship, however, does not necessarily defeat claimant's claim. We find this claim analogous to Wallace v. Green Thumb, Inc., 296 Or 79 (1983). In Wallace, the claimant was the caretaker of a rural fire station. He was on-call 24 hours per day and was required to live on the fire station premises. He was injured while preparing a meal inside his mobile home located on premises. While noting that compensation awards should not result from the mere fact that the employment placed the employe at the site of the injury, see Blair v. SIAC, 133 Or 450, 455 (1930), the Wallace Court recognized that when injury-causing activity is connected to the "on-duty" work of a resident employe, the employe's residency status must be factored into the analysis of compensability.

The Court noted that when a worker lives at the worksite, there are no off-premises alternatives available to the employe for accomplishing personal comfort activities. It found the Wallace claimant's preparation of a meal (during which he was injured) to be activity necessary for the effective performance of his on-duty tasks. It further found that because claimant was required to live at the worksite, the worksite was the only practicable place for his meals to be prepared. Because claimant's injury occurred in an "instrumentality" he was required to use, the claim was held compensable. Wallace, 296 Or at 84.

As with the claimant in Wallace, the present claimant was injured while engaging in personal activity on the employer's premises. This case does differ from Wallace in that the present claimant was not required to be on the employer's premises 24 hours per day. We do not find that distinction dispositive, however. Rather, we find the significant feature of this case to be that while claimant was on the employer's premises, which was also his home, he was automatically on duty. While at the rooming house claimant was expected to to be available to register guests and to perform all other duties of his contract for hire. By definition, therefore, any time claimant was on premises he was "in the course of employment" and any injury occurring during that time necessarily "arose out of" his employment activity. Claimant's injury is compensable.

ORDER

The Referee's order dated April 30, 1985 is reversed in

part and affirmed in part. That portion of the order that set aside the SAIF Corporation's acceptance of claimant's industrial injury claim is reversed. The claim is remanded to SAIF for processing according to law. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $1,750 for services at hearing and $750 for services on Board review, both fees to be paid by the SAIF Corporation.

MICHAEL D. BARLOW, Claimant
Gatti, et al., Claimant's Attorneys
Bottini & Bottini, Defense Attorneys

WCB 84-07650
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Myers' order that set aside its partial denial of claimant's ongoing course of chiropractic treatment and refused to address the issue of the extent of claimant's permanent partial disability on the ground that this issue had not yet been considered by the Evaluation Division. The issues are the compensability of claimant's medical services claim, the import of a Determination Order dated July 11, 1984 and the extent of disability.

Claimant injured his low back on August 17, 1982 in the course of his employment as a cannery worker when he slipped (but did not fall) on some broccoli lying on the floor. The day after the accident claimant visited a chiropractor, Dr. Warner. Dr. Warner diagnosed a lumbar strain and provided three weeks of conservative treatment. Dr. Warner released claimant for regular work on September 6, 1982.

Claimant returned to work at the cannery but his employment was terminated within a few days. From mid September 1982 through early 1983 claimant worked for other employers as a Christmas tree trimmer and harvester and as a dishwasher. Dr. Warner declared claimant medically stationary on January 12, 1983 noting that claimant had self-terminated care on September 13, 1982.

On March 11, 1983 claimant returned to Dr. Warner complaining of low back pain, right side pain, pain in both shoulders and headaches. Claimant told Dr. Warner that these symptoms related to his August 1982 industrial injury. Dr. Warner treated claimant on an infrequent basis until July 6, 1983. Dr. Warner declared claimant medically stationary on January 2, 1984 noting that he had not seen claimant for six months.

On May 30, 1983 claimant visited an emergency room and was examined by Dr. Wilson. According to Dr. Wilson, claimant stated that he was working as a dishwasher and complained of "diffuse back pain and bilateral rib pain." Claimant told Dr. Wilson about his 1982 industrial injury but also told him that this injury was no longer symptomatic. Dr. Wilson diagnosed lumbar strain and recommended conservative treatment.

During mid 1983 claimant moved to California and worked in the laundry room of a hotel for a few months. Claimant's job consisted of gathering linen and towels from rooms, delivering them to the laundry room and folding them after they had been cleaned. This job was full-time and claimant testified that he worked a considerable number of overtime hours as well.

Claimant left California in late 1983 and returned to Oregon for several months. He then moved to Nevada and found a job stocking shelves in a shoe store. Claimant quit this job after several weeks and returned to Oregon. Since that time claimant has made some attempts to find work but has found none.

On February 21, 1984 an independent medical examination of claimant was performed by Dr. Kelley, a chiropractor. Dr. Kelley stated emphatically that claimant was medically stationary from the 1982 industrial injury and rated him as without permanent impairment. He thought that claimant was fully capable of performing work without restrictions or limitations and stated that he could see no causal relationship between claimant's 1982 low back injury and his then current complaints. Near the end of his report Dr. Kelley stated that he did "not consider [further chiropractic] treatment to be reasonable and necessary for the material improvement and recovery from the [1982] industrial injury." Dr. Kelley reiterated these conclusions in a subsequent report dated April 5, 1984.

A few days before the examination by Dr. Kelley claimant returned to Dr. Warner for the first time in eight months. In a letter to the employer's adjusting agency dated February 28, 1984 Dr. Warner reported that claimant's cervical, thoracic and lumbar ranges of motion were within normal limits with minor complaints of pain at the extremes. He opined that claimant's condition had worsened since his last visit but released claimant for work without restrictions. In another letter dated April 11, 1984 Dr. Warner stated that claimant's 1982 industrial injury had resulted in some slight permanent impairment in that claimant would continue to experience "episodic symptomatology." He also indicated, however, that this slight impairment would not hamper claimant's ability to work.

Claimant's claim was closed by Determination Order dated July 11, 1984 with no award of permanent partial disability. After the Determination Order issued, Dr. Warner reiterated in a letter to claimant's attorney that claimant had sustained permanent impairment as a result of his 1982 injury. He also suggested that claimant not perform heavy work but related this suggestion more to claimant's "slight build" than to his 1982 industrial injury.

On March 12, 1985 the employer denied any further payment for chiropractic treatment on the grounds that such treatment was not causally related to the 1982 industrial injury and that such treatment was not reasonable and necessary. In a report dated March 14, 1985 Dr. Kelley reiterated his previous conclusions that claimant was medically stationary and that claimant had sustained no permanent impairment from the 1982 industrial injury. Near the end of his report Dr. Kelley also stated, "I am of the opinion that no further treatment of any type -- including curative, palliative, maintenance, observation, etc. -- is necessary or reasonable relative to the reported industrial accident of August 17, 1982." (Emphasis in original).

At the hearing claimant testified that he had experienced continuous and rather severe symptoms since the 1982 accident. When asked on cross-examination why he had sought so little treatment for these alleged symptoms, claimant stated that he had been too busy to seek treatment and that transportation had been a problem.

The Referee expressly found that claimant was not a credible witness based upon the numerous inconsistencies and implausibilities in his testimony. He nonetheless ruled that claimant had established entitlment to further chiropractic treatment and set aside the employer's denial. He emphasized the opinion of Dr. Warner as claimant's treating chiropractor and discounted Dr. Kelley's opinion by emphasizing the sentence in his early report to the effect that claimant's chiropractic treatments were not necessary for the improvement of claimant's condition. He reasoned that Dr. Kelley's opinion was insufficient to defeat claimant's claim for ongoing chiropractic treatment because treatment need not be curative to be compensable under ORS 656.245.

After reviewing the record in this case we agree with the Referee that claimant was not a credible witness. We disagree, however, with the Referee's conclusion that claimant has carried his burden of proving that his periodic chiropractic treatments are causally related to his 1982 industrial injury and that such treatment is reasonable and necessary.

The only credible evidence that tends to indicate a causal connection between claimant's 1982 injury and his 1984 complaints is the opinion of Dr. Warner. That opinion reflects a heavy reliance upon history provided by claimant, a noncredible witness, and some important details of that history are incorrect. For instance, Dr. Warner's report of August 23, 1984 states that claimant was injured as a result of "a rather nasty fall." Claimant stated at the hearing that no such fall occurred. Because of Dr. Warner's reliance upon questionable and inaccurate history, his opinion is of little probative value, see George E. Johnson, 37 Van Natta 547, 548, 37 Van Natta 673 (1985); Bonnie M. Danton, 37 Van Natta 561, 569 (1985), and we conclude that it is insufficient to satisfy claimant's burden of proof. We note also that Dr. Warner's reports contain no explanation of how claimant's low back injury relates to his cervical and thoracic symptoms which appear to be the focus of Dr. Warner's treatment after March 1983.

Whatever probative value Dr. Warner's opinion may have is further diminished by Dr. Kelley's thorough reports and especially by Dr. Wilson's emergency room report. In May 1983 claimant told Dr. Wilson about his 1982 industrial injury and also told him that this injury was no longer symptomatic. Claimant made these statements during a period of time in which he was receiving treatment from Dr. Warner supposedly for his 1982 injury. Claimant's statements to Dr. Wilson are a strong indication that at least as of May 1983 Dr. Warner was treating claimant for a condition other than his 1982 injury.

Even assuming that claimant had satisfied his burden of proof on the causation issue the record does not support a finding that claimant's periodic chiropractic treatments are reasonable and necessary. The Referee discounted Dr. Kelley's opinion that the treatments were not reasonable and necessary by seizing upon a statement in Dr. Kelley's original report to the effect that the treatments were not curative. The Referee correctly noted that medical services need not be curative to be compensable but overlooked the fact that Dr. Kelley later clarified the scope of his opinion to include palliative as well as curative treatment.

In any event, Dr. Warner's reports do not support the

conclusion that claimant's periodic chiropractic treatments are reasonable and necessary. In his report of April 11, 1984 Dr. Warner opined that the 1982 injury had resulted in some minimal permanent impairment but he went on to state that the symptoms associated with this impairment were "certainly not enough to require time loss" and would not hamper claimant's ability to work. These impressions are reinforced by claimant's infrequent treatment record and by his relatively continuous work history. We see no evidence in the file to indicate that claimant missed any work on account of his 1982 industrial injury after Dr. Warner released him for regular work on September 6, 1982. Under these circumstances claimant's periodic chiropractic treatments serve no useful purpose and thus are not reasonable and necessary under ORS 656.245. Fernando Lopez, 38 Van Natta 95 (WCB Case No. 84-13300, February 7, 1986.)

Regarding the issue of the extent of claimant's disability, the Evaluation Division issued a Determination Order dated July 11, 1984 which in pertinent part reads:

> "The Evaluation Division has considered the medical reports and all other information submitted regarding your injury or disease, and has now determined the extent of compensation for your disability. . . .
>
> "Your employer's insurance company has requested a determination of your claim because you are no longer under active medical treatment due to your injury. Your file indicates that you have not kept appointments scheduled for you on January 25, 1984 and May 21, 1984. No reason has been given for missing those appointments.
>
> "The Department finds that determination of your claim is justified by the facts listed above, but that information in your file is not adequate to support a determination on the issues of compensation for temporary total or permanent partial disability. A determination of these issues will be made if adequate information is received within one year from the mailing of this order, unless a hearing has been requested.
>
> "The Department therefore orders that your claim be closed.
>
> "The worker's condition was found to be medically stationary on May 21, 1984."

After reading the above-quoted language the Referee concluded that the Evaluation Division had refused to address the issue of the extent of claimant's disability and citing OAR 438-06-040 decided that he was without authority to do so. That rule provides that "issues of permanent disability shall not be adjudicated unless the claim has once been considered by the Evaluation Division or the insurer under ORS 656.268." The Referee ordered the claim remanded to the Evaluation Division for a determination of the extent of claimant's disability.

On Board review both the employer and the claimant argue that the Referee erred in refusing to address the issue of the extent of claimant's disability. We agree with the parties. The initial paragraph of the Determination Order clearly states that the Evaluation Division had considered the medical evidence submitted by the employer and was making a determination of the extent of claimant's disability. The third paragraph makes implicit reference to the reconsideration provision of ORS 656.268(4), thus confirming that a determination of claimant's claim had been made. The fourth paragraph states that claimant's claim was closed. The fifth paragraph recites a medically stationary date. The date of the Determination Order is cited at the bottom of the order as the beginning of claimant's five-year aggravation rights period.

Although some language contained in the third paragraph of the order may be read as a refusal to determine the extent of claimant's disability, it can also be read as saying that no award of temporary or permanent disability is warranted by the medical evidence. Taking the order as a whole, we conclude that the Evaluation Division did consider the issue of the extent of claimant's permanent partial disability and determined that no award was warranted. We, therefore, address the issue on review.

The only evidence tending to support an award of permanent partial disability is the opinion of Dr. Warner to the effect that claimant had sustained some minimal permanent impairment as a result of his 1982 industrial injury. That opinion is of questionable probative worth for the reasons stated previously in connection with the discussion of claimant's claim for medical services. Even taking the opinion at face value, it is clear from other statements in Dr. Warner's reports that claimant has sustained no loss of earning capacity. Dr. Warner stated in his report of April 11, 1984 that the symptoms associated with the minimal permanent impairment sustained as a result of the 1982 industrial injury would not hamper claimant's ability to work and would not require time loss. We also note that Dr. Warner placed no permanent restrictions on claimant's work activity because of the 1982 injury. Under these circumstances we conclude that claimant has lost none of his ability "to obtain and hold gainful employment in the broad field of general occupations" and thus that claimant is not entitled to an award of permanent partial disability. See ORS 656.214(5).

ORDER

The Referee's order dated April 10, 1985 is reversed in part. Those portions of the Referee's order that set aside the employer's partial denial of March 12, 1985, remanded the claim to the Evaluation Division for determination of the extent of claimant's disability, and awarded claimant's attorney a fee of $800 are reversed. The employer's partial denial of March 12, 1985 is reinstated and approved. The Determination Order dated July 11, 1984 is affirmed. The remainder of the Referee's order is affirmed.

VIRGIL R. CARGILL, Claimant
Bloom, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-11483
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Podnar's order which: (1) awarded 80 degrees for 25 percent unscheduled permanent partial disability in addition to the stipulation and Determination Orders which had awarded 112 degrees for 35 percent unscheduled permanent partial disability for a low back injury; (2) awarded 22.5 degrees for 15 percent scheduled permanent partial disability for loss of use or function of claimant's right leg due to the same low back injury; and (3) denied claimant's requests to: (a) set aside the Determination Order dated September 17, 1984 as premature; (b) order a training program; and (c) award penalties and attorney fees for: (1) the insurer's failure to pay temporary total disability compensation from September 17, 1984 through January 2, 1985; (2) the employer's failure to rehire claimant under ORS 659.400 through .435; and (3) the insurer's failure to authorize and implement a training program. In addition to the requests for reversal of the Referee's order, claimant requests remand to reopen the hearing to consider subsequently created medical and vocational reports. The insurer moves to strike those portions of claimant's brief on review which refer to claimant's request for relief under the Board's Own Motion authority pursuant to ORS 656.278.

We deny the insurer's motion to strike portions of claimant's brief. The Board was already on notice of the request for reopening under the Board's Own Motion authority. References in claimant's brief to the Own Motion request are irrelevant to the issues in this matter.

Claimant has submitted 32 documents created since publication of the Referee's order. The insurer has submitted two documents since publication of the Referee's order. All of the documents pertain to claimant's medical and vocational situation after closure of the claim by the Determination Order dated September 17, 1984. Not one of the documents casts doubt on the opinions or conclusions already contained in the record on the issue whether claimant's condition was prematurely found to be medically stationary. The first issue at the hearing in May 1985 was whether the claim was properly closed by the Determination Order. The Referee found that claimant's condition was medically stationary according to the statutory definition at the time of closure and, therefore, affirmed the closure and then went on to consider the other issues which followed from that determination. We agree with the Referee's decision. See Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985); Alvarez v. GAB Business Services, Inc., 72 Or App 524 (1985).

Worsening of claimant's condition after the closure on September 17, 1984 falls under the Board's Own Motion jurisdiction under ORS 656.278 and a separate request for reopening has been made. The question whether claimant is entitled to reopening of his claim will be decided by the Board pursuant to ORS 656.278 separately from the question whether his condition was medically stationary and properly closed by the Determination Order dated September 17, 1984, which is the first issue in this case.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). Remand to consider the subsequently created medical and vocational documents is denied because the documents are irrelevant to the issue of premature closure by the Determination Order dated September 17, 1984. On the issue of premature closure, the Board finds that the record has not been incompletely, insufficiently or improperly heard or developed.

On the merits, the Board affirms and adopts the well-reasoned order of the Referee.

ORDER

The Referee's order dated June 3, 1985 is affirmed.

CHARLES C. CLAMPITT, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 83-07241
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Mulder's order, as amended, that: (1) set aside its denial of claimant's psychological condition; (2) set aside its denials of claimant's aggravation claims for the psychological condition; (3) set aside the Determination Order dated October 26, 1983 as having been prematurely issued; and (4) ordered the insurer to pay claimant temporary total disability compensation beginning September 26, 1983. Claimant cross-requests review of those portions of the order that: (1) affirmed the insurer's denial of thermography; and (2) affirmed the insurer's denial of medical services provided by Dr. Berselli. Claimant also asserts entitlement to temporary total disability compensation for the period of July 26 through August 9, 1983, and penalties and attorney fees for the insurer's alleged failure to pay that compensation.

The issues on review are compensability of claimant's psychological condition, aggravation, premature closure, entitlement to temporary total disability compensation, thermography, Dr. Berselli's medical services, and penalties and attorney fees. We review de novo.

On the issues of compensability, thermography, and Dr. Berselli's medical services, we affirm the order of the Referee. On the remaining issue addressed by the Referee we reverse. Finally we find claimant not entitled to temporary total disability compensation for the period of July 26 through August 9, 1983.

Claimant originally injured his low back off the job in 1972. The injury resulted in laminectomies at L4-5 and L5-S1. Following these surgeries claimant experienced pain radiating to the right leg up to the time of the hearing. The present injury occurred in December 1980 and involved strains of both the lumbar and cervical spine. Claimant was examined by Orthopaedic Consultants, who found claimant's loss of back function due to the industrial injury to be minimal. Objective tests revealed little in the way of physical abnormalities.

Despite the absence of physical findings, claimant's condition failed to improve. His physicians began to suspect the possibility of a psychological interference. Claimant was referred to the Northwest Pain Center where he complained of irritability and depression stemming from the industrial injury. Dr. Dunlop, an osteopath who became claimant's treating physician, opined that claimant's psychological reaction was the result of the industrial injury. Claimant received temporary total disability compensation throughout 1982.

After a serious confrontation with his wife, claimant entered a psychiatric hospital in late 1982. He admitted to having marital problems for approximately two years prior to the industrial injury. While hospitalized claimant underwent a battery of psychological tests that revealed a preexisting personality disorder and a very low tolerance for stress.

Claimant continued to receive temporary total disability compensation until September 27, 1983 when Orthopaedic Consultants opined he was medically stationary. A subsequent Determination Order awarded periods of temporary disability and 64 degrees for 20 percent unscheduled permanent partial disability. Claimant then came under the care of Dr. Burke, a chiropractor, who issued a number of reports interpreted by the insurer to be requests for reopening. The claim was reopened on November 30, 1983 and the insurer paid compensation through February 21, 1984, the date claimant's aggravation claim was denied. The denial was based on the report of Orthopaedic Consultants that claimant's back condition remained unchanged since the Consultants' last examination conducted prior to the Determination Order. Claimant was subsequently examined by Dr. Stolzberg, a psychiatrist, who stated in her May 11, 1984 report that claimant's psychological condition was stationary and essentially unchanged from earlier examinations.

Although he found claimant's testimony "not reliable," the Referee concluded that claimant had proved a compensable worsening of his psychological condition since the October 1983 Determination Order. We disagree. We find most persuasive the opinion of Dr. Stolzberg, the only psychiatrist to offer an opinion regarding the aggravation of claimant's psychological condition. In Dr. Stolzberg's opinion, claimant's condition subsequent to the Determination Order remained essentially unchanged. We find that claimant has failed to prove a compensable aggravation. ORS 656.273(1).

The Referee also found that claimant's claim was prematurely closed by the 1983 Determination Order. Again, we disagree. A claim may be closed when it is established that claimant is medically stationary. ORS 656.268. At the time of the present closure, the medical evidence regarding claimant's status consisted primarily of a five-page Orthopaedic Consultants report concluding that claimant was medically stationary, and a form completed by Dr. Goldberg in which he checked a box indicating that claimant was not medically stationary. Of this evidence, we find the more complete report of Orthopaedic Consultants more persuasive and conclude that the October 1983 closure was proper based on the record in existence at the time of closure. See Maarefi v. SAIF, 69 Or App 527 (1984).

Because we find claimant's claim to have been properly closed, we must now rate the extent of his unscheduled disability. At the time of the hearing claimant had been awarded 20 percent. On review he asserts entitlement to permanent total disability. After a review of the record, and considering claimant's compensable psychological condition, we find claimant entitled to an additional 32 degrees (10 percent) unscheduled disability, bringing his total award to 30 percent.

The remaining issue is whether claimant is entitled to temporary total disability compensation for the period of July 26 through August 9, 1983. Claimant asserts that he was released only for "modified" employment during that period and as such is entitled to compensation. After a review of the record, we note that claimant's "modified" release was no more than a release for regular work with lifting restrictions. He was released and available for work and was, therefore, not entitled to temporary total disability compensation for the period at issue.

ORDER

The Referee's order dated March 25, 1985, as amended April 17, 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, set aside the October 26, 1983 Determination Order as prematurely closed and ordered payment of compensation beginning September 27, 1983 are reversed. Claimant is awarded 30 percent (96 degrees) unscheduled permanent partial disability in lieu of all prior awards. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $500 for prevailing on the issue of the compensability of claimant's psychological condition, to be paid by the insurer. In addition, claimant's attorney is allowed a fee equal to 25 percent of the increased unscheduled disability compensation awarded by this order, not to exceed $3,000.

DARLA FALCON, Claimant
Burt, et al., Claimant's Attorneys
John Snarskis, Defense Attorney

WCB 85-01340
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee T. Lavere Johnson's order that found claimant entitled to an award of permanent total disability in lieu of awards by Determination Order of 30 degrees for 20 percent scheduled permanent partial disability for claimant's right leg and 160 degrees for 50 percent unscheduled permanent partial disability for injury to claimant's pelvis. The issue is extent of disability.

Claimant was injured on September 22, 1981 in the course of her employment as a farm worker. She was driving an open vehicle and towing a hop wagon when she fell out of the vehicle and was run over by the wagon. The accident fractured claimant's pelvis in two places, dislocated the left sacroiliac joint and the pubic junction (symphysis pubis) and fractured her right femur. Claimant was in the hospital for several weeks. Her pelvic fractures and dislocations were treated with traction and her fractured right femur was stabilized through surgical implantation of metal rods.

In February 1982, shortly after she was discharged from the hospital, claimant moved to Fort Worth, Texas. Claimant continued to recover from her injuries under the care of a Texas orthopedist, Dr. Youngman. In October 1983 Dr. Youngman surgically removed the metal rods from claimant's right femur.

Dr. Youngman declared claimant medically stationary in February 1984. At that time, claimant complained of chronic low back, sacroiliac, tailbone and groin pain. Dr. Youngman estimated claimant's tolerances as walking for 10 minutes, standing for 15 minutes and sitting for 15 minutes. He stated that by alternating sitting, standing and walking, claimant was capable of working four hours per day. Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Dr. Youngman rated the impairment of claimant's pelvis and low back at 45 percent and the impairment of her right leg and hip at 20 percent. Claimant's claim was closed by Determination Order dated March 14, 1984 with awards of two and a half years temporary total disability, 20 percent (30 degrees) scheduled permanent partial disability for her right leg and 50 percent (160 degrees) unscheduled permanent partial disability for injury to her pelvis.

After she was declared medically stationary, claimant participated in a training program with Goodwill Industries and, upon completing the program, was hired by Goodwill in July 1984 to do office work in its training center. Claimant was averaging 22 hours per week in this position at the time of the hearing. Claimant worked up to 30 hours per week for two months during early 1985, but found this schedule to be beyond her physical limitations. Claimant has been allowed a good deal of flexibility in setting her work hours and in alternating work duties so as to change physical positions in accordance with the limitations imposed by Dr. Youngman.

Claimant's supervisor at Goodwill stated in a letter to claimant's attorney that claimant was a good worker with excellent clerical skills and a respected and valuable employe. At the time of the hearing, claimant had achieved two merit pay raises during the fourteen months of her employment with Goodwill. Since beginning her job with Goodwill, claimant had not applied for work elsewhere.

Claimant is 27 years old and is of average intelligence. She dropped out of high school in the eleventh grade, but since her injury has obtained a GED. Besides farm work, claimant has worked in a cannery, in a fabric store and as a librarian's aide.

To be entitled to an award of permanent total disability, a worker has the burden of establishing that she is permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(1)(a). The worker may carry this burden in one of two ways: (1) she may establish on the basis of the medical evidence alone that she is physically incapable of regularly performing gainful and suitable work; or (2) she may establish that she is effectively foreclosed from gainful and suitable employment through a combination of medical and nonmedical factors, the so-called "odd-lot" doctrine. Clark v. Boise Cascade, 72 Or App 397, 399 (1985). The ability of a worker regularly to perform suitable and gainful work on a

part-time basis may preclude an award of permanent total disability. Pournelle v. SAIF, 70 Or App 56, 60 (1984); Hill v. SAIF, 25 Or App 697, 701 (1976); Ellen Lankford, 37 Van Natta 1146, 1148 (1985).

In the present case, the medical evidence by itself does not establish that claimant is permanently incapacitated from regularly performing gainful and suitable work. The Referee concluded, however, that claimant was totally disabled under the odd-lot doctrine. This conclusion was based upon the rule of Harris v. SAIF, 292 Or 683, 695 (1982):

> "The determination of permanent total disability status does not turn upon whether the claimant has money-earning capacity, but rather upon whether the claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market . . . 'undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.'" (quoting 2 Larson, The Law of Workmen's Compensation, §57.51 at 10-164.49 (1983)).

In the present case, the Referee saw claimant's position with Goodwill Industries as, in essence, a "charity job." He emphasized claimant's inability to work a full eight-hour day and the fact that her employer allowed her significant flexibility in setting her work hours and in performing her work duties. He did not think that claimant would be able to sell her skills in a truly competitive labor market.

We disagree. Claimant is performing half-time work at a gainful and suitable occupation. She is a competent and valued employe. She is young, of normal intelligence and reasonably well-educated. Such qualities make her clerical skills saleable in the general labor market. Although her present employer allows her considerable flexibility in working hours and duties, claimant has not established that she is incapable of working in a somewhat less flexible environment or that other employers would be unwilling to allow similar flexibility. We conclude, therefore, that claimant is not entitled to an award of permanent total disability.

On our de novo review of the record, we find that claimant was adequately compensated in connection with her compensable injuries by the Determination Order of March 14, 1984.

ORDER

The Referee's order dated September 13, 1985 is reversed. The Determination Order dated March 14, 1984 is reinstated and affirmed.

KATHLEEN M. GOULD, Claimant
Malagon & Moore, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 84-12506
March 13, 1986
Order on Reconsideration

On December 20, 1985 we issued an Order of Abatement, stating that we had decided to reconsider our Order on Review of December 17, 1985. In our initial order we affirmed the Referee's order which assessed a penalty and accompanying attorney's fee for the insurer's failure to pay interim compensation as directed by a prior Referee's order. The Referee found that interim compensation ordered payable pursuant to the Court of Appeals' decision in Bono v. SAIF, 66 Or App 687 (1984), rev'd, 298 Or 405 (1984), was "compensation" as that term is used in ORS 656.313(4) and must be paid pending review. Both parties have complied with our request for supplemental arguments concerning the "interim compensation" issue. On reconsideration, we reverse the order of the Referee.

The pertinent facts are as follows. Claimant filed a claim for a right knee injury on April 23, 1984. She was off work due to the injury for approximately 9 days. Pending its eventual acceptance of the claim, the insurer paid temporary disability compensation for the time claimant was not working. No compensation was paid for the time claimant was working.

Claimant requested a hearing, contending that she was entitled to interim compensation from the date of her claim through July 13, 1984, the date of the insurer's acceptance. By virtue of a prior Referee's order, claimant was awarded interim compensation through July 12, 1984, penalties, and accompanying attorney fees. The prior Referee's order was based on the Court of Appeals' decision in Bono v. SAIF, 66 Or App 687 (1984), which required payment of "interim compensation" beginning 14 days after a claim was made, regardless of whether a claimant was working.

The insurer requested Board review and refused to pay the interim compensation as directed by the prior Referee's order. Claimant requested a hearing, contending that the insurer unreasonably failed to comply with the prior Referee's order.

Subsequent to claimant's hearing request, the Supreme Court reversed the Court of Appeals' decision in Bono v. SAIF, 298 Or 405 (1984). The Supreme Court held that a claimant is entitled to temporary disability compensation as "interim compensation" only if the claimant "left work" as the phrase is used in ORS 656.210(3), i.e. on account of injury or disease. Relying on the Supreme Court's decision in Bono, the Board reversed that portion of the prior Referee's order which required payment of interim compensation during the time claimant was working. Kathleen M. Gould, 37 Van Natta 458, aff'd mem., 74 Or App 722 (1985).

In the present case, the Referee rejected the insurer's argument that the interim compensation awarded by the prior Referee's order was not "compensation" as that term is used in ORS 656.313(4). Therefore, the Referee found that payment of the interim compensation ordered pursuant to the Court of Appeals' Bono decision could not be stayed pending review. Accordingly, the Referee concluded that the insurer's refusal to pay the interim compensation was unreasonable and warranted a maximum penalty.

Subsequent to the Referee's order, the Board issued its opinion in Terry L. Hunter, 38 Van Natta 134 (February 18, 1986). Hunter involved the identical legal issue which is presently before us, i.e. whether "interim compensation" ordered payable by a Referee pursuant to the Court of Appeals decision in Bono v. SAIF, supra., may be stayed pending Board review of the Referee's decision. In Hunter, we concluded that the "interim compensation" ordered by a Referee's order was payable solely by virtue of the Court of Appeals' interpretation of ORS 656.262(4) regardless of claimant's work status, and, thus, was not temporary total disability compensation due under ORS 656.210. Since the Supreme Court's decision in Bono v. SAIF, supra., had terminated the existence of such compensation, we reasoned that this was not the type of compensation that must be paid under ORS 656.313(4) pending further review. Therefore, we held that the insurer was justified in refusing to pay this compensation pending review of a Referee's order.

Here, as in Hunter, the interim compensation ordered by the Referee's order was based solely on the Court of Appeals' interpretation of ORS 656.262(4). As such, this interim compensation was not temporary disability compensation due under ORS 656.210 and was not required to be paid pending further review pursuant to ORS 656.313(4). Accordingly, we conclude that the insurer's refusal to pay interim compensation as directed by the Referee's order pending review of the decision was justified.

ORDER

The Board's Order on Review dated December 17, 1985 is set aside and the Referee's order dated May 20, 1985 is reversed. Claimant's request for hearing is dismissed.

DAN W. HEDRICK, Claimant
Hayner, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 84-10652
March 13, 1986
Second Order on Reconsideration

Claimant requested reconsideration of our Order on Reconsideration dated January 17, 1986 in which we modified our December 31, 1985 Order on Review to delete an attorney fee award. Employer petitioned for judicial review on or about January 23, 1986. On February 10, 1986 we withdrew our previous orders to consider claimant's request. ORS 183.482(6). Because this case represents a procedure new to the Board, we discuss the procedural posture of this matter in some detail.

This was a denied claim case. Claimant requested a hearing and, after hearing, the Referee set aside the employer's denial. Employer requested Board review. Upon mailing of the transcript of the hearing to the parties, the due date for employer's opening brief was established as June 17, 1985. By August 8, 1985 employer had not filed an opening brief. On August 8, 1985 claimant filed a motion to dismiss the employer's request for review on the ground that employer did not timely file an opening brief. The motion was denied on August 16, 1985. Employer then filed a request for an extension of time within which to file its opening brief and a request for clarification of our August 16, 1985 order. On September 10, 1985 we issued an order in which we denied employer's requested extension, allowed claimant an additional 20 days to file a brief and advised the parties that we would consider a reply brief from employer if filed within ten days

of claimant's brief. On September 16, 1985 claimant advised the Board that he did not intend to file a brief.

This matter was reviewed in the normal course of business and on December 31, 1985 we issued our Order on Review in which we affirmed and adopted the Referee's order and awarded claimant's attorney a reasonable attorney fee of $550 for services on Board review. Employer requested reconsideration of our order to the extent that it awarded an employer paid attorney fee. The essence of employer's request was that, because no briefs were filed on Board review, there was no basis upon which to award an attorney fee. We reconsidered our order in view of employer's request and issued the January 17, 1986 Order on Reconsideration that is the subject of the current request. On January 17 and January 23, 1986 claimant requested reconsideration and reinstatement of the previous attorney fee. As noted, employer had by this time petitioned for judicial review of our order.

We held in Clinton L. Maddock, 37 Van Natta 984 (1985), that ORS 183.480 does not apply to this agency by virtue of ORS 183.315(1). We further reasoned that although ORS 183.482 was not enumerated in ORS 183.315(1), that statute sets forth the basis and jurisdiction for judicial review of agency orders under the Administrative Procedures Act. Because the basis and jurisdiction for judicial review of our orders is found in ORS 656.298, and is different from that of ORS 183.482, we concluded that ORS 183.482 could not apply to this agency, either. On that basis, we declined to withdraw our order for reconsideration after the filing of a petition for judicial review, believing that we had no jurisdiction to do so. In reaching that result, we distinguished dicta in Tektronix Corp. v. Twist, 62 Or App 602, rev den, 295 Or 259 (1983), that was arguably to the contrary.

Very recently the Court of Appeals decided Fischer v. SAIF, 76 Or App 656 (1985). In that case, we issued an order on reconsideration following the filing of a petition for judicial review, but made no change in our previous order. SAIF moved to dismiss the petition for review because no amended petition was filed after our last order. See ORS 183.482(6); ORAP 5.35. The court first stated, "[ORS 183.482(6)] applies to the Workers' Compensation Department, because its application is not excluded by ORS 183.315(1) . . . ," citing Tektronix Corp. v. Twist, supra. The court then held that no amended petition for judicial review was required because we had not withdrawn or otherwise modified our previous order. We conclude that Fischer v. SAIF, supra, has, in effect, overruled Clinton L. Maddock, supra, and that we are authorized to withdraw an order for reconsideration after the filing of a petition for judicial review with the Court of Appeals. The procedure for doing so is set forth at ORAP 5.35, and we have followed that procedure in this case.

On the merits of claimant's request for reconsideration and reinstatement of the previous attorney fee, we agree with claimant. We addressed this very issue in Betty J. McMullen, 38 Van Natta 117 (WCB Case No. 83-08212, February 12, 1986). We concluded that when an employer or insurer requests Board review of a Referee's decision, and the claimant's compensation is not disallowed or reduced, ORS 656.382(2) mandates that an attorney fee, paid by the employer or insurer, be awarded to the claimant's attorney. We further noted, however, that the legislature has

delegated to the Board the authority to determine the amount of the fee. Pursuant to this delegation, we have adopted administrative rules establishing guidance for the award of attorney fees. See OAR 438-47-010(2); 438-47-055. Under these rules, an attorney fee is based upon the efforts of the attorney and the result obtained for the claimant. Subfactors considered relate to the nature of this forum and the complexity of cases, among other. See Barbara A. Wheeler, 37 Van Natta 122, 123 (1985); Francisco M. Hernandes, 37 Van Natta 1455 (1985). One excellent measure of these factors, and quite often the only one, is the brief submitted to the Board.

In this case, claimant prevailed at hearing and employer requested review. When nearly 60 days had passed after the due date for employer's brief without word from employer, claimant moved to dismiss the request for review. Briefing is not, and never has been, jurisdictional. See OAR 438-11-010(3). However, the Board had at that time expressed its unwillingness to accept flagrantly late briefs. Nancy J. Rensing, 37 Van Natta 3 (1985). Thus, we denied the request to dismiss, but we also denied employer's belated request for a briefing extension. Claimant then elected to not file a brief and we continued to perform our statutory duty to conduct de novo review in the absence of briefs. After review, we issued a memorandum order affirming and adopting the Referee's order. See John B. Bruce, 37 Van Natta 135, aff'd mem, 76 Or App 732 (1985). Notwithstanding the fact that claimant did not file a brief, we realize that the motions and other required work performed by claimant's attorney should be compensated. Those efforts have been well-documented and will be made a part of the supplemental record forwarded to the court. ORAP 5.35(4). On this record, we conclude that claimant's attorney is entitled to a reasonable attorney fee in the amount of $550, to be paid by the self-insured employer.

ORDER

The Order on Reconsideration dated January 17, 1986 is hereby withdrawn and vacated. Our Order on Review dated December 31, 1985 is republished in its entirety effective this date.

RONALD M. HERRINGTON, Claimant
Galton, et al., Claimant's Attorneys
Tooze, et al., Defense Attorneys
Dunn, et al., Defense Attorneys

WCB 84-06818, 84-02569 & 84-13438
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review in these consolidated cases of Referee Knapp's orders that: (1) dismissed WCB Case No. 84-13483 without addressing claimant's request for attorney fees; (2) affirmed the Determination Orders dated March 2, 1984 and April 8, 1985 that awarded a total of 64 degrees for 20 percent unscheduled permanent partial disability for the low back and made no award of scheduled disability for claimant's legs; (3) denied claimant's request for attorney fees for prevailing on what claimant asserts was an insurer-initiated request for hearing on the issue of unscheduled disability; (4) denied claimant's request for attorney fees for an insurer's failure to agree to an order pursuant to ORS 656.307(1); and (5) denied claimant's request for penalties and attorney fees for an insurer's failure to accept or deny his claim in a timely manner. The issues on review are whether WCB Case No.

84-13438 should be returned to the Referee for consideration of attorney fees, attorney fees for an alleged insurer-initiated request for hearing, attorney fees for an alleged failure to agree to an ORS 656.307 order, extent of unscheduled and scheduled disability, and penalties and attorney fees for an alleged untimely acceptance or denial of claimant's claim.

We affirm the Referee's order dated May 20, 1985, which pertains to WCB Claim Nos. 84-06818 and 84-02569. We also affirm the Referee's order dated April 23, 1984 which dismissed WCB Case No. 84-13438, with the following comment. Claimant argues on review that he is entitled to an insurer-paid attorney fee for services rendered before a hearing occurred in WCB Case No. 84-13438. In order to address claimant's argument, the procedural context of the claim must be reviewed.

Claimant suffered a compensable injury to his low back in June 1982 while National Union Fire Insurance Company (National) was on the risk. He suffered a second pain-producing incident in October 1984. The employer was then insured by The Hartford Insurance Group (Hartford). Claimant filed a claim (WCB Case No. 84-13438) with Hartford, alleging that he sustained a new injury at the time of the latest incident. Hartford deferred the claim and paid interim compensation until November 29, 1984 when claimant returned to work. Hartford ultimately denied the claim on December 14, 1984. In the interim, claimant filed an aggravation claim with National. National also deferred the claim and paid interim compensation when claimant again left work due to pain.

Claimant requested that the Workers' Compensation Department name a paying agent pursuant to ORS 656.307(1). The Department directed the insurers to set out their respective positions with regard to claimant's request. Hartford concurred that a paying agent should be named. National asked that the naming of an agent be deferred pending its receipt of a medical report bearing on whether claimant had suffered an aggravation or a new injury at the time of the most recent work incident. Upon receipt of the medical report, National accepted claimant's aggravation claim.

After National's acceptance, Hartford asked that claimant's new injury claim be dismissed. Referee Knapp sought claimant's response to Hartford's request. Claimant had no objection to the dismissal, but he argued for an attorney fee for counsel's services rendered before the request for dismissal. Claimant argued that he was compelled to retain counsel in order to preserve his appeal rights due to the insurers' failure to timely request an order under ORS 656.307. After receiving claimant's response, Referee Knapp dismissed claimant's claim against Hartford, but did not address the request for attorney fees.

On review claimant asks that WCB Case No. 84-13438 be returned to the Referee for a hearing on the issue of attorney fees. The issue is whether claimant's counsel was entitled to a fee for his pre-hearing services. We note that under certain circumstances, an attorney fee is awardable whether or not a claim goes to hearing. We further note, however, that under OAR 438-47-015 an attorney fee award is dependent on the attorney's instrumental participation in actually obtaining compensation for his client.

In the present case, claimant would have received, and in fact did receive, all of the compensation due him without his attorney's participation. Subsequent to the filing of the Hartford claim, Hartford paid interim compensation until claimant returned to work. Subsequent to the filing of the National claim, National paid interim compensation until the date of its denial. At no time did claimant fail to receive compensation to which he was entitled. Although it is true that claimant may have required the services of counsel in order to request a hearing, the statutes do not provide for attorney fees for counsel's participation in merely preserving a claimant's appeal rights.

ORDER

The Referee's orders dated April 23, 1985 and May 20, 1985 are affirmed.

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

WCB 82-06757
March 13, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Kobayashi v. Suislaw Care Center, 76 Or App 320 (1985). The court has ordered that claimant's clubfoot condition be accepted as compensably related to claimant's May 31, 1981 knee injury. Now, therefore, the insurer's July 14, 1982 formal denial is hereby set aside and claimant's claim is remanded to the insurer for acceptance and processing according to law.

IT IS SO ORDERED.

JUDY G. LESUEUR, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-03903
March 13, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Nichols' order which set aside its denial of claimant's aggravation claim for a low back condition. On review, SAIF contends that claimant failed to establish the compensability of her aggravation claim.

We affirm 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 low back condition has worsened since the last arrangement of compensation. Although claimant's obesity has likely contributed to this worsening, we find that her 1982 compensable injury remains a material contributing cause of her current condition. See Taylor v. SAIF, 75 Or App 585 (1985); Lobato v. SAIF, 75 Or App 488 (1985).

ORDER

The Referee's order dated July 26, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

RICHARD M. MAIN, Claimant
Wausau Insurance, Defense Attorney

Own Motion 85-0113M
March 13, 1986
Own Motion Order

Claimant has requested that the Board exercise its own motion authority and reopen his claim for an alleged worsening of his March 2, 1976 industrial injury. Claimant's aggravation rights have expired. Wausau Insurance Companies is unwilling to voluntarily reopen claimant's claim as they do not feel claimant's condition has worsened.

Claimant's claim was last closed by a Determination Order of September 6, 1984. He subsequently saw Dr. Gill on February 15, 1985 with complaints of pain in and about his right elbow. Dr. Gill put claimant's arm in a long-arm cast for a period of three weeks. Dr. Gill admits to having trouble accurately diagnosing claimant's problem and, therefore, ascertaining appropriate treatment is also a problem. He felt claimant should be seen by another doctor, possibly the Orthopaedic Consultants or Dr. Groth.

The Orthopaedic Consultants saw claimant on April 1, 1985. They felt a bone scan should be done in order to make a proper diagnosis. If the bone scan was negative, the claimant's claim could remain closed with only conservative treatment done. In the event the bone scan was positive, further testing should be done. They found no reason to reopen the claim except to allow for further work-up. They indicated claimant's condition was not objectively worsened since the last closure in 1984. The Board has delayed issuance of an order in this case to allow time for the recommended bone scan to be performed. There is nothing further in our record to indicate that the scan was ever done. We can only conclude that claimant (and/or his treating doctor) and the insurer have chosen not to proceed with the scan.

Based on the current record, the Board is not persuaded to reopen claimant's claim for the payment of time loss compensation. Wausau has paid time loss benefits for the three-week period claimant's arm was in a cast. No further compensation is due at this time and the request for own motion relief is hereby denied.

WILLIAM P. MALONEY, Claimant
W.D. Bates, Jr., Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06752
March 13, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The employer requests review of that portion of Referee Baker's order that established $9.60 per hour as the wage rate for computing claimant's temporary total disability compensation. The employer attaches three pages of documentary evidence to its brief and asks that the Board consider this evidence on review. We construe the employer's submissions as a request for remand. See Judy A. Britton, 37 Van Natta 1262 (1985). The issues are remand and the rate of temporary total disability compensation.

Claimant injured his left arm on May 14, 1984 in the course of his employment as a tree thinner when he slipped and fell on his running chainsaw. Claimant was paid temporary total disability compensation computed on the basis of a wage rate of $8 per hour. Claimant requested a hearing on a number of issues

connected with his claim including the rate of temporary total disability compensation.

Temporary total disability compensation is computed as a percentage of a worker's "wages." See ORS 656.210. The term "wages" is defined in ORS 656.005(26) as "the money rate at which the service rendered is compensated under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer." The question in the present case is what the parties agreed concerning the rate at which claimant's services would be compensated.

Claimant testified that he agreed to work for $10 per hour and to provide his own chainsaw. He testified that it cost him only 40 cents per hour to operate his chainsaw. According to the employer, the agreement was that claimant would be paid $8 per hour as wages and $2 per hour as a chainsaw rental fee. An employer representative testified that its standard wage for a tree thinner who did not have his own chainsaw and who used a chainsaw provided by the employer was $8 per hour. The representative further testified that a chainsaw rental fee of $2 per hour was reasonable and that the United States Forest Service used a rate of $2.70 per hour.

Claimant was injured on the Monday following his first weekly pay period. The Friday before his injury claimant had received two checks from the employer, one based upon a rate of $8 per hour and the other based upon a rate of $2 per hour. Deductions were taken from the $8 per hour check, but not from the $2 per hour check. A notation on the $2 per hour check indicated that it was for saw rental. Claimant stated that he thought this arrangement was odd but did not question it because, in his words, "It was Friday evening and we were in a hurry and there was a lot of commotion going on at the office."

Given this record, the Referee concluded that claimant's temporary total disability compensation should be based upon an hourly rate of $9.60. The Referee arrived at this figure by subtracting the 40 cents per hour that claimant testified it cost him to operate his chainsaw from the total $10 hourly rate agreed upon by the parties.

Before addressing the merits of this case, we first must decide whether remand is appropriate to allow the Referee to consider the three documents submitted by the employer on Board review. Nearly all of the information contained in these documents is already part of the record through the testimony of the parties. The additional information, we think, could have been developed prior to the hearing with due diligence and, in any event, is of no significant probative value. Under these circumstances, we conclude that the record has not been improperly, incompletely or otherwise insufficiently developed or heard by the Referee and we deny the employer's request for remand. See ORS 656.295(5); Winzell L. Hamilton, 37 Van Natta 215, 216 (1985); Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

On the merits, we accept the employer's account of the wage agreement between the parties for several reasons. First, the employer's standard wage rate for tree thinners who did not provide their own chainsaws was $8 per hour, not $9.60 per hour.

Second, prior to his injury, claimant received two checks with rates, deductions and notations strongly favoring the employer's account of the wage agreement. Claimant did nothing to protest this arrangement. Third, in light of the evidence presented at the hearing, chainsaw rental fees are customary in the tree thinning business when a worker provides his own chainsaw and $2 per hour was a reasonable chainsaw rental fee. We conclude, therefore, that the parties agreed that claimant's services would be compensated at a rate of $8 per hour and that claimant's temporary total disability compensation should be computed accordingly.

ORDER

The Referee's order dated July 12, 1985 is reversed in part. That portion of the order that established $9.60 per hour as the wage rate for computing claimant's temporary disability compensation is reversed and the wage rate is fixed at $8 per hour. Claimant's attorney fee shall be adjusted accordingly. The remainder of the order is affirmed.

DONALD D. MILBURN, Claimant
Jolles, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 84-08598
March 13, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee Holtan's July 19, 1985 Order on Reconsideration that affirmed the self-insured employer's partial denial of claimant's left hip condition. The issue on review is compensability. Claimant asks us to reinstate the Referee's May 16, 1985 Opinion and Order, which set aside the partial denial in part on the basis of Bauman v. SAIF, 295 Or 788 (1983).

We affirm the Referee's Order on Reconsideration with the following comment. Claimant suffered a compensable left knee injury in June 1982. Dr. Bert, the treating orthopedist, performed an arthroscopic debridement and repair in November. By April 1983, claimant's knee was stable.

Sometime in either late 1982 or early 1983 claimant began complaining of left hip pain, relating it to the compensable knee injury. Dr. Bert diagnosed avascular necrosis of the left hip and first suggested a causal connection between that condition and the accepted knee injury in November 1983. Dr. Bert requested authorization for hip surgery in January 1984. Although authorization was apparently never given, the employer paid for the surgery and all medical costs related to claimant's hip condition. The employer also paid temporary total disability compensation until it ultimately issued a partial denial for the hip condition on July 31, 1984.

Claimant's wife testified that sometime before her husband's surgery she contacted an agent of the employer in an attempt to determine whether the employer would pay for the surgery. According to the wife's testimony, Ms. Clinton, a clerk for the employer, represented that claimant's surgery would be covered. Ms. Clinton testified that in her capacity as clerk she

had no authority to approve or deny requests for medical services. She further testified that while she remembered speaking with claimant's wife, she did not recall discussing claimant's surgery.

The Referee initially set aside the partial denial based in part on Bauman, supra, which holds that an employer is not at liberty to accept a claim, pay compensation and then, as an afterthought, litigate the compensability of the claim by way of a denial. The employer requested reconsideration of the Referee's order, arguing that Bauman does not prohibit an employer from issuing a partial denial of a previously accepted medical services claim when the employer has reason to believe that it is no longer responsible for claimant's condition. See Clyde C. Wyant, 36 Van Natta 1067 (1984). On reconsideration the Referee agreed with the employer's argument, examined the claim on the merits and ultimately affirmed the partial denial.

We agree with the Referee that, on the facts, claimant has failed to prove the compensability of his left hip condition. We find, however, that the Referee need not have considered Bauman in the first instance, because claimant's claim was never "accepted," as that term is used in Bauman. In Bauman claimant submitted a claim for a bursitis condition in 1977. The claim was formally accepted by the insurer, which then paid medical benefits. In November 1980 the insurer halted further medical payments, independently concluding that the bursitis condition was not compensable. 295 Or at 790.

The Court set aside the retroactive denial, holding:

> "If, as in this case, the insurer officially notifies the claimant that the claim has been accepted, the insurer may not, after the 60 days [in which the insurer must accept or deny] have elapsed, deny the compensability of the claim unless there is a showing of fraud, misrepresentation or other illegal activity." 295 Or at 794. (Emphasis added.)

The Court also made reference to an insurer's "acceptance" under ORS 656.262(6). 295 Or at 790. That statute describes acceptance as a written notice advising claimant of the status of the claim along with notification of other attendant rights. We interpret the Court's reference to ORS 656.262(6) and its discussion of "official" acceptance to suggest that for Bauman to apply there must be formal acceptance of a claim by the insurer. In the present case claimant alleges that his claim was "accepted" by way of an informal oral representation by the employer's clerk. We find that if in fact the representation occurred, it did not represent an "official" acceptance subject to retroactive denial within the meaning of Bauman and ORS 656.262(6).

ORDER

The Referee's Order on Reconsideration dated July 19, 1985 is affirmed.

CHARLES L. MILLS, Claimant
Rosenbaum, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-05687
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Thye's order which upheld the self-insured employer's denial of his occupational disease claim for mental stress. On review, claimant contends that certain investigative reports were improperly admitted into evidence and that his claim is compensable.

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 not persuaded that claimant's work conditions were the major contributing cause of his current mental condition. In conducting our review, we have considered the "documents provided to Dr. Shannon" only for the limited purpose of establishing to which materials Dr. Shannon was referring in reaching her opinion. Any surprise or prejudice caused by the late submission of these documents for this limited purpose was rectified by the Referee's rulings. First of all, claimant had copies of these documents well in advance of the hearing. Moreover, all of the declarants whose statements were transcribed in these documents testified at the hearing after the documents were admitted. Finally, claimant declined the opportunity to continue the hearing for further evidence. Under these circumstances, we conclude that good cause has been shown for the late submission of these documents and that the Referee was within his discretion in admitting them. See OAR 438-07-005(4).

ORDER

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

JOSEPHINE E. PRATT, Claimant
Michael B. Dye, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-11808 & 83-11763
March 13, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Mulder's order that awarded claimant 48 degrees for 15 percent unscheduled permanent partial disability in lieu of a Determination Order that awarded temporary total disability only. At the hearing, claimant asserted entitlement to permanent total disability or, in the alternative, an additional award of unscheduled disability. The insurer asks that the Referee's award of permanent disability be reversed and that the Determination Order be reinstated. Claimant has not submitted a brief on review.

Claimant suffered two compensable industrial injuries on a chicken farm. The first occurred in December 1981. The second occurred in July 1983. Both injuries involved neck and shoulder strains. All treatment has been conservative. Claimant was off work for approximately one month following each injury. Her treating doctor anticipated no permanent impairment from either one.

Following the second injury claimant began treating with Dr. Holman, a chiropractor. On a referral from Dr. Holman, claimant was seen by Dr. Silver, a neurologist. Claimant's neurological examination was normal. She was next seen by a panel of Orthopaedic Consultants. The orthopedic examination was also normal, although claimant exhibited significant functional interference. A left shoulder arthrogram was also normal. A psychiatric examination by Dr. Colbach revealed subjective complaints that could not be objectively verified.

In July 1984 Dr. Holman found claimant medically stationary with no impairment. Two months later, however, Dr. Holman reported that claimant had a myriad of restrictions and that she was able to do only very light work. The record does not explain Dr. Holman's change of opinion.

The Referee awarded claimant 48 degrees for 15 percent unscheduled disability. The order does not reflect the Referee's reasoning, however. On our own review of the record, including claimant's testimony, we are not persuaded that claimant has suffered permanent disability as a result of her industrial injuries. The preponderance of the evidence is to the contrary. We find that claimant has failed to meet her burden of proving entitlement to an award of unscheduled disability. The Determination Order shall be reinstated.

ORDER

The Referee's order dated July 26, 1985 is reversed in part and affirmed in part. That portion of the order that awarded claimant 48 degree for 15 percent unscheduled permanent partial disability is reversed. The Determination Order dated October 29, 1984 is reinstated. The remainder of the Referee's order is affirmed.

NORMA L. READ, Claimant
Vick & Associates, Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 85-00423
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Seifert's order which upheld the insurer's denial of her occupational disease claim for a bilateral carpal tunnel syndrome condition. On review, claimant contends that her condition is compensable.

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 work activities were neither the major contributing cause of her bilateral carpal tunnel syndrome condition, nor its worsening. In reaching this conclusion, we find the medical opinions of the consulting specialists more persuasive than the opinion of claimant's treating physician, a family practitioner.

The insurer has objected to claimant's appellant's brief, contending that it was untimely filed. It is the Board's policy that OAR 438-11-010(3), the rule establishing the time periods within which briefs must be filed, will be strictly

enforced and that late briefs will not be considered. Vanessa Dortch, 37 Van Natta 1207 (1985). Claimant's appellant's brief was filed nine days late, after one extension had been requested and granted. Consequently, the appellant's brief was not considered on Board review. See Earl P. Houston, 37 Van Natta 1210 (1985).

ORDER

The Referee's order dated September 5, 1985 is affirmed.

CANDELARIO REYNAGA, Claimant
Kenneth Peterson, Claimant's Attorney
Larry Dawson, Defense Attorney

WCB 82-10833
March 13, 1986
Order on Remand

This matter is before the Board on remand from the Supreme Court, Reynaga v. Northwest Farm Bureau, 300 Or 255 (1985), for further proceedings consistent with the court's opinion. The parties stipulated to all relevant facts. We conclude that the record is sufficiently developed to enable us to decide this case without further proceedings before the Hearings Division.

On October 18, 1982 the insurer advised claimant that it would not pay for any medical services outside the state of Oregon unless those services were rendered by an orthopedist. Claimant's chosen mode of treatment was chiropractic. On November 11 and 18, 1982 claimant received chiropractic treatment from a chiropractic physician in the state of California. On November 22, 1982 the insurer denied payment for the chiropractic treatments. Claimant requested a hearing.

The Referee upheld the insurer's denial, relying upon Rivers v. SAIF, 45 Or App 1105 (1980). We affirmed the Referee on the same ground. 36 Van Natta 753 (1984). The Court of Appeals affirmed our order without opinion. 74 Or App 151 (1985). The Supreme Court accepted review and reversed the Court of Appeals, stating: "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." 300 Or at 262. We conclude that by stipulating that, "The treatments, if provided in Oregon, would be the responsibility of the insurer . . . ," the insurer has agreed that the treatments were reasonable and were related to claimant's compensable injury. We, therefore, set aside the insurer's denial. Claimant has apparently abandoned his request for a penalty for unreasonable denial. We nevertheless note that the denial was not unreasonable under the law at the time it was issued, as evidenced by the extensive litigation in this case.

Claimant's attorney is entitled to a reasonable attorney fee for his services in overcoming the denial. ORS 656.386(1); OAR 438-47-045(2). The court did not award an attorney fee. We therefore consider the awarding of a reasonable attorney fee to be within the scope of the court's mandate on remand. We conclude that $3,000 is a reasonable attorney fee in this case.

ORDER

The insurer's formal denial dated November 22, 1986 is set aside and this matter is remanded to the insurer for payment of medical services. Claimant's attorney is awarded a reasonable attorney fee of $3,000 for services in securing the overturning of the denial, to be paid by the insurer in addition to compensation.

DARYL G. RICHMOND, Claimant
Philip H. Garrow, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-08780
March 13, 1986
Order on Reconsideration

The SAIF Corporation has requested reconsideration of our Order on Review dated August 30, 1985. We abated our earlier order to allow sufficient time to fully consider the arguments of the parties.

In our earlier order, we affirmed Referee Nichols' order that set aside a May 26, 1983 disputed claim settlement that allegedly settled on a disputed basis claimant's claim for a pshychiatric or psychological condition. The first basis of the Referee's decision was that at the time the disputed claim settlement was executed there was no dispute as to the compensability of claimant's psychiatric or psychological condition, on the record as a whole. The Referee reasoned that, in the absence of a bona fide dispute as to the compensability of the condition, the "settlement" was a prohibited release. See ORS 656.236(1). In the alternative, the Referee concluded that, under the rationale of Bauman v. SAIF, 295 Or 788 (1983), SAIF's payment of medical services for treatment of the psychological condition for approximately 17 months precluded denial of the condition and therefore prevented any dispute as to compensability from arising. She held that under either theory she would not uphold the validity of the disputed claim settlement. In affirming the Referee, we did not discuss either theory.

After reconsideration, we conclude that under neither of the approaches discussed by the Referee should the disputed claim settlement have been set aside. The Bauman v. SAIF, supra, rationale does not apply. It is axiomatic that, "Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability . . . ." ORS 656.262(9). There is no provision in the workers' compensation law that contemplates a "de facto acceptance" of a claim. If the disputed claim settlement in this case is to fail, such failure must be based upon lack of a bona fide dispute on the record as a whole.

SAIF argues that Greenwade v. SAIF, 41 Or App 697, rev den, 288 Or 173 (1979), is on point and controlling. We disagree that Greenwade is fully dispositive of this case, although it is instructive. Greenwade turned upon allegations that the disputed claim settlement in that case was invalid: (1) because of the disparity between the amount of the settlement and the true extent of the claimant's disability; (2) because the claimant lacked the requisite capacity to enter into the settlement; and (3) because the settlement document did not advise the claimant of appeal rights. The court rejected each of the three allegations in turn and upheld the disputed claim settlement. In doing so, the court relied upon the fact that the compensability of the claim had been denied, and that a dispute as to compensability precluded discussion of the extent of the claimant's disability. The court in Greenwade did not directly discuss the issue present in this case, i.e. whether there is a bona fide dispute as to the compensability of the claim. The court did, however, state that, "A dispute as to whether a claimed injury is covered by the Act is determined based on the available evidence regarding whether the injury arose out of and in the course of claimant's employment." 41 Or App at 701.

A formal denial makes out a prima facie case of a

dispute as to the compensability of a claim. In this case, there was no formal denial issued prior to the execution of the disputed claim settlement; however, the disputed claim settlement recites that the compensability of claimant's psychological condition is denied. If the evidence as a whole presents a question to be resolved by a finder of fact, a bona fide dispute exists. We have looked to the record to determine whether the available evidence persuades us that a bona fide dispute as to compensability was present. We conclude such a dispute was present, based upon the documentary evidence in existence prior to the execution of the disputed claim settlement.

Claimant sustained an injury to his low back and left leg on October 17, 1980. His injury claim was accepted and closed on October 12, 1981. The claim was reopened by stipulation on December 17, 1981 and finally closed for the last time on February 24, 1983. Between December 1981 and May 1983, claimant was either treated or examined by Dr. Holland, a psychiatrist; Dr. Holmes, a family practitioner at the Southern Oregon Pain Center; Dr. Wichser, a general practitioner and claimant's attending physician; Dr. McConokie, a psychologist; Dr. Goldstein, a psychologist, and Dr. Stolzberg, a psychiatrist. Dr. Holmes is the only one of these health care providers to opine that claimant's emotional and marital problems were directly attributable to the industrial injury, and he did so in a very conclusory way. Drs. Holland and Stolzberg both noted that claimant had psychological disorders that preexisted his industrial injury and neither rendered an opinion directly relating claimant's then-current psychological condition to his industrial injury. Dr. Stolzberg opined that any depressive or anxiety reaction claimant may have experienced as a result of his injury had resolved. Dr. Holland noted that claimant experienced extreme psychological stressors that predated his injury.

We are not called upon to weigh the evidence to determine whether it is more probable than not that claimant's psychiatric or psychological condition as it may have existed in May 1983 was or was not compensable, and we render no opinion on that issue. We do, however, find that the evidence available at that time, which we have summarized above, is sufficiently divergent that a bona fide question of fact is presented. We, therefore, hold that a bona fide dispute as to the compensability of claimant's psychiatric or psychological condition existed, which could be the basis of a disputed claim settlement pursuant to ORS 656.289(4). There being such a dispute, we conclude that we are bound to uphold the settlement, in the absence of some other unconscionability. See Guerra v. Nottingham Transfer, 58 Or App 750 (1982); Johns v. Utility Trailer & Equipment Co., 55 Or App 431, 432 (1981). On de novo review of the record as a whole, we find no basis upon which to set aside the disputed claim settlement of May 26, 1983.

We agree with that portion of the Referee's order that upheld SAIF's denial of claimant's aggravation claim.

ORDER

Reconsideration is allowed. Our previous order dated August 30, 1985 is withdrawn. The Referee's order dated January 11, 1985 is affirmed in part and reversed in part. Those

portions of the Referee's order that set aside the disputed claim settlement dated May 26, 1983 and awarded claimant's attorney an insurer paid attorney fee are reversed. The disputed claim settlement dated May 26, 1983 is reinstated and approved. That portion of the Referee's order that allowed the SAIF Corporation to offset sums paid under the disputed claim settlement is set aside as moot, and any sums recovered by authority of the Referee's order shall be repaid to claimant. The remainder of the Referee's order is affirmed.

DARRELL R. ROUNTREE, Claimant
Galton, et al., Claimant's Attorneys
Edward C. Olson, Defense Attorney

WCB 84-06876
March 13, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Thye's order that upheld the insurer's denial of claimant's injury claim for the low back. The issue on review is compensability.

Claimant is a former heavy equipment mechanic. He alleges that on March 6, 1984 he was working alone, removing a front wheel assembly on a truck, when he "felt something pop" and he went down on his left knee. Because claimant had suffered an earlier left knee injury, he initially thought that he had pulled a muscle in that knee. He felt that the injury was minor and that it would resolve on its own. He, therefore, did not immediately report the injury or seek medical attention. He continued to work. According to his testimony claimant did mention in passing to one of his employers that he had sustained an injury on the job.

Although claimant initially believed that he had injured his knee, he apparently soon became aware of low back pain. Approximately five weeks after his alleged incident, claimant sought treatment from Dr. Cook, an orthopedist. Dr. Cook's initial chart note indicates that claimant presented on April 12, 1984 with low back pain of "three weeks duration."

Claimant returned to work after this initial visit and worked until being laid off for a two-week period due to a shortage of truck parts. Claimant resumed work after the layoff and continued working until low back pain led him to return to Dr. Cook on May 11, 1984. According to his testimony claimant contacted Dr. Cook by telephone the day before the May 11 visit and was advised by the physician to file a workers' compensation claim. Claimant filed an 801 form on May 10, 1984. Four days later Dr. Cook sought authorization to perform surgery for what was diagnosed as a herniated disc at L5-S1. Claimant's claim was denied.

The Referee noted that there was no question regarding claimant's diagnosis. Nor did the insurer offer an alternative theory for claimant's injury. The Referee made no specific finding regarding claimant's credibility. He found the claim noncompensable, however, based on what he felt were several inconsistencies in claimant's testimony. The Referee held: ". . . I am sufficiently confused by the evidence to be unable to conclude that claimant has sustained his burden of proof." On de novo review of the whole record, we find that claimant's testimony and the documentary evidence are not inconsistent.

The Referee found four supposed problems with claimant's

testimony. First, he found no evidence that claimant told Dr. Cook either on the first or second visits of the work-relatedness of his injury. Dr. Cook's submission of a Form 827 and his request for surgery on May 14, 1984, however, appear to be a clear indication of his opinion that claimant's injury was work-related. Claimant, therefore, must have at some time related the cause of his injury to Dr. Cook.

Second, the Referee felt that claimant's supposed testimony that he sought medical attention "a couple of weeks" after his injury was inconsistent with the medical record indicating that no medical care was sought for approximately five weeks. According to the hearing transcript, however, claimant did not testify that he sought medical assistance two weeks after the injury. Rather, claimant represented to an insurer's investigator that he sought medical help "probably four weeks later or something like that." The Referee misread the record.

Third, the Referee found claimant's statement that he filed his claim at Dr. Cook's suggestion in May to be inconsistent with the remaining evidence. The Referee found that because claimant filed a claim form on May 10, but did not see Dr. Cook until May 11, Dr. Cook could not have advised claimant to file. The Referee failed to note claimant's testimony, however, that claimant spoke with Dr. Cook by telephone on May 10, the day he filed his claim. Thus, it appears Dr. Cook advised claimant to file his claim before claimant personally visited the doctor on May 11. There is no inconsistency in claimant's testimony.

Last, the Referee found claimant's statements regarding when he returned to work after first seeing Dr. Cook to be inconsistent. The Referee found that claimant testified both that he returned to work following his initial visit to Dr. Cook on April 12 and that he was laid off for the entire period between April 12 and May 11, 1984. The Referee was incorrect. Claimant testified that following his initial medical visit he was laid off for a period of about two weeks and then returned to work. He did not testify that he was off from April 12 through May 11. There is no inconsistency in claimant's testimony.

When the Referee's erroneous findings are resolved we are left with claimant's consistent testimony regarding the alleged mechanism of his injury. The insurer has offered no alternative theory for claimant's injury, and the only medical evidence supports claimant's version of the facts. From this record, claimant's claim is compensable.

ORDER

The Referee's order dated September 26, 1985 is reversed in part and affirmed in part. That portion of the order that affirmed the insurer's denial of claimant's low back claim is reversed. The claim is remanded to the insurer for processing according to law. Claimant's attorney is awarded $1,200 for services at hearing and $550 for services on Board review, to be paid by the insurer. The remainder of the Referee's order is affirmed.

BETTY L. WILLIAMS, Claimant
Malagon & Associates, Claimant's Attorneys
Peter O. Hansen, Attorney
Schwabe, et al., Defense Attorneys

WCB 80-10620
March 13, 1986
Order on Remand

This matter is before the Board on remand from the Supreme Court, Williams v. Gates, McDonald & Company, 300 Or 278 (1985), for further proceedings consistent with the court's opinion. We conclude that no further action by the Hearings Division is required for a final decision.

At issue in this case was the propriety of an August 29, 1983 denial of the compensability of alleged complications arising out of a right carotid endarterectomy performed in September 1979. We concluded that the complications were not compensable because claimant had failed to prove that the complications were caused by the endarterectomy. The Court of Appeals, on de novo review of our order, found that the complications were caused by the endarterectomy, and the Supreme Court accepted that finding. We are, therefore, bound by it. The Supreme Court went on to hold that the complications were compensable. This holding forecloses further inquiry.

Now, therefore, the denial dated August 29, 1983 is set aside and this matter is remanded to the employer for acceptance and further processing according to law.

IT IS SO ORDERED.

COSTA ARVANTIS, Claimant
Royce, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-07274
March 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Mulder's order that upheld the insurer's denial of claimant's industrial injury claim for the low back. The issue on review is compensability.

Claimant asserts that he suffered a compensable low back injury on or about April 10, 1985 while employed as a bottle sorter. According to his testimony, claimant felt a sharp pain in his left low back while picking up a case of empty soft drink bottles and turning to his right to set them on a conveyor belt.

Claimant's supervisor testified that on the day in question he saw claimant "grab his left back." He further testified that he asked claimant about the incident and that claimant reported that he'd been hurt stacking bottles. The supervisor took claimant off the job, assisted him in filing a claim form and directed him to a hospital where he ultimately reported to the emergency room.

Claimant's fiancee testified that she visited claimant at his home on the day of the alleged incident and that he was in severe pain. She further testified that since the alleged accident, claimant has been unable to engage in the rigorous physical activities he performed before the injury.

The first medical report is from Dr. Hyland, a chiropractor. It indicates that claimant suffered an acute severe left sacroiliac sprain. Approximately one week after the alleged incident claimant visited Dr. Ho, who diagnosed a lumbar strain and reported that claimant had injured himself while "throwing" cases of bottles. Dr. Ho also reported that claimant had been seen approximately five years earlier for a lumbar sprain incurred during an earlier employment.

Claimant next saw Dr. Howell, an osteopath, who indicated that claimant could not recall a specific traumatic incident at work, but that he attributed his pain to the cumulative effects of the job. Claimant denied having suffered prior lumbar injuries. When asked by Dr. Howell to explain the medical report of Dr. Ho indicating a previous back injury, claimant responded: "That was different," apparently referring to pain in a different area of the spine and of a different quality. Dr. Howell found no objective signs of disability and stated that claimant was an unreliable historian.

Claimant was next examined by Dr. Novick, a chiropractor who became the treating physician. According to Dr. Novick claimant was specific in identifying the incident that led to his back pain. Dr. Novick identified several objective findings suggestive of a disk syndrome at L3-4.

In a taped statement given to the insurer's investigator approximately two weeks after the accident, claimant denied having ever been injured prior to the April 1985 incident. Evidence submitted at hearing, however, indicates that claimant filed six workers' compensation claims with a prior employer, two of which involved the lumbar spine. Claimant later also admitted that he injured his neck in a noncompensable auto accident. Claimant has offered no explanation for his inconsistent statements.

The Referee found "claimant's credibility and reliability [to be] significantly eroded by inconsistencies and omissions . . . ." He found the balance of claimant's evidence to be insufficient to support a finding of compensability and he affirmed the insurer's denial.

From the outset we agree with the Referee that claimant is not credible. His denial of previous injuries is directly and convincingly refuted by evidence of numerous injuries. Our credibility finding does not end our inquiry, however. As the court held in Westmoreland v. Iowa Beef Processors, 70 Or App 642 (1984), a claim may be compensable despite a claimant's lack of credibility so long as the remainder of the record supports claimant's version of how he was injured. Id. at 645. We must, therefore, consider the remainder of the record in this case in order to determine whether claimant's claim is compensable. After examining all the evidence, we conclude that it is.

Even if we disregard claimant's testimony, there is persuasive evidence that he suffered a disabling injury on the day in question. Claimant's supervisor credibly testified that he witnessed the injurious event and assisted claimant in preparing his claim. Claimant's fiancee credibly testified that she visited claimant soon after the incident in question and that claimant was not only in severe pain, but has since been forced to substantially curtail his recreational activity.

We find the testimony of claimant's treating doctor, Dr. Novick, to be particularly persuasive. At the time of his testimony, Dr. Novick was aware that claimant had suffered a low back injury in 1980. He felt, however, that claimant's X-rays and CT scan findings were suggestive of an injury of recent onset. He also found claimant's rendition of a lifting/twisting incident to be consistent with the resulting symptoms and objective findings. The insurer has offered no contrary medical opinion.

Thus, while we agree with the Referee that claimant's testimony is worthy of little weight, we find that the record as a whole supports a finding of compensability. The insurer's denial shall be set aside.

ORDER

The Referee's order dated August 26, 1985 is reversed. The claim is remanded to the insurer for processing acccording to law. Claimant's attorney is awarded $1,350 for services at hearing and $550 for services on Board review, to be paid by the insurer.

LINDA M. BAKER, Claimant
Dobbins & McCurdy, Claimant's Attorneys
Lindsay, et al., Defense Attorneys

WCB 84-11605
March 18, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Presiding Referee Daughtry's order which dismissed her hearing requests for failure to show cause why her requests for hearings should not be dismissed. The issue on review is whether claimant's hearing requests should have been dismissed.

Claimant submitted two hearing requests. No application to schedule a hearing was filed on either request. More than 90 days after the last hearing request was filed, the Presiding Referee issued an order to show cause within 30 days why the hearing requests should not be dismissed as abandoned. No response was filed. More than 30 days after the show cause order was issued the Presiding Referee issued the dismissal order at issue on review. Claimant was represented by counsel at all relevant times.

The Board finds that the Presiding Referee's order was procedurally and substantively correct and accordingly affirms the order.

ORDER

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

DENNIS D. GRACE, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-01053
March 18, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Grace v. SAIF, 76 Or App 511 (1985). The court found as facts: (1) that claimant was not medically stationary from a psychiatric standpoint at the time of claim closure; and (2) that claimant's psychiatric/psychological disability in existence at the time of claim closure was brought on by his accepted industrial injury. We are bound by the court's findings.

Now, therefore, the Determination Order dated January 27, 1983 is set aside. The SAIF Corporation shall commence payment of temporary disability compensation effective February 2, 1983 and continue said payments until closure of claimant's claim pursuant to ORS 656.268. SAIF shall be allowed credit for any temporary disability compensation paid pursuant to ORS 656.313 during the period between the Referee's order dated July 21, 1983 and the Board's Order on Review dated April 25, 1984. SAIF shall accept and pay all medical services provided or prescribed by Douglass S. Johnson, M.D., rendered on and after February 2, 1983, in connection with claimant's compensable psychiatric treatment, pursuant to ORS 656.245.

IT IS SO ORDERED.

JAMES I. GWYNN, Claimant
Emmons, et al., Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 85-01871
March 18, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Seymour's order that awarded claimant 160 degrees for 50 percent unscheduled permanent partial disability in lieu of a Determination Order award of 80 degrees for 25 percent unscheduled disability for the low back. The employer argues that the Referee's award was excessive. We agree and reverse.

Claimant is a former lumber mill chipper operator who compensably injured his low back in September of 1979. The injury necessitated a L4-5 discectomy in March 1980. Claimant was offered vocational assistance and the claim was ultimately closed in February 1982 with an award of 25 percent unscheduled disability. A February 6, 1985 Determination Order awarded temporary total disability only, finding claimant to have been adequately compensated by the earlier award of permanent disability. It was from this later Determination Order that claimant appealed.

Claimant entered a number of training programs during the course of the claim, both with the assistance of the Workers' Compensation Department and on his own initiative. He first entered a program in computer operations, but the program ended in failure when claimant became frustrated. He next entered a program involving computer repair. This program, too, ended in failure due to claimant's frustration with his lack of progress. Claimant then relocated to central Oregon where he obtained employment

first as a gas station attendant and then as a retail clerk. The first job ended due to an exacerbation of claimant's back pain. The second failed because claimant was not provided the assistance he indicates he was promised when he accepted the job.

After leaving the retail position claimant underwent training to become a school bus driver. Near the completion of the program, however, claimant withdrew, apparently convinced that he would be unable to get by financially on the wages he would earn.

Claimant next obtained an insurance sales job after completing two months of independent study and receiving a sales license. Soon after he began selling, however, claimant terminated his position because he found that he empathized too greatly with those submitting claims against his company.

Claimant next undertook a training course in locksmithing and obtained both standard and advanced locksmithing certifications. He now works part-time as a locksmith and serves as a substitute bus driver. Claimant testified that he earns gross wages of approximately $900 per month. He is 32 years of age and has a GED.

Claimant suffers from a personality disorder that preexisted his compensable injury. After becoming frustrated with his early training programs, he sought psychiatric treatment from Dr. Newman. Neither Dr. Newman nor Dr. Holland, who completed an independent psychiatric examination, have stated that claimant's personality disorder was caused or worsened by the compensable injury. Neither psychiatrist has indicated that claimant will suffer permanent psychiatric impairment.

The Referee increased claimant's permanent disability award from 25 to 50 percent. It is clear from the Referee's order that the increase was based largely on the psychological aspects of the claim. The Referee found that claimant's injury "had a devastating effect on the claimant." Although claimant's injury may have affected his personality disorder, neither of the psychiatric experts have indicated that he will suffer permanent psychological impairment as a result of the compensable injury. To be entitled to an award of permanent disability for the psychological aspects of his injury, claimant must prove that his impairment is both permanent and related to his injury. ORS 656.214(1). Claimant has failed to prove either element of a claim for an award of psychological disability. We conclude that the extent of claimant's disability should be determined by examining the physical aspects of the claim alone.

After a review of the record and consideration of claimant's age, education, training, work history, transferable skills and physical impairment, we conclude that the extent of claimant's disability does not exceed 25 percent. The Determination Order dated February 6, 1985, which awarded claimant temporary total disability only and did not increase claimant's permanent disability award, shall be reinstated.

ORDER

The Referee's order dated September 9, 1985 is reversed and the Determination Order dated February 6, 1985 is reinstated.

EARL P. HOUSTON, Claimant
Richard O. Nesting, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 83-00851
March 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Mulder's order, as adhered to on reconsideration, that: (1) awarded claimant 32 degrees (10 percent) unscheduled permanent partial disability for the low back in addition to a Determination Order award of 80 degrees (25 percent), bringing claimant's total award to 112 degrees (35 percent); and (2) allowed the insurer to recover an alleged overpayment of temporary total disability compensation in the amount of $6,438.37. The issues on review are extent of unscheduled disability and the propriety of the offset.

On the issue of extent of unscheduled disability we affirm the order of the Referee. On the offset issue we reverse.

Claimant suffered a compensable mid and low back injury in November of 1975. His claim was initially closed in August 1980. It was reopened when claimant entered vocational rehabilitation in October 1980. Claimant received temporary total disability compensation through November 19, 1981, when he left vocational training to seek employment. Claimant reenrolled in training on June 28, 1982 and continued through the end of his program, which terminated on December 17, 1982. A December 30, 1982 Determination Order awarded temporary total disability for the two periods of claimant's vocational rehabilitation.

The alleged overpayment in this case involves payment of temporary disability begun by the insurer on January 20, 1982 and continuing through June 28, 1982, the date claimant resumed his vocational training. The insurer reopened claimant's claim in January based on a report from claimant's treating physician, Dr. Misko, recommending that claimant enter a program for patients with back pain. Claimant did enter the program and remained there through April 26, 1982. The insurer continued disability payments through June 28, 1982, however, apparently as a result of Dr. Misko's recommendation that claimant continue treatment with Dr. Vizzard, a psychologist.

The insurer argued at hearing that its January-through-June payments were gratuitous and neither recognized nor authorized by the December 1982 Determination Order. The insurer argued, therefore, that it should be allowed to recover what it characterized to be an overpayment from any future compensation to which claimant might become entitled. The Referee agreed and authorized recovery of the entire amount of the disputed temporary disability compensation.

Neither the Referee nor the insurer has cited authority for an offset under the present circumstances. In any event, we find from the facts that claimant was entitled to temporary disability compensation during the entire period disputed here. A claimant is entitled to temporary disability compensation during any period in which he is not medically stationary. ORS 656.268(1). It is clear from Dr. Misko's January 1982 report that he did not consider claimant medically stationary when he referred claimant to the back pain center. Claimant remained in the pain

program through April 26, 1982 and was clearly entitled to temporary disability compensation through that date.

The remaining question is whether claimant was entitled to compensation for the period of April 27 and June 28, 1982, the period between the termination of the back pain program and claimant's reenrollment in an authorized vocational rehabilitation program. Again, on the facts, we find that claimant was so entitled. A few days before claimant left the back pain program, the treating psychologist reported that claimant was not psychologically stationary. A subsequent report from Dr. Misko recommended that claimant continue to treat with the psychologist for approximately three months, or through July 1982. We interpret this report and the report of claimant's psychologist to mean that claimant was not stationary at any time between the date he entered the back pain program and his reenrollment in vocational training. Temporary disability payments, therefore, were due during the entire period at issue. The insurer is not entitled to an offset.

Because claimant's compensation is not increased by this order, no attorney fee shall be awarded. See ORS 656.386(2); Forney v. Western States Plywood, 297 Or 628 (1984).

ORDER

The Referee's order dated December 14, 1984, as affirmed on reconsideration, is affirmed in part and reversed in part. That portion of the order that awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability compensation, thereby bringing claimant's total award to 112 degrees for 35 percent, is affirmed. That portion of the order that authorized the recovery of $6,438.37 allegedly overpaid by the insurer is reversed.

HOWARD H. HURST, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-01616
March 18, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Hurst v. SAIF, 76 Or App 532 (1985). The court has ordered that claimant's industrial injury claim for myocardial infarction be accepted. Now, therefore, the SAIF Corporation's formal denial dated January 9, 1983 is set aside and this claim is remanded to SAIF for acceptance and payment of compensation according to law.

IT IS SO ORDERED.

CAROL J. LEVESQUE, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-01489
March 18, 1986
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review dated March 7, 1986 in which we reversed the Referee's award of 10 percent (32 degrees) unscheduled permanent disability for an upper torso injury. SAIF requests authorization to offset overpaid permanent disability payments made pursuant to the Referee's order against future permanent disability awards.

SAIF's request is contrary to prevailing law. ORS 656.313(2) provides that an employer cannot recover from a claimant any compensation that is paid pending review or appeal and which is later held not to have been due. Therefore, no offset will be authorized against future awards of compensation based on an overpayment due to a Referee's order. See Hutchinson v. Louisiana-Pacific, 67 Or App 577, 581, rev. den., 297 Or 340 (1984); George E. Salleng, 37 Van Natta 1701, 1702 (1985).

Accordingly, the request for reconsideration is granted. On reconsideration, the Board adheres to and republishes its former order, effective this date.

IT IS SO ORDERED.

JERRY W. McLARRIN, Claimant
Pozzi, et al., Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 85-01845
March 18, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Nichols' order which: (1) declined to award additional temporary total disability; and (2) declined to assess penalties and accompanying attorney fees for an alleged untimely payment of temporary disability. On review, claimant contends that he is entitled to additional temporary disability, penalties, and attorney fees.

The Board affirms that portion of the Referee's order concerning claimant's entitlement to additional temporary disability with the following comments.

We have previously found that claimant had established the compensability of his aggravation claims. Jerry W. McLarrin, 37 Van Natta 1064 (1985). In finding the claims compensable, we noted that claimant's entitlement to temporary disability was not then at issue. The present issue arises from the June 27, 1985 Determination Order which closed the aggravation claims. Claimant contends that his temporary disability compensation should have commenced effective October 14, 1983, the date his aggravation claim reopened, rather than March 7, 1984, as directed by the Determination Order. The Referee affirmed the Determination Order, concluding that claimant had failed to establish a medical verification of his inability to work due to his worsened condition prior to March 7, 1984.

Claimant cites Donald A. Teem, 37 Van Natta 770 (1985), in support of his contention that he is entitled to an additional award of temporary disability beginning the date his aggravation claim reopened, rather than the date on which the evidence established a medical verification of an inability to work. In Teem, the Board agreed with the Referee's finding that a claimant with a 100 percent unscheduled permanent disability award had established a compensable aggravation. However, the Board modified a portion of the Referee's order which directed when the claim should be reopened. The Board concluded that the claim should be reopened as of the date it found that the compensable condition had worsened, rather than the date the claimant submitted for surgery. Considering the claimant's permanent

disability award, and since there apparently was no contention that the claimant was able to work, the Board found that temporary disability should also commence as of the date of reopening.

The present claim is distinguishable from Teem. Here, claimant has received a relatively modest prior permanent disability award of 15 percent unscheduled disability. Moreover, claimant's ability, or inability, to work is definitely at issue. Thus, unlike Teem, a conclusion concerning the date to reopen the aggravation claim does not automatically coincide with claimant's entitlement to temporary disability.

Consequently, to establish his entitlement to temporary compensation, claimant continues to have the burden of proving a medical verification of his inability to work resulting from his worsened condition. ORS 656.273(6). Following our de novo review of the record, we agree with the Referee that claimant has failed to prove entitlement to temporary disability benefits beyond those awarded by the Determination Order.

Anticipating that we might affirm this portion of the Referee's order, claimant has requested that this matter be remanded for the taking of further evidence. Claimant asserts that in reliance on Teem he chose to proceed to hearing without obtaining further medical evidence regarding his inability to work. Claimant's position is "simply that if the Board does reject the Teem case, then it is entirely appropriate to allow a remand."

We deny the request for remand. We are not persuaded that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been shown that material evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). Claimant's reliance on his interpretation of Teem and his decision not to obtain further evidence is a tactical decision which does not entitle him to remand under the Lopez standard.

We reverse that portion of the Referee's order which declined to assess a penalty and attorney fees. We conclude that the employer unreasonably failed to promptly comply with a Determination Order.

The employer stipulated that it paid temporary disability benefits for the period extending from March 7, 1984 through June 6, 1984, the date of its denial of the aggravation claim. Once its denial was set aside, the claim was closed by the June 27, 1985 Determination Order which directed the employer to pay temporary disability between March 7, 1984 and June 24, 1984. The employer did not pay the approximately 18 days of additional temporary disability until August 13, 1985, some 47 days after the issuance of the Determination Order. The employer contends that its failure to promptly comply with the Determination Order was "clearly inadvertent" in that the majority of the temporary disability had been paid over a year earlier. The employer further asserts that once claimant's counsel brought the matter to its attention, the additional temporary disability was immediately paid.

Temporary disability benefits are due no later than the 14th day after the date of any determination or litigation order which orders temporary disability. OAR OAR 436-60-150(3)(e). If

the employer unreasonably delays in paying compensation, the 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. ORS 656.262(10). The amount of the penalty rests largely on the extent of the delay and the cogency of the employer's explanation. See Zelda M. Bahler, 33 Van Natta 478, 479 (1981), reversed on other grounds, 60 Or App 90 (1982).

Considering the employer's explanation for its conduct and its immediate action to rectify its oversight, we decline to assess the maximum penalty. Accordingly, the employer is assessed a 10 percent penalty based on "the amounts then due" and accompanying attorney fees for its unreasonable failure to promptly comply with the Determination Order. The penalty shall be based on the temporary disability due between June 6, 1984 and June 24, 1984.

ORDER

The Referee's order dated September 5, 1985 is affirmed in part and reversed in part. That portion of the order which declined to assess a penalty and an accompanying attorney's fee is reversed. The employer is ordered to pay a 10 percent penalty based on the temporary disability due and payable between June 6, 1984 and June 24, 1984 and an accompanying attorney's fee of $250. The remainder of the Referee's order is affirmed.

RICHARD L. PELL, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-09515
March 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Lipton's order that found that claimant's claim was not prematurely closed by the Determination Order dated August 27, 1984. In the alternative, claimant asks that we remand this claim to the Referee for consideration of evidence generated after the record had closed. The issues on review are premature closure and the propriety of remand.

Claimant compensably injured his low back while lifting a couch in June of 1978. The injury resulted in a laminectomy at L5-S1. Claimant was declared medically stationary on April 5, 1979, and a May 9, 1979 Determination Order awarded five percent unscheduled permanent partial disability for the low back. Claimant's complaints continued thereafter, however, and on May 21, 1979 he was admitted to a hospital for a myelogram, performed by Dr. Smith. The myelogram was negative and claimant was released to return to work in June 1979.

Claimant's complaints continued off and on for several years. In October 1983 claimant returned to Dr. Hockey, with whom he had previously treated, complaining of left leg radiating pain. The diagnostic impression was a recurrent L5-S1 herniated disk on the left. A repeat laminectomy was performed. In January 1984 the SAIF Corporation reopened the claim retroactive to October 24, 1983.

Claimant returned to Dr. Hockey in May 1984 with continuing left leg complaints. He was then seen by a panel of

Orthopaedic Consultants on July 11, 1984. The panel noted that claimant had experienced no change in symptoms over a four month period. The Consultants declared claimant medically stationary with mildly moderate impairment. Dr. Hockey issued a report in which he concurred with the panel's findings. A Determination Order then issued, awarding claimant 35 percent unscheduled disability for the low back and five percent scheduled disability for the left leg. The Determination Order was dated August 27, 1984.

Claimant's complaints continued. He returned to Dr. Smith in early November 1984. On December 18, SAIF authorized the performance of a repeat myelogram, the results of which were negative. A CT Scan was also negative.

Claimant again sought medical attention in June 1985. A magnetic resonance image demonstrated disc degeneration at L5-S1 and L3-4. The possibility of a recurrent herniated disc was also suggested. Although Dr. Smith felt that claimant's condition had remained essentially unchanged since his November 1984 examination, Dr. Smith proposed that claimant's condition may not have been stationary at the time of the August 1984 closure. He requested authority to perform a bilateral facet block at L5-S1. SAIF had authorized surgery at the time of the hearing but had deferred reopening of the claim for the Board's consideration under our Own Motion authority. ORS 656.278. On August 30, 1985 Claimant requested that we reopen his claim by way of Own Motion. On September 4, 1985 claimant underwent surgery for bilateral exploration, decompression, diskectomy and posterior lumbar interbody fusion at L5-S1. On September 12, 1985 we issued an order postponing action on the Own Motion request, pending our review of the present claim. Richard L. Pell, (WCB 85-0479M). Claimant requested reconsideration of our order of postponement. On October 15, 1985 we issued an order adhering to our postponement order.

On the present claim the Referee found from the record that claimant was medically stationary at the time of the August 1984 closure but that his condition had subsequently worsened. On review claimant asserts that the 1984 closure was premature. He cites William Bunce, 33 Or App 546 (1981), for the proposition that claim closure may be determined to have been premature if it is later discovered that an objective medical condition existed which doctors could not find or were unable to diagnose at the time of closure. Claimant argues that his disk degeneration and possible herniated disk discovered by way of magnetic resonance imaging after claim closure constitutes a newly diagnosed condition that was not apparent at the time of closure.

Since our decision in Bunce the court has repeatedly held that a determination of medically stationary status is to be made solely on the evidence available at the time of closure. Subsequent developments in claimant's condition are not to be considered in determining whether closure was appropriate. Sullivan v. Argonaut Ins. Co., 73 Or App 694, 697 (1985); Alvarez v. GAB Business Services, 72 Or App 524 (1985); Maarefi v. SAIF, 69 Or App 527 (1984). To the degree that our decision in Bunce is inconsistent with the court's pronouncement, it no longer controls. We agree with the Referee that as of the time of claim

closure, the evidence preponderated in favor of a finding that claimant was medically stationary. We, therefore, find that the August 27, 1984 Determination Order properly closed claimant's claim.

In his request for remand claimant asks that we return this case to the Referee for the consideration of additional medical evidence generated after the hearing. The evidence apparently consists of an operative report from Dr. Smith. Claimant asserts that the report is evidence that claimant was suffering from a disc herniation at the time of 1984 claim closure and that he was, therefore, not medically stationary.

While we find in this order that claimant was medically stationary based on the evidence available at the time of closure, we shall consider evidence generated after the hearing on the premature closure issue in our Own Motion determination of claimant's claim. The request to remand is, therefore, denied.

ORDER

The Referee's order dated August 5, 1985 is affirmed.

RENE L. PENCE, Claimant
Michael B. Dye, Claimant's Attorney
Marshall C. Cheney, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-10329 & 84-13434
March 18, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Tenenbaum's order which: (1) upheld Industrial Indemnity's partial denial of claimant's October 1981 low back injury claim; (2) awarded temporary total disability compensation from June 10 through August 30, 1982; (3) awarded temporary partial disability compensation from August 30 through November 3, 1982; (4) awarded temporary total disability compensation from August 3 through September 10, 1984; and (5) otherwise affirmed closure of the claim by the Determination Order dated October 22, 1984. The Referee also recommended that the SAIF Corporation's denial of own motion reopening of claimant's January 1977 low back injury claim be upheld. Claimant also argues that the Referee should have awarded interim compensation for the claim under ORS 656.278 for medical services related to the 1977 low back injury claim. The issues on review are compensability of requested back surgery as a new injury or as an own motion worsening of a prior injury, temporary total disability compensation, premature closure, and interim compensation on an own motion claim.

On the issues of compensability of the requested surgery and premature closure, the Board affirms the order of the Referee. On the issue of interim compensation on the own motion claim, we find that the claim was first raised in claimant's reply argument before the Referee and was not an issue raised at or before the hearing; therefore, we will not consider it on review. See Clark v. SAIF, 50 Or App 319 (1981).

Claimant was injured on October 23, 1981 in a truck accident in Idaho when he was returning to Oregon. Claimant has been off work since the date of his injury. Dr. Casterline, an

Oregon physician, examined claimant shortly after the October 1981 accident and reported to the employer that claimant would have no time loss due to his injuries. Dr. Casterline "initiated" an 827, physician's first report of industrial injury, on October 26, 1981 which would have been sufficient for claimant to have established that he had a claim. ORS 656.310(2); see Colvin v. Industrial Indemnity, 75 Or App 87 (1985); Evans v. SAIF, 62 Or App 182 (983); Billy J. Eubanks, 35 Van Natta 131 (1983).

Claimant was an Oregon resident who was hired in Oregon and who operated trucks out of the employer's Oregon terminal. He wished to file his workers' compensation claim in Oregon, but the employer and insurer insisted that it be filed in Idaho relying on Hollingsworth v. May Trucking, 59 Or App 531, rev. den., 294 Or 212 (1982). The claim was apparently accepted and processed according to Idaho law.

Dr. Poulson examined claimant for the first time on December 3, 1981 and reported claimant was unable to work due to his industrial injury since that time, based on his observation of claimant. On June 9, 1982 Dr. Rosenbaum examined claimant and opined that claimant was medically stationary. On June 15, 1982 Dr. Poulson opined that claimant was medically stationary and that claimant had a permanent disability due to pain which prevented claimant's return to work as a truck driver but should allow light to medium capacity work. In August 1982 Dr. Poulson reported that the claim could be closed at any time with disability based on mild pain.

In August 1982, when temporary disability compensation was terminated in Idaho, claimant filed an 801 claim form for benefits under Oregon Workers' Compensation Law. In November 1982 Industrial Indemnity denied compensability of the claim because it denied claimant was a subject worker under Oregon's Workers' Compensation Law. Claimant requested a hearing. The parties agreed to delay the hearing until a decision was obtained from the Court of Appeals in related cases, including that of Norman Wright. On May 9, 1984 the Court of Appeals issued its opinion in Wright v. Industrial Indemnity Co., 68 Or App 302, which changed case law upon which Industrial Indemnity had relied to deny compensability under Oregon law. Industrial Indemnity delayed until September 1984 to inform claimant that it accepted his claim under Oregon law, to pay him the difference between Idaho and Oregon compensation, and simultaneously to deny responsibility for his back condition.

On October 8, 1984 Industrial Indemnity applied for a Determination Order from the Evaluation Division of the Workers' Compensation Department. The Department issued its order dated October 22, 1984 which awarded temporary total disability from December 3, 1981 through June 9, 1982, the date claimant was medically stationary according to the report of Dr. Rosenbaum. The Referee found that claimant was also entitled to: (1) temporary total disability compensation from June 10 through August 30, 1982, the date claimant filed his formal claim for Oregon benefits; (2) temporary partial disability compensation from August 31 through November 3, 1982, the date Industrial Indemnity issued its formal denial of the claim for Oregon benefits; and (3) interim compensation from February 28 through September 10, 1984 based on an aggravation claim for the low back condition. September 10, 1984 was the date Industrial Indemnity

issued its formal denial of responsibility for claimant's low back injury.

To summarize, claimant submitted a claim for benefits on October 26, 1981. He was off work due to his industrial injury, in the opinion of the attending physician, since at least December 3, 1981. The attending physician, Dr. Poulson, never released claimant to return to his regular work, driving a truck, and claimant never did, in fact, return to his regular work. Dr. Rosenbaum first opined claimant was medically stationary on June 9, 1982. Dr. Poulson reported claimant was medically stationary on June 15 and on August 30, 1982. We do not know the status of the claim under Idaho processing law, but Industrial Indemnity did not process the claim under Oregon law until it received the 801 form in August 1982 and formally denied the overt request for benefits under Oregon law in November 1982. It also processed the claim after it subsequently conceded compensability in September 1984. The first Determination Order issued October 22, 1984.

The employer or insurer must continue to pay temporary total disability compensation to an injured worker whose claim is in open status until the worker returns to regular work, is released by the attending physician to return to regular work or "until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division." ORS 656.268(2); Volk v. SAIF, 73 Or App 643 (1985); Jackson v. SAIF, 7 Or App 109 (1971); Joel I. Harris, 36 Van Natta 829 (1984); aff'd mem., 72 Or App 591 (1985). The fact that claimant may have been, and in this case was, medically stationary for 28 months before the Evaluation Division issued its Determination Order does not abrogate the clear statutory mandate that temporary disability compensation be paid until the Evaluation Division speaks. See Lester v. Weyerhaeuser Co., 70 Or App 307 (1984); Georgia Pacific v. Awmiller, 64 Or App 56 (1983). We conclude that claimant is entitled to payment of temporary disability compensation during the period from December 3, 1981 through October 22, 1984. The insurer shall be allowed to offset amounts already paid as temporary disability compensation and interim compensation.

The Referee relied on Sharon L. Bracke, 36 Van Natta 1245 (1984), rev'd on other grounds, 78 Or App 128 (CA A33433, February 26, 1986), to deny compensation during that period between the insurer's denial of compensability under Oregon law and the first report by Dr. Bernson that claimant's injuries required low back surgery. In Bracke, there was a claim filed with three employers for an occupational disease. All of the insurers denied compensability. Pending ultimate determination of compensability and responsibility, no insurer processed the claim. When the legal proceedings finally established compensability and responsibility, the claimant had been medically stationary for more than two years. Once compensability and responsibility were finally determined, the responsible insurer promptly requested and obtained a Determination Order which awarded temporary disability compensation through the medically stationary date. The Board approved this result in the limited circumstance where there was legitimate confusion among insurers about who should process a claim that was reasonably denied both as to compensability and responsibility and when the insurer ultimately found responsible for compensation promptly processed the claim correctly to closure.

We do not have the extenuating circumstances in this case that were present in Bracke. In this case, there was no doubt who was to process the claim or whether there was work-related disability. The only doubt that existed was whether Oregon compensation law would ultimately apply. Claimant was entitled to temporary disability compensation until closure by the Determination Order.

ORDER

The Referee's order dated May 14, 1985 is modified in part and affirmed in part. Claimant is awarded temporary disability compensation from December 3, 1981 through October 22, 1984 less amounts already paid. Claimant's attorney is awarded 25 percent of the additional compensation granted by this order, not to exceed $750 as a reasonable attorney's fee. The remainder of the Referee's order is affirmed.

ROBERT L. SLOTMAN, Claimant
William Bassett, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-07660
March 18, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Galton's order which set aside its denial of claimant's dermatitis condition. The issue on review is compensability.

Claimant was employed by a roofing manufacturer. He worked for four years as a splicer of fabricated fiberglass. He was exposed to fiberglass and fiberglass dust while doing his work. Claimant specifically denied that he suffered any skin condition during his four years of handling fiberglass as a splicer. After a short layoff, claimant began work as a roll tender on the dry end of glass fiber manufacture. Within a month of beginning the new job, claimant developed "red blotches all over" and indicated that he had a rash on his face, his arms, and shoulders. Claimant reported to his supervisor that he had a problem and went to a general practitioner for assistance. The general practitioner recommended treatment and referred claimant to a dermatologist. The dermatologist treated the rash with medications. The condition eventually spread over claimant's body and onto his right leg. The condition took approximately one year to heal. Claimant testified that his condition did not get any worse after he was removed from exposure to fiberglass.

Claimant's first physician contact was on May 27, 1983. The general practitioner, Dr. Hoggard, wrote a short note that claimant had been to the doctor's office and the doctor authorized return to work on May 28, 1983. The first examination by the dermatologist, Dr. Goodkin, was on May 31, 1983. In his report Dr. Goodkin wrote that claimant had "pruritis possibly related to fiberglass exposure and secondary infection, face, arms, shoulders," released claimant to return to work the same day, prescribed medication, and checked the box that indicated that it was "undetermined" whether the condition was work related. Claimant decided without advice from either doctor that his condition was a hazard to fellow employes and did not return to work. The employer terminated claimant on June 1, 1983 for failure to return to work without cause.

On June 8, 1983 claimant obtained a short note from Dr. Hoggard which said in its entirety: "Robert has fiberglass related dermatitis and has been referred to a dermatologist." On June 17, 1983 claimant signed a claim for workers' compensation benefits. On July 15, 1983 SAIF denied the claim.

On August 9, 1983 claimant "caught" Dr. Goodkin outside the doctor's office and presented a supplemental accident form for authorization of time loss. The doctor wrote on the form that claimant was authorized to return to work as of July 25, 1983. No responses were given to the other questions on the report form, including which day was the first day of authorized time loss.

Dr. Goodkin's chartnotes are clear that the doctor's opinion of a causal connection with employment exposure became less and less certain the more he observed and considered claimant's condition. Dr. Hoggard's ultimate opinion was provided by letter dated February 22, 1984:

> "In regards to your question about [claimant], whether his problems were related to fiberglass, asbestos, or other problems; I believe that he did have impetigo which was related to fiberglass dermatitis. It is something that I am not used to dealing with and, because of that, I asked him to see Dr. Peter Goodkin, a dermatologist who would be more apt to deal with this.
>
> "My understanding is Dr. Goodkin felt that this may be related to dermatitis. I would clarify that with him, however, my feeling is that this was due to dermatitis."

Dr. Goodkin's ultimate opinion was provided by letter dated March 13, 1984:

> "You already have my diagnosis and explanation from previous chart notes. I previously stated that [claimant]'s problems could have been initiated by fiberglass. You asked me if this was remote possibility or a probability. In all likelihood, it is somewhere in between. Certainly fiberglass is known to be able to create this type of dermatitis. It is, however, unusual to develop protracted and recurrent bouts of infection after the initial exposure."

The Referee considered standards of proof by which claimant had to prove that his condition arose out of and in the course of his employment under either industrial injury or occupational disease theories. He concluded that claimant met his burden of proof under either the injury or disease theory. He reasoned as follows:

> "Sitting as a quasi-jury, I find the totality of persuasive evidence in the record, including claimant's reliable and

> credible testimony and the weight of the medical reports, convinces me that claimant sustained either a compensable I[ndustrial] I[njury] or O[ccupational] D[isease] resulting in his fiberglass dermatitis. Garbutt v. SAIF, 297 Or 148 (1984). The fact that claimant's reaction to the work exposures was unusual in severity and/or duration does not in any way diminish the compensability of his claim. I believe the case at bar is far stronger than the res ipsa loquitur argument made by claimant and seemingly adopted by the Court of Appeals. Bradshaw v. SAIF, 69 Or App 587 (1984)."

We have no reason to question the Referee's finding of credibility. On those matters on which claimant was competent to testify, there is no reason to doubt the accuracy and veracity of claimant's statements. On those matters on which claimant was not competent to testify, which include matters of medical causation, we consider his opinions and statements to be worthy of no weight.

On the issue whether claimant suffered from an industrial injury, we find that claimant's gradual appearance of signs of dermatitis over a five day period without some identifiable precipitating causal event precludes a finding for claimant. There was no discrete period of time in which claimant was injured after which signs and symptoms of injury appeared. Claimant failed to carry his burden of proof that his condition results from an industrial injury.

On the issue whether claimant suffered from an occupational disease, claimant must prove by a preponderance of the evidence that exposure to some disease-producing element in the course of his employment was the major contributing cause of his resulting condition as compared to all other causes. Dethlefs v. Hyster Co., 295 Or 298 (1983). Claimant's description of a temporal connection alone does not meet the standard of proof without systematically excluding other probable and likely causes of the condition. See Bradshaw v. SAIF, 69 Or App 587 (1984).

Dr. Hoggard's opinion is based on only one examination of claimant and provides no insight into how the doctor concluded that claimant's condition was a result of fiberglass exposure other than his reliance on claimant's statements. Dr. Hoggard's repetition of claimant's conclusion does not transform that conclusion into a medical opinion supporting causation unless it is otherwise supported. Moe v. Ceiling Systems, 44 Or App 429 (1980); Marjorie Hearn, 36 Van Natta 1300 (1984). Dr. Hoggard finally stated that he was not accustomed to dealing with dermatitis and deferred to Dr. Goodkin on the question of causation. We give little weight to Dr. Hoggard's summary conclusion of industrial causation of claimant's condition.

Dr. Goodkin's ultimate opinion is based on four examinations over a three month period. It does not rely solely on claimant's statements because he had the opportunity to observe for himself the nature and course of claimant's condition. He finally concluded that the condition was "factitious dermatitis" which was not the probable result of exposure to something at work. He explicitly stated that it was medically improbable that claimant's condition was related to industrial exposure.

We are persuaded by Dr. Goodkin's opinion that claimant's condition may have been caused by exposure to fiberglass at work, but that it is not probable that employment exposure was medically causal. The Board relies on the opinion of claimant's treating dermatologist that claimant's condition is probably not the result of industrial exposure as opposed to some other unnamed cause. We are also persuaded by Dr. Goodkin's final diagnosis of "factitial dermatitis" that claimant's condition is probably not related to an industrial exposure. Therefore, we conclude that claimant failed to carry his burden of proof that industrial exposure was the major contributing cause of his skin condition and SAIF's denial should be reinstated and upheld.

ORDER

The Referee's order is reversed. The SAIF Corporation's denial of compensability is reinstated and upheld.

BRUCE W. BROWN, Claimant
Vick & Associates, Claimant's Attorneys
Liberty Northwest, Defense Attorney

WCB 84-11148
March 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Baker's order which increased claimant's unscheduled permanent disability award for a low back injury from 15 percent (48 degrees), as awarded by a September 28, 1984 Determination Order, to 40 percent (128 degrees). On review, the insurer contends that the award should be reduced. We agree and modify.

Claimant was 31 years of age at the time of hearing. In March 1983, while working as a mobile home assembler, he sustained a lifting injury. Claimant continued to work and did not seek treatment until approximately three weeks later. Dr. Kelley, chiropractor, diagnosed moderately severe lumbar sprain, muscle spasms, and right sacral plexus radiculitis. Claimant continued to work, but his back pain and leg numbness gradually worsened, eventually forcing him to leave his employment in June 1983.

In January 1984 claimant came under the care of Dr. Morrison, a California orthopedist. Claimant described low back and right leg pain after ambulation or following any type of heavy lifting and twisting. A CT scan revealed a unilateral bulge at the L5-S1 disc, prompting an April 1984 chemonucleolysis.

In August 1984 Dr. Morrison reported that claimant had "made a dramatic recovery and now is completely asymptomatic." In Dr. Morrison's opinion claimant was precluded from heavy lifting, repetitive bending and stooping. Dr. Morrison concluded that claimant had lost approximately one-half of his pre-injury capacity for heavy lifting, bending, or stooping.

In February 1985 claimant returned to Dr. Morrison, reporting that his symptoms had reappeared. Claimant attributed this reoccurence to a sneezing episode. Dr. Morrison prescribed anti-inflammatory medication and requested that claimant return in two weeks. Claimant has not sought treatment since the February 1985 examination.

In May 1985 Dr. Morrison addressed the extent of claimant's permanent low back impairment. Dr. Morrison opined that claimant sustained 25 percent permanent impairment and that his current symptoms were to be expected. If claimant's pain became so severe that he was unable to participate in usual daily activities, Dr. Morrison mentioned the possibility of a decompression laminectomy.

Claimant has an 11th grade education and no GED. His past work experiences have primarily involved manual labor. For example, in addition to his experience as a mobile home assembler, he has worked as a carpenter and car wash laborer. While in the armed services, he received training as a jet engine mechanic. Claimant has purchased a portable pressure washer, which he uses to clean businesses, mobile homes, and other buildings. While offering to clean an establishment, claimant inquires into employment possibilities. He also has applied for work at assembly plants and trucking companies that need forklift drivers. As of the hearing, claimant's pressure washer business was "going real slow" and his reemployment efforts had been unsuccessful. He realized that if he returned to Oregon he would be entitled to vocational rehabilitation services. However, for financial reasons he has chosen to remain in California.

Following the April 1984 chemonucleolysis claimant's symptoms gradually disappeared. However, prompted by the "sneezing episode," his pain returned in early 1985. Claimant currently experiences pain in both legs and "locking" in his back when he bends over. The pain is constant and is worsening. These symptoms prevent him from prolonged sitting or from lifting his one year old child. He also does not engage in household activities. Dr. Morrison has recommended a 25 pound lifting restriction. Claimant refrains from taking prescribed medication because it makes him "too dizzy."

Considering claimant's physical limitations and social/vocational factors, the Referee found that the Determination Order's award of 25 percent permanent disability should be increased to 40 percent. We agree that the Determination Order's award should be increased. However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes disabling pain, and all of the relevant social and vocational factors set forth in OAR 436-30-380. 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 30 percent unscheduled permanent disability award adequately compensates claimant for his compensable injury.

ORDER

The Referee's corrected order dated August 26, 1985 is modified. In lieu of the Referee's award, and in addition to the Determination Order's award of 25 percent (80 degrees) unscheduled permanent disability, claimant is awarded 5 percent (16 degrees), which gives him a total award to date of 30 percent (96 degrees) unscheduled permanent disability for his compensable low back injury. Claimant's attorney's fee shall be adjusted accordingly.

LEWIS H. PAIGE, Claimant
Galton, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 84-12377 & 84-12259
March 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Argonaut Insurance Co. requests review of Referee Podnar's order which: (1) set aside its denial of claimant's "new injury" claim for a back condition; and (2) upheld United Grocers Insurance's denial of claimant's aggravation claim. On review, Argonaut contends that United Grocers is responsible for claimant's back condition. United Grocers cross-requests review, contending Argonaut should be directed to pay the transcription costs for the depositions of three physicians.

The Board affirms that portion of the Referee's order concerning the responsibility issue with the following comments.

Claimant compensably injured his low back in November 1982, when he slipped and fell. He sought medical treatment, but missed no time from work. United Grocers was on the risk and processed the claim as nondisabling. Since this injury claimant has experienced low back and left leg symptoms. However, he continued to perform his regular work duties and sought no further medical treatment for his symptoms until September 1984, at which time Argonaut was on the risk. His return for medical treatment followed a lifting incident at work approximately two weeks earlier. Since the incident claimant's symptoms had become progressively worse. Subsequent testing revealed a herniated disc.

Initial medical opinions suggested that claimant's condition was directly related to the 1982 injury and that his work activities while Argonaut was on the risk had not materially contributed to his current condition. However, recent depositions of the attending physicians indicate that claimant's subsequent work activities also contributed, in varying degrees, to his present disability.

In finding Argonaut responsible for claimant's current back condition, the Referee relied upon Industrial Indemnity Co. v. Kearns, 70 Or App 583, 587 (1984), for the proposition that "a rebuttable presumption exists that a claimant's last industrial injury contributed independently to the worsened condition and that the insurer at that time is responsible." Although we agree with the Referee's ultimate conclusion regarding the responsibility issue, we disagree with his reliance on Kearns.

In Kearns, the issue was which of two prior accepted back claims would be reopened as an aggravation. Kearns did not involve the question as to whether the present claim for compensation was a result of an aggravation of an old injury or was a result of a new injury. Thus, the "rebuttable presumption" is that the most recent accepted injury remains the cause of claimant's increased disability. Kearns does not stand for the proposition that a specific incident is presumed to be a new injury, rather than an aggravation of an old injury. See Stanley C. Phipps, 38 Van Natta 13 (January 14, 1986). Whether claimant has suffered a new injury or an aggravation is a question of fact, and the proper inquiry is whether claimant's present condition is a continuation of the prior injury or whether some subsequent

incident independently contributed in a material way to claimant's condition. See Ceco Corp. v. Bailey, 71 Or App 782, 785 (1985).

Where the trier of fact is convinced that the 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). 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 v. Starbuck, supra., 296 Or at 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. Smith v. Ed's Pancake House, 27 Or App 361 (1976).

Following our de novo review of the medical and lay evidence, we are convinced that claimant's present disability was caused by successive work-related incidents. However, we are unconvinced which incident was the more likely cause of his disability. Accordingly, we apply the "last injurious exposure" rule.

The preponderance of the evidence establishes that claimant's August 1984 lifting incident independently contributed in a material way to his present disability. Therefore, application of the "last injurious exposure" rule rests responsibility on Argonaut. Our conclusion of an independent contribution is further supported by claimant's history which includes: (1) a November 1982 "nondisabling" low back strain requiring one medical treatment and no loss of time from work; (2) recurring symptoms, but no further medical treatment for some 22 months; (3) an August 1984 lifting incident; (4) progressively worsening symptoms eventually requiring medical attention approximately two weeks after the lifting incident; and (5) the detection of a herniated disc.

We reverse the Referee's ruling that United Grocers was responsible for the costs of transcribing three attending physicians' depositions.

In advance of the hearing Argonaut submitted medical reports and opinions from three attending physicians. United Grocers requested the opportunity to cross-examine these physicians. Thereafter, each of the physicians' testimony was taken by way of deposition. Argonaut paid for the appearance costs of the court reporter and the physicians. However, Argonaut contended that United Grocers should be responsible for transcription costs. Argonaut recognized that it was being "hypertechnical", but it declared that it was making a statement against the "over-use" of depositions, particularly in responsibility cases. The Referee agreed with Argonaut's argument and found United Grocers responsible for the costs of trancribing the depositions.

Pursuant to ORS 656.310(2) copies of medical reports shall constitute prima facie evidence of the information they contain, provided that the doctors rendering the reports consent to submit to cross-examination. A medical witness "remains the

witness of the party offering the medical reports and that party is responsible for paying the fees and expenses incident to his appearance as a witness for cross-examination." Hanna v. McGrew Bros. Sawmill, 44 Or App 189, 195 (1980). This reasoning is similarly applicable to the costs of deposition. W. Craig Walker, 37 Van Natta 974 (1985); Michael N. McGarry, 34 Van Natta 1520 (1982).

Here, the depositions were taken pursuant to United Grocers' right to cross-examine the physicians who authored reports offered into evidence by Argonaut. Consequently, we conclude that the costs of transcription should be borne by Argonaut. There are certainly less expensive cross-examination methods available. However, prevailing statutory and case law does not limit the method of cross-examination. In fact, ORS 656.310(2) specifically mentions the use of depositions as a discovery tool, albeit in regards to out-of-state physicians. Furthermore, if Argonaut's argument is followed, the decision could be interpreted as encouraging cross-examination through hearing testimony, which is a method that all parties agree would be more costly, extremely time consuming, and less efficient.

ORDER

The Referee's order dated August 20, 1985 is affirmed in part and reversed in part. Argonaut Insurance Co. shall be responsible for the costs of transcribing the three attending physicians' depositions and shall reimburse United Grocers Insurance for these costs. The remainder of the Referee's order is affirmed.

MARVIN L. STRINGER, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-05141
March 19, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee McCullough's order which: (1) increased claimant's unscheduled permanent disability award for a back injury from 30 percent (96 degrees), as awarded by an April 5, 1985 Determination Order, to 60 percent (192 degrees); and (2) awarded 5 percent (7.5 degrees) scheduled permanent disability for loss of use of the right leg (knee), whereas the aforementioned Determination Order had awarded no permanent disability. On review, the issue is extent of disability, unscheduled and scheduled.

We affirm that portion of the Referee's order concerning claimant's award of scheduled permanent disability. However, we modify that portion of the order pertaining to claimant's award of unscheduled permanent disability.

Claimant was 33 years of age at the time of hearing. In February 1984, while working as a choker setter, he was struck in the back by a large piece of wood. The blow knocked him to the ground. Claimant continued to work for approximately three weeks, but eventually sought medical treatment for his increasing back pain. Dr. Tryon, claimant's treating chiropractor, diagnosed "chronic dorsal-lumbar strain with attendant spinal fixation, and subluxation of L4." X-rays indicated a narrowing at the L4-5 level, but otherwise the findings were normal. Treatment has been

conservative, primarily consisting of chiropractic manipulative adjustment, heat, massage, physical therapy, and exercise.

In September 1984 Dr. Tryon referred claimant to Dr. Daskalos, osteopath, at the Southern Oregon Pain Center. Dr. Daskalos diagnosed dorsolumbar strain secondary to a contusion of the same area. Noting "very few" physical findings to substantiate claimant's complaints, Dr. Daskalos suggested that claimant participate in an outpatient back program. Dr. Hennings, a psychologist at the Pain Center, agreed with Dr. Daskalos' recommendation, further concluding that ongoing psychological treatment was not indicated.

In October 1984 Dr. Daskalos completed an assessment of claimant's physical limitations. In Dr. Daskalos' opinion, claimant could: (1) sit, ride or drive for four hours with breaks; (2) stand or walk for two hours with breaks; (3) occasionally lift and carry twenty pounds; and (4) occasionally bend, kneel, and crouch. Dr. Tryon basically agreed with Dr. Daskalos' findings. Concluding that claimant was precluded from returning to his former employment, Dr. Tryon recommended further evaluation for rehabilitation purposes.

In January 1985 Dr. Tryon completed a "Physical Capacities Evaluation" in preparation for claimant's referral for vocational assistance. According to Dr. Tryon, claimant was subject to the following restrictions: (1) sitting two hours without a break and eight hours in an eight hour work-day; (2) standing one hour without a break and two hours in an eight hour work-day; (3) walking two hours without a break and three hours in an eight hour work-day; (4) occasionally lifting and carrying up to twenty pounds; and (5) no bending and squatting. Dr. Tryon subsequently opined that claimant exhibited a moderate level of pain concerning his spine and left shoulder.

Claimant's vocational assistance initially concentrated on the possibility of his return to his former employer. However, considering claimant's work experiences in heavy manual labor and his current physical limitations, a retraining program was eventually proposed. Claimant exhibited an aptitude for automobile repair and maintenance, stemming from twenty years of unpaid experience. Consequently, a seven-month on-the-job training program in automobile mechanics was arranged, but had not been implemented by the time of hearing.

Claimant has a seventh grade education. At the time of hearing, he was participating in coursework designed to prepare him for a GED examination. His past work experiences primarily involved manual labor in the logging industry. In addition to his work as a choker setter, claimant had been a log grader, a long haul truck driver, a head-rig barker, a cut-off saw edger, a green chain laborer, a boiler repairman, an oil field worker, and a farm laborer. Most, if not all, of these activities require physical capabilities which exceed his current restrictions.

Claimant credibly described his disabling pain and physical limitations. He is able to bend, kneel, and stoop. However, each activity is performed with difficulty and provokes pain in his lower back, which radiates into his neck and shoulders. He also experiences recurring headaches. Standing for more than fifteen minutes, sitting for more than thirty minutes, or walking over a mile also increases claimant's symptoms. These

symptoms have disturbed his sleep patterns and curtailed his household chores and recreational activities. Claimant receives some periodic relief from hot baths.

Considering claimant's physical limitations and social/vocational factors, the Referee found that his earning capacity had been significantly diminished. Accordingly, the Referee increased claimant's permanent disability award from 30 percent to 60 percent. We agree that the Determination Order's award should be increased. However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes his credible testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. 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). Furthermore, the extent of claimant's permanent disability is rated as of the time of hearing and cannot await the results of possible future change in employment status. Gettman v. SAIF, 289 Or 609, 614 (1980); Livesay v. SAIF, 55 Or App 390, 394 (1981); Leedy v. Knox, 34 Or App 911 (1978). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines and principles, we conclude that a 40 percent unscheduled permanent disability award adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated October 9, 1985 is affirmed in part and modified in part. In lieu of the Referee's award, and in addition to the Determination Order's award of 30 percent (96 degrees) unscheduled permanent disability, claimant is awarded 10 percent (32 degrees), which gives him a total award to date of 40 percent (128 degrees) unscheduled permanent disability for his compensable back injury. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $250 for services on Board review concerning the scheduled permanent disability issue, to be paid by the SAIF Corporation.

CAROL L. SYLVESTER, Claimant
Doblie & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11627
March 19, 1986
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 job stress and awarded an extraordinary attorney's fee. On review, SAIF contends that claimant failed to establish compensability or, alternatively, that the attorney's fee should be reduced.

Following our de novo review of the medical and lay evidence, we are persuaded that: (1) real events and conditions, capable of producing stress when viewed objectively, existed during claimant's employment as a female corrections officer at

the Oregon State Prison; (2) she suffered a mental disorder which required medical treatment; and (3) the real stressful events and conditions she experienced on her job were the major contributing cause of her mental disorder. See McGarrah v. SAIF, 296 Or 145, 165-66 (1983). Accordingly, we affirm that portion of the Referee's order which found claimant's stress claim compensable.

We modify that portion of the Referee's order which awarded claimant an extraordinary attorney's fee of $7,000.

The amount of a reasonable attorney fee shall be based on the efforts of the attorney and the results obtained. OAR 438-47-010(2). In determining the reasonableness of attorney fees, several factors must be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985).

By affidavit, claimant's counsel itemized their services rendered concerning this matter and the amount of time expended in providing these services. Claimant's counsel expended 76.25 hours on her behalf. The issue of compensability for claimant's stress claim presented a complex issue, legally as well as factually. The hearing covered two separate days of testimony, involving ten lay witnesses and claimant's treating psychologist. In addition, the testimony of a consulting psychiatrist was subsequently taken by way of deposition. Claimant's primary counsel has seventeen years of experience in the workers' compensation and personal injury field. Due to her counsel's efforts, claimant has realized a most favorable and valuable result.

Following our de novo review of the record, we agree that an extraordinary attorney's fee is appropriate. However, we find that $7,000 is excessive.

Considering the nature of the practice in general and the facts and circumstances of this case in particular, we conclude that $5,000 is a reasonable award for claimant's extraordinary attorney's fee for services at the hearing level.

Claimant has cross-requested review of that portion of the Referee's order which "for procedural purposes only" found that she was able to return to work on November 16, 1983. Claimant asserts that the Board "recommend" a claim closure date of March 19, 1984.

We decline to address claimant's request because we conclude that it was inappropriate for the Referee to deliver what was, in effect, an advisory opinion on the issue of claim closure. The sole issue at hearing was compensability, not the date claimant's psychological condition became medically stationary. Consequently, any finding regarding claim closure would be gratuitous since the issue had not been raised by the parties. Moreover, although the Referee acknowledged that the Evaluation Division was free to reach its own determination concerning the effective date of claim closure, we consider his finding improper. See ORS 656.268(2) and (3). This reasoning is similarly applicable to the Referee's finding concerning the extent of claimant's permanent disability.

ORDER

The Referee's order dated October 31, 1985 is affirmed in part, modified in part, and reversed in part. In lieu of the Referee's award of an extraordinary attorney's fee, claimant's attorney is awarded $5,000 for services rendered at the hearing, to be paid by the SAIF Corporation. The Referee's finding concerning a medically stationary date is reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $650 for services on Board review concerning the compensability issue, to be paid by the SAIF Corporation.

RAYMOND K. ADDLEMAN, Claimant
Gary J. Susak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11333
March 21, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Wasley's order that upheld the SAIF Corporation's denial of claimant's industrial injury claim for the low back. The issue on review is compensability. We reverse.

Claimant is a former hospital maintenance worker. On September 7, 1984 he began a three-day remodeling job involving heavy sheetrock work. On the first two days claimant worked with other hospital employes. On the third day he worked alone. Claimant testified that he did not experience low back symptoms at any time during the three day period. On the day after the job was completed, however, he experienced a sharp pain in his left hip upon arising from his bed at home.

Claimant returned to work for three days but ultimately left due to severe and increasing low back and leg pain. He was soon diagnosed as having suffered a herniated disk at L5-S1.

The treating doctor was Dr. German, who opined that absent a showing of other causes, claimant's three days of heavy labor prior to the appearance of symptoms contributed to his disk herniation. There is no contrary medical opinion. There has been no other theory offered for the appearance of claimant's symptoms.

The Referee held the claim noncompensable, citing Roseburg Lumber Co. v. Killmer, 72 Or App 626 (1985); Wheeler v. Boise Cascade Corp., 298 Or 452 (1985) and Weller v. Union Carbide, 288 Or 27 (1979), for the proposition that in order to establish his claim, claimant must prove that his working conditions were the "major contributing cause" of his disability. The Referee was in error, for the cases cited by the Referee pertain to claims for occupational disease. The present claim was pleaded as, and in fact is, one for accidental injury. See Valtinson v. SAIF, 56 Or App 184 (1982). Weller, supra, and its progeny do not apply to accidental injury claims. Jameson v. SAIF, 63 Or App 553 (1983).

In an accidental injury context, claimant must prove that his work was a material contributing cause of his disability. Summit v. Weyerhaeuser Co., 25 Or App 851 (1976); Jack D. Ledford, 37 Van Natta 1152 (1985). Given Dr. German's opinion that claimant's work contributed to his disability, and

absent an alternative explanation for the onset of symptoms, we find that claimant has satisfied his burden of proof. Claimant's claim is compensable.

ORDER

The Referee's order dated July 25, 1985 is reversed. Claimant's claim is remanded to the SAIF Corporation for processing according to law. Claimant's attorney is awarded a fee of $1,200 for services at hearing and $550 for services on Board review, to be paid by the SAIF Corporation.

WILLIAM A. CUMMINGS, Claimant
Steven C. Yates, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 84-00139
March 21, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of those portions of Referee Baker's order that: (1) set aside its denial of claimant's aggravation claim involving the neck and low back; and (2) set aside its denial of claimant's psychological claim. The issues on review are the compensability of the aggravation and psychological claims.

Claimant compensably injured his neck and low back in January 1978 when the truck he was driving left the road and struck a guard rail. A Determination Order issued a year later and awarded temporary total disability compensation only. Claimant subsequently filed an aggravation claim, the denial of which was affirmed first by way of an Opinion and Order and later by our Order on Review.

The instant proceeding involves, in part, a second aggravation claim made in December 1983. Claimant asserts that since the last arrangement of compensation, his neck and low back conditions have worsened as a result of his industrial injury. In addition to his own testimony claimant relies on reports of his initial treating chiropractor, Dr. Grubka. Dr. Grubka treated claimant for approximately one year following the 1978 injury and last saw him in January 1979 before claimant moved to Mississippi for nearly four years. Dr. Grubka did not see claimant again until December 1983. Upon claimant's return for treatment, Dr. Grubka filed an aggravation claim on his behalf.

Upon receipt of the claim the employer sent claimant to a panel of Orthopaedic Consultants, whose lead physician, Dr. Stainsby, had examined claimant as a private consultant in November 1978. Dr. Stainsby opined that claimant evidenced no objective signs of impairment either at the time of the 1978 examination or in 1984 when he again examined claimant on behalf of Orthopaedic Consultants. Dr. Stainsby therefore found that claimant had experienced no injury-related worsening since the last arrangement of compensation. Based on this opinion the employer's denial issued February 20, 1984.

In Dr. Grubka's opinion the condition he treated in December 1983 resulted from the original injury and had worsened both subjectively and objectively. Dr. Grubka found increased hypomobility and myofibrositis. He also discussed thermographic studies consistent with nerve fiber irritation at the fourth

lumbar vertebra. Dr. Grubka felt that these findings were consistent with claimant's increased complaints of pain. Dr. Gatterman, a chiropractor, examined claimant on behalf of the employer and found a lumbar facet syndrome. She could not state, however, whether it resulted from the industrial injury. She also noted severe functional overlay and recommended an evaluation of claimant's behavior.

Without elaborating, the Referee held:

> "On consideration of the testimony and the documentary evidence I find it is more likely than not that this claimant's condition resulting from the compensable accident has deteriorated and his aggravation claim is compensable."

The Referee did not state why he was more persuaded by certain testimony or reports than he was by others. In our own review of the record, we are persuaded by the reports of Dr. Stainsby that claimant's condition has remained essentially unchanged since the last arrangement of compensation.

We find Dr. Stainsby's opinion more persuasive than that of Dr. Grubka. Dr. Stainsby's reports are more thorough and were supported by his extensive testimony at hearing. Both before and after the last arrangement of compensation, Dr. Stainsby conducted numerous orthopedic tests of claimant's physical abilities. He also preserved his findings in extensive written reports. By contrast, the record contains no report from Dr. Grubka providing data on claimant's specific physical abilities and limitations before the last arrangement. In addition, the only statements offered by Dr. Grubka after the last arrangement of compensation are essentially conclusory opinions regarding claimant's allegedly worsened condition. No data has been offered by Dr. Grubka from which to compare claimant's condition before and after the last arrangement of compensation. In light of Dr. Stainsby's expert medical analysis, we find Dr. Grubka's statement of claimant's alleged worsening lacking in empirical support and insufficient to sustain claimant's claim.

The remaining issue is the compensability of claimant's psychological condition, which has been variously termed an "adjustment reaction" by Dr. Forester, the treating psychologist, and a "psychogenic pain disorder" by the consulting psychiatrist, Dr. Holland. Claimant asserts that the compensable injury triggered an emotional disturbance requiring treatment.

The medical evidence on compensability is split. Dr. Forester testified that claimant's injury caused pain, which ultimately resulted in a chronic pain syndrome and reactive depression. In Dr. Forester's opinion, claimant's current psychological condition is causally related to his industrial injury.

Dr. Holland examined claimant in February 1985 and filed a 16-page report outlining his findings. He also testified at the hearing. In Dr. Holland's opinion, which we find persuasive, claimant's injury provided a vehicle for the symptomatic expression of his preexisting dependent personality disorder. The injury neither caused nor worsened the preexisting disease, but merely precipitated symptoms. Dr. Holland testified that the

appearance of symptoms served to promote subconscious secondary gain by satisfying certain of claimant's psychological needs.

We find from Dr. Holland's testimony and reports that claimant's psychological condition preexisted his compensable injury. It is, therefore, claimant's burden to prove that his preexisting psychiatric condition was worsened by that injury. Partridge v. SAIF, 57 Or App 163, 167 (1982); David Hulbert, 37 Van Natta 1256 (1985). We also find from Dr. Holland's testimony that claimant's injury did no more than trigger a symptomatic psychological reaction without worsening the underlying condition. Under the controlling case law, therefore, claimant's claim is not compensable. The self-insured employer's denial shall be reinstated.

ORDER

The Referee's order dated July 10, 1985 is reversed in part and affirmed in part. Those portions of the order that set aside the self-insured employer's denials of claimant's claims for aggravation and a psychological condition are reversed and the employer's denials are reinstated. The remainder of the order is affirmed.

SUSAN K. BELL, Claimant
Gatti, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 83-09991 & 84-05124
March 25, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The United Employers Insurance Company requests review of those portions of Referee Seymour's Order on Reconsideration that: (1) found a guaranty contract filed by United Employers in connection with a workers' compensation policy issued to an employer for one business location extended coverage to another business location; and (2) found it responsible rather than the SAIF Corporation for claimant's right arm, right shoulder, low back, upper back and neck conditions. The issues are coverage and responsibility.

Claimant's initial employer in this case was a partnership consisting of a husband and wife, Kenneth and Barbara Klawitter. The Klawitters owned a grocery store in Dallas, Oregon called the Dallas Sentry. United Employers issued a workers' compensation policy on this business and filed a guaranty contract with the Workers' Compensation Department on January 19, 1983. During March or April 1983 the Klawitters sold the Dallas Sentry. United Employers cancelled the guaranty contract and notified the Workers' Compensation Department on May 31, 1983. The cancellation became effective June 30, 1983. See ORS 656.427(2).

At some point in late 1982 or early 1983, the Klawitters purchased a restaurant in Salem and called it "The Big Dipper Ice Cream and Sandwich Shop." Other than common ownership, there was no connection between the Dallas Sentry and the Big Dipper. Claimant began working at the Big Dipper shortly after the Klawitters purchased it.

In early to mid April 1983 claimant began to experience gradually worsening pain and cramping in her right hand, arm, shoulder, upper back and neck which she associated with scooping ice cream at work. Claimant orally reported her symptoms to her employer, Mr. Klawitter. Mr. Klawitter asked her not to file a workers' compensation claim because he did not think he had coverage for the Big Dipper. Instead, he told her to visit a doctor and have the bill sent to him.

Claimant visited a chiropractor, Dr. Grobman, on April 19, 1983 and received heat treatment. The following day, claimant visited the emergency room and received prescriptions for a forearm splint and pain medication.

On April 21, 1983 Mr. Klawitter visited his insurance agent and discussed obtaining workers' compensation coverage for the Big Dipper through United Employers. The agent wrote a liability policy for the Big Dipper, but upon learning that the Klawitters had been operating the Big Dipper for several months ostensibly without workers' compensation coverage, he refused to write a workers' compensation policy.

Claimant visited chiropractor Grobman three more times in late April 1983, but then quit seeing him because Mr. Klawitter was not paying Dr. Grobman's bills. The Klawitters sold the Big Dipper on July 11, 1983 to Ralph and Cassandra Harris who renamed it "The Willow Ice Cream Company." Claimant continued working at the restaurant. The new owners obtained workers' compensation coverage through SAIF, effective August 5, 1983.

During August 1983 claimant experienced gradually worsening symptoms in her right arm, right shoulder, upper back and neck. Then, on September 2, 1983 claimant lifted a heavy cannister of soda pop and felt an intense pain in her low back. Claimant was able to finish her shift, but was unable to return to work the following day. Claimant later testified that the incident involving the soda pop cannister only minimally aggravated her right arm, right shoulder, upper back and neck conditions.

Claimant returned to Dr. Grobman on September 3, 1983 complaining of pain throughout her cervical, thoracic and lumbar back. Dr. Grobman diagnosed chronic cervical, thoracic and lumbar strain or sprain and began treating claimant three times per week. Dr. Grobman's treatment of claimant prior to this time had not involved claimant's low back. Dr. Grobman opined that claimant's condition in September 1983 was an aggravation of her April 1983 condition brought on by the discontinuation of treatment and the continuation of work activity.

On September 6, 1983 claimant filed a claim with SAIF in connection with the pain in her right arm, right shoulder, low back, upper back and neck. She cited as the cause of her symptoms various work activities including picking up cannisters of soda pop, moving picnic tables and mopping and indicated that her symptoms had worsened gradually during the previous month.

On November 7, 1983 claimant was examined at the behest of SAIF by a panel consisting of two orthopedic surgeons and a neurologist. The panel could find little objective evidence of any injury at the time of its examination and recommended a physical conditioning program. SAIF denied responsibility for claimant's condition later the same month.

In the meantime, on October 17, 1983, the Compliance Division of the Workers' Compensation Department issued a proposed order finding the Klawitters to be noncomplying employers for the period from February 27 to July 11, 1983. This period included the time in April 1983 during which claimant first developed symptoms in her upper body. The Klawitters did not contest the proposed order and it became a final order of the Department by the operation of law on October 27, 1983. See ORS 656.740(1), (3).

In early 1984 the Compliance Division amended its order and redetermined the period of noncompliance as June 30 to July 11, 1983. This period did not include the time during which claimant first developed symptoms in her upper body and sought medical treatment. Later, in a letter to claimant's attorney, the Compliance Division stated that it had determined that the guaranty contract filed in connection with the Klawitters' Dallas Sentry grocery store had extended workers' compensation coverage to the Big Dipper until the cancellation of the guaranty contract became effective on June 30, 1983. After the Compliance Division amended its order, claimant filed a claim with United Employers. United Employers denied the claim on the ground that it had never provided coverage for the Big Dipper.

The Referee ruled that under the terms of the guaranty contract filed by United Employers in connection with the Dallas Sentry grocery store, United Employers provided workers' compensation coverage for all of the Klawitters' business locations, including the Big Dipper, until the guaranty contract was cancelled on June 30, 1983. The Referee also ruled that claimant had not sustained a new injury in September 1983 and concluded that United Employers was responsible for claimant's right arm, right shoulder, low back, upper back and neck conditions.

On Board review, United Employers contends that the Referee erred in construing the guaranty contract to extend coverage to the Big Dipper restaurant. We conclude that the Referee did not have jurisdiction to construe the terms of the guaranty contract and that the Board does not have jurisdiction to address United Employers' argument.

The jurisdiction of the Hearings Division of the Workers' Compensation Board is limited to "matters concerning a claim" except as otherwise prescribed by law. ORS 656.708(3), see also ORS 656.283, 656.704(3). Questions of compliance are not matters concerning a claim. See Heinz J.U. Sauerbrey, 37 Van Natta 1512 (1985); Jovita P. Garcia, 37 Van Natta 1208 (1985); Gary O. Soderstrom, 35 Van Natta 1710 (1983), 36 Van Natta 1366 (1984). The Hearings Division and the Board, therefore, do not have jurisdiction to decide or review such matters unless jurisdiction is otherwise provided by law.

Under ORS 656.740(1) and (3), the Hearings Division has jurisdiction to decide questions of compliance if the employer files a request for a hearing with the Department within 20 days of receiving the Department's proposed order of noncompliance. If matters concerning a claim are also litigated at such a hearing, review of the Referee's order is as provided for matters concerning a claim. ORS 656.740(4)(c). In such situations, the Board then obtains jurisdiction to review questions of compliance. Id.; ORS 656.295. If, however, the employer does not request a hearing within the prescribed time limitation, the

proposed order of noncompliance becomes a final order of the Department and is "not . . . subject to review by any agency or court." ORS 656.740(3).

In the present case, the Compliance Division issued a proposed order of noncompliance on October 17, 1983. That order was not challenged by the employer and thus became a final order of the Department. The Compliance Division later amended this order to shorten the period of noncompliance. The amended order was not challenged by the employer and also became a final order of the Department. Under ORS 656.740(3), the Referee did not have jurisdiction and we do not now have jurisdiction to go behind the Compliance Division's final orders and examine the language of the guaranty contract to determine whether coverage should have been extended to the Big Dipper.

We assume without deciding that the Compliance Division had authority to amend its original order once it became final by the operation of law. That question is a matter between the Compliance Division, United Employers and the Klawitters. It is not a matter concerning a claim and thus is not within the scope of our jurisdiction. See ORS 656.704(3); SAIF v. Broadway Cab Co., 52 Or App 689. rev den 291 Or 662 (1981) (dispute between SAIF and an employer regarding whether certain employes should be listed as covered by SAIF's policy was not a question concerning a claim). We conclude, therefore, that we must give effect to the Compliance Division's amended order which found, in essence, that United Employers provided workers' compensation coverage for the Big Dipper at the time that claimant's upper body conditions first manifested themselves in April 1983.

Having concluded in accordance with the amended order of the Compliance Division that United Employers provided coverage for the Big Dipper in April 1983, we now turn to the responsibility issue. The evidence is clear that although claimant's right arm, right shoulder, upper back and neck symptoms worsened after SAIF became the insurer, there was no new injury affecting these conditions. United Employers, therefore, is responsible for claimant's right arm, right shoulder, upper back and neck conditions. As to claimant's low back condition, the evidence is that claimant did sustain a new injury when she lifted a soda pop cannister on September 2, 1983. SAIF was the insurer at that time and thus is responsible for claimant's low back condition.

ORDER

The Referee's Order on Reconsideration dated June 26, 1985 is affirmed in part and reversed in part. Those portions of the order that set aside United Employers' denial and found United Employers responsible for claimant's right arm, right shoulder, upper back and neck conditions are affirmed. That portion of the order finding United Employers responsible for claimant's low back condition is reversed and claimant's low back condition is ordered accepted by the SAIF Corporation. Claimant's attorney was awarded $900 by the Referee for services at the hearing to be paid by United Employers. That award is affirmed and claimant's attorney is awarded an additional $500 for services at the hearing to be paid by the SAIF Corporation. Claimant's attorney is awarded $500 for services on Board review to be paid as follows: $300 by United Employers Insurance Company and $200 by the SAIF Corporation.

CHARLENE K. BROTHERTON, Claimant
Robert L. Chapman, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11719
March 27, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of those portions of Referee Brown's order which: (1) found that claimant was entitled to temporary total disability as awarded by a Determination Order; and (2) assessed penalties and accompanying attorney fees for an alleged unreasonable unilateral termination of temporary total disability benefits and an unreasonable failure to comply with the aforementioned Determination Order. On review, SAIF contends that: (1) claimant is not entitled to approximately three weeks of temporary total disability benefits; (2) its conduct was justified; and (3) the attorney fee award was excessive.

Following our de novo review of the medical and lay evidence, we conclude that claimant was entitled to the approximately three weeks of temporary disability benefits at issue. If for no other reason, SAIF was required to pay these benefits in compliance with the Determination Order. OAR 436-60-150(3)(c); C. D. English, 37 Van Natta 572, 573 (1985). Furthermore, we agree with the Referee's conclusion that SAIF's conduct was unreasonable.

Accordingly, we affirm those portions of the Referee's order which affirmed the Determination Order and assessed a 25 percent penalty based on the approximately three weeks of unpaid temporary disability benefits. However, we modify that portion of the order which awarded an accompanying attorney's fee of $1,000.

If an insurer or self-insured employer unreasonably refuses to pay compensation, claimant is entitled to a reasonable attorney fee. ORS 656.262(10); ORS 656.382(1). The amount of the reasonable attorney fee shall be set by the Referee, Board or the court. ORS 656.382(2). Pursuant to OAR 438-47-010(2), the amount of a reasonable attorney fee shall be based on the efforts of the attorney and the results obtained. In determining the reasonableness of attorney fees, several other factors must also be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985).

In awarding the attorney fee, the Referee cited William H. McCall, 35 Van Natta 1200, 1201 (1983), for the proposition that attorney fees associated with a penalty are imposed, in significant part, as a measure of the relative unreasonableness of the employer/insurer's claims processing action. To the extent that the above-mentioned statement conflicts with the rationale of Wheeler, the citation to McCall is of diminished utility.

After conducting our review of the record and considering the aforementioned Wheeler factors, we conclude that $500 is a reasonable attorney's fee.

ORDER

The Referee's order dated June 21, 1985 is affirmed in part and modified in part. In lieu of the Referee's award of a

reasonable attorney's fee, claimant's attorney is awarded $500 for services at the hearing level concerning the penalty issue, to be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by the SAIF Corporation.

BETTY A. CORNWALL, Claimant
Brian R. Whitehead, Claimant's Attorney
Bottini & Bottini, Defense Attorneys

WCB 85-09276
March 27, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Whitmire Chiropractic Clinic, in the name of claimant, requests review of Presiding Referee Daughtry's order that dismissed the request for hearing on the ground of lack of jurisidiction. The issue is standing to request a hearing under ORS 656.283.

Claimant entered into a disputed claim settlement of her denied low back claim. At the time of the settlement, there were unpaid bills for chiropractic treatments totalling $1,578. Under the terms of the settlement, claimant agreed to pay all outstanding bills from medical providers. The chiropractic bills apparently were not paid. Whitmire Chiropractic Clinic thereafter requested a hearing, in the name of claimant, seeking payment of one-half of the unpaid bills by the industrial insurer. See ORS 656.289(4). The hearing request was dismissed on motion of the insurer.

We affirm the Presiding Referee's order with the following observations. ORS 656.283(1) provides that ". . . any party or the director may at any time request a hearing on any question concerning a claim (emphasis supplied)." A medical service provider is not a party, ORS 656.005(19), and collection of a medical bill from an insurer under ORS 656.289(4) is not a question concerning a claim, ORS 656.704(3). We offer no opinion regarding remedies possibly available to the medical service provider, beyond holding that the Board does not have jurisdiction over this dispute.

ORDER

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

IRENE M. GONZALEZ, Claimant
Michael B. Dye, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-12022
March 27, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Foster's order that: (1) set aside its denial of claimant's industrial injury claim for the right wrist; (2) set aside its purported Notice of Closure; and (3) ordered the employer to commence payment of temporary total disability compensation as of the date of the purported closure and to continue payments until the next proper closure. Claimant cross-requests review of those portions of the order that: (1) denied claimant's request for penalties and attorney fees for the employer's alleged

improper closure; and (2) denied claimant's request for penalties and attorney fees for the employer's unreasonable denial. Claimant also asks the Board to set aside an August 30, 1985 order of Referee Quillinan that vacated an Order to Show Cause why the employer should not resume temporary total disability payments ordered by Referee Foster's Opinion and Order in this case. The issues on review are compensability, the propriety of the employer's Notice of Closure, claimant's entitlement to temporary total disability, penalties and attorney fees and Referee Quillinan's order.

Claimant is a former cannery worker who was compensably injured when she slipped and fell back on her wrists and right elbow. The injury occurred on November 20, 1980 and was originally accepted as nondisabling. The initial diagnosis was strain and contusion of the wrists and contusion of the right elbow. Soon after the injury claimant began experiencing symptoms in the neck and right shoulder as well.

Claimant treated off and on with her family doctor without appreciable results. She was ultimately referred to Dr. Buza, a neurologist, whose initial diagnosis was soft tissue injury. Claimant was ultimately declared medically stationary by Dr. Stanford on June 25, 1982. The record does not reflect that the employer submitted the claim to the Evaluations Division for closure at that time.

Claimant's symptoms continued without objective evidence of physical disability. Her physicians began to suspect a psychological component to the claim. Dr. Buza, however, suggested a sympathectomy as a possible means of reducing claimant's symptoms. The procedure was performed in June 1983 and its effects were temporarily beneficial. When claimant's symptoms later continued, however, the employer requested a psychiatric examination from Dr. Stolzberg. Dr. Stolzberg opined that claimant suffered from a preexisting psychological disorder not caused nor worsened by the industrial injury. In a later deposition, however, Dr. Stolzberg noted that claimant had a preexisting tendency to develop somatic complaints resulting from incidents such as the job-related injury.

Claimant's right wrist symptoms progressed until her right hand was rendered essentially useless by contractures. The condition was later diagnosed by Dr. Burr as a "psychoflexed hand." The employer then arranged for claimant to be examined by Dr. Voiss, who agreed that claimant's psychiatric condition predated her injury. He concluded that claimant's wrist condition was a physical manifestation of the underlying psychological condition rather than the result of the industrial injury. The insurer then polled claimant's prior physicians as to whether they agreed with the opinion of Dr. Voiss. All agreed.

After its receipt of Dr. Voiss's report and the concurrences of claimant's doctors, the employer closed the claim without a Determination Order on November 2, 1984. The Notice of Closure identified claimant's medically stationary date as June 25, 1982, or more than two years before the employer's closure. Claimant filed an amended request for hearing on the issue of the closure. Three days after closing the claim the employer issued what purported to be a partial denial of claimant's right wrist condition. The essence of the denial was that claimant's wrist

condition was now related to a preexisting psychological problem rather than the industrial injury. The denial denied not only the psychological condition but also all ongoing responsibility for the physical manifestations, i.e., wrist contractures, resulting therefrom. The denial concluded by stating that the denial was not to be construed as a denial of claimant's original accepted wrist injury, which was to remain in an accepted status.

Upon receiving the employer's Notice of Closure, the Evaluation Division set it aside as premature. The Division then ordered the employer to continue payment of any compensation to which claimant might be entitled. At the hearing, however, a Division representative testified that the Division was considering rescinding its order. The representative testified that the Division had originally set the closure aside only because it was issued before the employer's denial. The Division apparently felt that it lost its jurisdiction to consider the closure upon claimant's request for hearing on that issue. One day after the hearing the Division issued an order rescinding its prior order.

With regard to the compensability of claimant's wrist condition the Referee found that regardless of the merits, the employer's denial was precluded under the rationale of Bauman v. SAIF, 295 Or 788 (1983), which prohibits the retroactive denial of an accepted condition absent proof of fraud, misrepresentation or other illegal activity. The Referee reasoned that the employer's denial was an attempt to terminate its liability for a previously accepted condition.

We find that we need not address the Referee's Bauman conclusion, for we find claimant's wrist condition to be compensable on the facts. This case is simliar to Kobayashi v. Siuslaw Care Center, 76 Or App 320 (1985), in which a claimant with preexisting psychological problems suffered a minor compensable knee injury. The claimant's physicians expected the physical effects of the injury to resolve within a short time. When the claimant did not improve, however, his problem was determined to be of psychological origin. Ultimately, the claimant developed a "club foot" condition determined by the examining psychologists to be a means whereby the claimant could physically gratify his significant psychological needs. 76 Or App at 326.

The issue in Kobayashi was whether the claimant's foot condition, which was clearly the result of a psychological disorder rather than physical trauma, was the compensable result of the minor knee injury. The court found that it was, relying largely on Dr. Voiss's opinion that the claimant's knee injury precipitated a means by which the claimant could compensate for deep-seated psychological problems. The court noted:

> "We understand [the testimony of Dr. Voiss] 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." 76 Or App at 325.

The present claimant, like the claimant in Kobayashi, has apparently transformed a relatively minor wrist trauma into a

means of compensating for significant psychological deficits, according to the reports of the various psychologists. It appears that the compensable wrist injury directly precipitated the psychological reaction that led to the development of the present wrist condition. The wrist condition is, therefore, compensable.

Claimant seeks penalties and attorney fees for an alleged improper closure by the employer. The Referee found the closure to be improper, but denied claimant's request for penalties and fees. We agree with the Referee that the closure was improper. We also find, however, that it was unreasonable under the circumstances and that penalties and fees are not only warranted but statutorily required. Under ORS 656.268(3) an employer may close a claim without first requesting a Determination Order, but only if claimant is medically stationary and without permanent disability. If it is ultimately found that closure was not supported by "substantial evidence" a penalty in an amount equal to 25 percent of all compensation determined to be owing between the date of original closure and the date upon which the claim is closed by Determination Order shall be assessed against the employer. The penalty is to be not less than $500. ORS 656.268(3).

In the present case there is persuasive medical evidence that claimant was not medically stationary at the time the employer unilaterally closed the claim. Closure was, therefore, statutorily improper and penalties must be assessed. Claimant's attorney is also entitled to a fee for prevailing on the penalty issue. ORS 656.382(1).

Claimant also requests penalties and attorney fees for the employer's alleged improper partial denial. She asserts that under the rationale of Roller v. Weyerhaeuser, 67 Or App 583 (1984), the effect of the employer's partial denial was to circumvent the normal procedure for closure set forth in ORS 656.268, thereby precluding the Evaluations Division from rating the extent of claimant's disability, if any. We agree. As we noted in Deborah L. Greene, 37 Van Natta 575 (1985): "Where a claimant has a single accepted condition or an accepted condition which cannot be separated from other conditions, an employer/insurer may not issue a partial denial without first processing the claim to closure [through the Evaluation Division]." 37 Van Natta at 577. Claimant's accepted wrist condition is inextricably intertwined with her psychological reaction. Under these circumstances the employer's partial denial was improper.

Although we find the employer's denial unreasonable, we are constrained by statute from assessing an additional penalty. ORS 656.262(10); Marlene Ritchie, 37 Van Natta 1088, 1097 (1985).

Finally, claimant asks that we reverse an August 30, 1985 order issued by Referee Quillinan in WCB Case 85-09023. That order was issued subsequent to a hearing before Referee Quillinan in which claimant sought to enforce the payment of temporary total disability ordered by Referee Foster in his Opinion and Order. Claimant asserts that Referee Quillinan entertained the relitigation of claimant's entitlement to that compensation and as such, allowed the employer to collaterally attack the order of Referee Foster.

We will not consider Referee Quillinan's order. WCB Case 85-09023 has not been consolidated with the present case; it is separately docketed for Board review and will be considered in due course.

ORDER

The Referee's Order is reversed in part and affirmed in part. Those portions of the order that denied claimant's request for penalties for the self-insured employer's improper closure and improper denial are reversed. The employer is assessed a single penalty in an amount equal to 25 percent of all compensation determined to be owing between November 2, 1984, the date of the original closure, and the date upon which the claim is closed by Determination Order, when issued. The penalty shall not be less than $500. ORS 656.268(3). For prevailing on the penalty issue, claimant's attorney is awarded a fee of $400, to be paid by the self-insured employer. For prevailing on the issues of compensability and claimant's entitlement to temporary total disability compensation raised by the employer's request for review, claimant's attorney is awarded $450, to be paid by the self-insured employer. The remainder of the Referee's order is affirmed.

WILLIAM E. McNICHOLS, Claimant
Bryant, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 84-11706
March 27, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seifert's order which upheld the self-insured employer's denial of his claim for a right carpal tunnel syndrome condition. On review, claimant contends that his condition is compensable. We agree and reverse.

On a procedural matter, claimant has requested that the record be reopened in order to admit a letter from his attorney to claimant's treating physician. We treat this request as a motion for remand.

We deny the motion. Following our de novo review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been clearly shown that this evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). In any event, a copy of the letter claimant seeks to have admitted apparently was previously admitted into evidence and thus is already in the record.

We turn to the merits of the case. Claimant was 31 years of age at the time of hearing. In October 1984 he filed his claim, contending that his approximately three week activities as a window capper on an assembly line had caused his right carpal tunnel wrist condition. Claimant's duties entailed applying a protective cardboard covering around the corners of windows and woodwork, lifting the windows from a table, and placing them in a cart. The windows varied in size from two feet by two feet to eighteen feet by eight feet. Their weight ranged from fifteen pounds to several hundred pounds. The larger windows required the assistance of a co-worker.

Claimant began experiencing a tightness and tingling in his right wrist approximately one week after beginning his duties. He described his symptoms to his foreman, who provided him with a wrist brace. About one month after working on the assembly line, a co-worker dropped one end of a cumbersome window claimant was holding. Claimant experienced "a big pop and extreme pain" in his right wrist. He continued to work, but his wrist became swollen and increasingly painful. His employer's nurse placed an ice pack on the joint and gave claimant an "Ace" bandage.

At the end of his shift claimant sought medical treatment from his family physician, Dr. Cross. According to chart notes, claimant attributed his right wrist pain to an injury at work, but stated that the injury had occurred a week earlier. When questioned about this discrepancy, claimant testified that Dr. Cross was far more interested in discussing the onset of the right wrist symptoms rather than the episode at work. Dr. Cross diagnosed a wrist injury with possible carpal tunnel syndrome, prescribed medication, and referred claimant to Dr. Wigle.

In October 1984 claimant came under the care of Dr. Wigle, orthopedist. Claimant described progressing right wrist symptoms starting about two weeks after his job began. His work history included experience as a private contractor and house painter. However, he denied any prior wrist problems or injuries. Attributing claimant's complaints to a "rather sudden change in his physical activities," Dr. Wigle concluded that claimant had a "job related flexor tenosynovitis of the right wrist with an associated carpal tunnel syndrome." Thereafter, electrical studies confirmed the diagnosis of carpal tunnel syndrome.

In February 1985 Dr. Wigle responded to several questions posed by claimant's counsel concerning carpal tunnel syndrome. Dr. Wigle stated that the causative problem of the syndrome, in the majority of cases, was a flexor tenosynovitis of the wrist and flexor tendons of the finger. In most cases, the etiology of the problem was nonspecific. However, there were anatomical entities, such as muscle bellies which extend across or through the carpal tunnel, which certainly could cause the syndrome to be job related. This work relationship can occur when these muscle bellies expand as the muscles are used in repetitive wrist and hand motions, thereby causing compression of the median nerve as it passes through the carpal tunnel.

Dr. Wigle opined that certain individuals seem to have a tendency to develop inflammatory conditions of their hands, wrists, elbows, and shoulders in the form of tendinitis, synovitis, and bursitis. This predisposition can be aggravated by repetitive work activities and result in the development of carpal tunnel syndrome. Inasmuch as claimant had no history of any prior symptoms, Dr. Wigle concluded that claimant's carpal tunnel syndrome was related to his work activities as a window capper.

Prior to working as a window capper, claimant had performed several work activities for other employers requiring repetitive hand and wrist motions. These activities generally included the use of power tools, hand tools, painting equipment, rollers, and sprayers. However, claimant had not experienced any wrist symptoms until beginning his duties as a window capper.

Based on Dr. Wigle's opinion, the Referee analyzed the claim as an occupational disease for an underlying carpal tunnel syndrome condition. Consequently, claimant had the burden of proving that his work activities had caused a worsening of his underlying disease resulting in an increase of pain to the extent that it produced disability or a need for medical services. See Weller v. Union Carbide, 288 Or 27, 35 (1979). The Referee cited Wheeler v. Boise Cascade Corp., 298 Or 452 (1985), and Amfac, Inc. v. Ingram, 72 Or App 168 (1985), for the proposition that merely establishing a causal relationship between claimant's work and the carpal tunnel syndrome was insufficient to prove a worsening. Inasmuch as the Referee found that the evidence failed to establish a worsening of the underlying carpal tunnel disease, he concluded that the claim was not compensable.

We disagree. Following our de novo review of the medical and lay evidence, we are persuaded that claimant's work activities were the major contributing cause of the worsening of his underlying carpal tunnel syndrome condition. Consequently, we conclude that claimant's occupational disease claim is compensable.

The employer argues that Amfac, Inc. v. Ingram, supra., requires a finding that the claim is noncompensable. We find Ingram to be distinguishable on its facts. In Ingram, a potato trimmer complained of wrist symptoms shortly after beginning her work activities. She had not previously experienced any symptoms. Thereafter, nerve conduction studies confirmed carpal tunnel syndrome. The Board found the claim compensable, relying on the Court of Appeals' decision in Wheeler v. Boise Cascade, 66 Or App 620 (1984), which had held that the Weller requirement of a worsening of the underlying condition need not be met if the claimant had not previously sought medical treatment. The Ingram court reversed the Board's order, relying on the Supreme Court's subsequent decision in Wheeler v. Boise Cascade, supra., which held that Weller applied whether the condition was symptomatic or asymptomatic at the time of employment.

The claimant in Ingram contended that the evidence established that an increase in pressure on the median nerve constituted a worsening of her underlying disease. Since she had no prior symptoms, she argued that the appearance of her symptoms shortly after commencing work reflected an increase in pressure on the median nerve and, thereby, a worsening of her underlying carpal tunnel disease. The Ingram court found the claimant's argument unpersuasive, relying on a contrary medical opinion from a consulting specialist. In addition, the court stated that there was no medical evidence supporting the claimant's contention that her work had caused a worsening of her underlying disease.

Here, claimant advances the same medical causation argument that was presented in Ingram. However, unlike Ingram, there is persuasive medical evidence that supports claimant's theory. Dr. Wigle, claimant's treating specialist, concluded that claimant's repetitive wrist and hand motions aggravated the muscle bellies of his right wrist, which resulted in the development of carpal tunnel syndrome. In short, Dr. Wigle unequivocally attributed claimant's right wrist condition to his work activities as a window capper. Furthermore, and also distinguishable from the facts of Ingram, there is no medical opinion contradicting the opinion of the treating specialist.

The employer asserts that there is no medical evidence

that claimant's employment worsened his condition. We disagree. Dr. Wigle stated that the etiology of flexor tenosynovitis, the harbinger of carpal tunnel syndrome, in most cases is unspecific. However, the clear thrust of Dr. Wigle's opinion is that claimant's work activities have expanded anatomical entities in his right wrist, in this case the muscle bellies of his wrist, which has resulted in the development of carpal tunnel syndrome. The fact that Dr. Wigle does not use specific terminology such as "worsening" or "major contributing cause" does not necessarily defeat a finding of compensability, particularly where the opinion, taken as a whole, strongly indicates that claimant's work was the major cause, if not the sole cause, of his condition's worsening. See McClendon v. Nabisco Brands, Inc., 77 Or App 412 (January 29, 1986).

The employer further argues that Dr. Wigle's opinion was based on an inaccurate history. Specifically, the employer contends that Dr. Wigle believed claimant's work activities were far more repetitive and strenuous than they were in actuality. In addition, the employer contends that the record is inconsistent concerning the onset of claimant's symptomology and the date, if any, of the traumatic work incident. We do not consider any of these arguable discrepancies of sufficient magnitude to reject Dr. Wigle's opinion. Claimant may have been guilty, to a degree, of exaggerating his work activities. However, the gist of Dr. Wigle's opinion persuades us that even if claimant's duties were somewhat less repetitive and strenuous than those described, the activities were still more than sufficient to result in the development of carpal tunnel syndrome. Likewise, the confusion concerning the date of the traumatic incident is not fatal, particularly where there is no indication of an off-the-job injury involving the right wrist and where the claim is being analyzed under an occupational disease theory.

ORDER

The Referee's order dated August 2, 1985 is reversed. The self-insured employer's denial is set aside and this matter is remanded to the self-insured employer with instructions to process this claim according to the Workers' Compensation Law. Claimant's attorney is awarded $1,200 for services at the hearing level and $600 for services on Board review, to be paid by the self-insured employer.

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

WCB 83-06440
March 27, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Miville v. SAIF, 76 Or App 603 (1985). The court has ordered that it be determined whether or not claimant has filed a claim for workers' compensation benefits in the state of Indiana; if so, the disposition of any such claim; and to conduct further proceedings consistent with the court's opinion. The record is inadequately developed on the question to enable us to make a determination, and we do not have the authority to take additional evidence. ORS 656.295(5).

Now, therefore, this matter is remanded to the Hearings Division for further proceedings consistent with the mandate of the Court of Appeals.

IT IS SO ORDERED.

JERRY F. FOSTER, Claimant
Evohl F. Malagon, Claimant's Attorney
David O. Horne, Defense Attorney

WCB 84-11283 & 84-12837
March 28, 1986
Order Denying Motion to Dismiss and Granting Brief Extension

Wausua Insurance Company has requested that it be dismissed from the current proceedings on Board review. In the alternative, it requests an extension of time within which to file a respondent's brief.

This is a "responsibility" case. The Referee found Western Employers Insurance Company responsible for claimant's low back condition and affirmed Wausau's denial. Western Employers requested Board review by means of a document captioned with WCB Case No. 84-11283, which is the case number assigned to the request for hearing on the Western Employers denial. The request for review, however, clearly requests review of the entire order that resolved the responsibility dispute between Wasuau and Western Employers. Because our review is de novo on the entire record, Wausau remains a necessary party. See Zurich Ins. Co. v. Diversified Risk Management, 300 Or 47, 50 (1985). The request to dismiss Wausau is, therefore, denied.

Although Western Employers did not initially serve a copy of its appellant's brief on Wausau, the record establishes that it did so on February 12, 1986. Wausau has now filed a respondent's brief. The Board will consider a reply brief if mailed within 14 days of the mailing date of this order.

IT IS SO ORDERED.

DONALD M. HOLLENBECK, Claimant
Flaxel, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 84-00255
March 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Holtan's order which denied claimant's request to increase the award for permanent disability from the Determination Order dated November 16, 1983, as amended December 30, 1983, which awarded no permanent disability in addition to prior awards and stipulation which total 256 degrees for 80 percent unscheduled permanent partial disability. Claimant argues that he is permanently and totally disabled. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

The Board affirms and adopts the well-reasoned order of the Referee with the following comment. The Referee properly followed the fact-finding process described in longstanding case law involving the issue of how much consideration should be given to preexisting disability and preexisting conditions which worsen after the date of a compensable injury when the worsening is not related to the industrial injury. E.g. Emmons v. SAIF, 34 Or App 603 (1978); John D. Kreutzer, 36 Van Natta 284, aff'd mem., 71 Or App 355 (1984); Frank Mason, 34 Van Natta 568, aff'd mem., 60 Or App 786 (1982).

ORDER

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

ASHTON V. LAWRENCE, Claimant
SAIF Corp Legal, Defense Attorney

WCB 83-03493 & 83-08676
March 28, 1986
Order of Dismissal

The SAIF Corporation has moved for dismissal of claimant's request for Board review of Referee Brown's order that dismissed claimant's requests for hearing for failure to appear at hearing. The motion is allowed.

ORS 656.289(3) requires that a request for Board review be mailed to the Board and all parties no later than 30 days after the mailing date of the Referee's order. Strict compliance with ORS 656.289(3) is required to invoke our jurisdiction. Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983). The Referee's order was mailed January 8, 1986. The thirtieth day thereafter was Friday, February 7, 1986. According to the postmark on the envelope, claimant's request for Board review was mailed February 8, 1986, more than 30 days from the mailing date of the Referee's order. The request was, therefore, untimely and we are without jurisdiction to review the Referee's order, which is now final.

The SAIF Corporation's motion to dismiss claimant's request for Board review is allowed. Claimant's request is hereby dismissed.

IT IS SO ORDERED.

MICHAEL MULCAHY, Claimant
Charles Robinowitz, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06844
March 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of those portions of Referee Pferdner's order, as modified on reconsideration, which: (1) awarded 6.75 degrees for 5 percent scheduled permanent partial disability for loss of function of claimant's left ankle due to an industrial injury in addition to the Determination Order dated April 25, 1984 which awarded 54 degrees for 40 percent scheduled permanent partial disability; and (2) found that claimant had not proven that the claim was prematurely closed by the Determination Order dated April 25, 1984. Claimant cites as error the Referee's denial of claimant's motion to reopen the hearing based on a psychological examination report dated one month after the hearing. Claimant also asserts that the Board has no authority to change the definitions of "leg" and "foot" as used in the American Medical Association's publication Guides to the Evaluation of Permanent Impairment. The issues on review are extent of scheduled permanent partial disability, premature closure, and whether to remand to reopen the hearing.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5); Bailey v. SAIF, 296 Or 41 (1983). To merit remand for consideration of new evidence, 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).

The parties' briefs on the remand issue raise the question whether claimant waived the right to have his subsequently created evidence considered by a Referee after the hearing was closed. The procedural development of the case is crucial to our determination of the correct result.

The claim was closed by Determination Order on April 25, 1984. On June 27, 1984 the Board received claimant's request for a hearing which specified issues of further medical treatment, temporary and permanent disability compensation, and penalties and attorney fees. By claimant's representation, he received documents which SAIF considered to be all of the medical and vocational reports pertaining to his claim on July 9, 1984. On August 20, 1984 the Board received SAIF's response which denied claimant was entitled to additional temporary or permanent disability compensation or penalties and attorney fees. On August 22, 1984 the Board received claimant's application to schedule a hearing on the Board's form which specified issues of temporary and permanent disability compensation but which did not include premature closure nor penalties and attorney fees.

On November 1, 1984 the Board received claimant's first request for an expedited hearing. The request was granted on November 21, 1984 and a hearing was scheduled for December 28, 1984. By claimant's representation, he "learned on December 13, 1984, these [documents received July 9, 1984] included only about one-fourth of the records, and specifically excluded all of the Callahan Center records, which are now the most significant in this file."

Claimant submitted a hearing memorandum to the Referee which represented that claimant had a psychological condition which might be related to his compensable injuries and that claimant was in the process of seeking a medical opinion. Based on the representations of the attorneys at the opening of the hearing, the Referee determined that the issues were premature closure, extent of permanent disability, and penalties and attorney fees for delay in production of documents. By colloquy it was established that claimant knew that he was proceeding on the issue of premature closure based on the evidence as it had been developed and that SAIF had not deliberately withheld the delayed documents. By testimony it was established that claimant had suffered psychological problems after his accident, that claimant knew that he had been examined by a psychologist at the Callahan Center in August 1982, and that claimant was waiting to be examined by a particular psychiatrist who would be available within two weeks after the hearing.

The Referee closed the record at the conclusion of the hearing and issued his Opinion and Order on January 7, 1985. On January 18, 1985 claimant requested reconsideration of that portion of the Referee's order which awarded no additional compensation for permanent disability of claimant's left foot. On January 23, the Referee issued an order which vacated the original order and requested SAIF's response. The Referee received SAIF's response on January 29, 1985.

On February 6, 1985 the Referee received claimant's motion to reopen the hearing which included the January 22, 1985 letter of a psychiatrist. On February 8, 1985 the Referee denied the motion to reopen. On February 13, 1985 the Referee received

SAIF's response to the motion to reopen. The Referee issued his Opinion and Order on Reconsideration on February 20, 1985. On March 11, 1985 the Board received claimant's request for review of the Referee's "opinion letter of February 8, 1985, and his Opinion and Order on Reconsideration of February 20, 1985."

When the Board received claimant's request for a hearing, the request was referred "to a referee for determination as expeditiously as possible." ORS 656.283(3). Claimant's original hearing request and hardship hearing request complied with the administrative rules which require that the party requesting the hearing "[C]ertify that the moving party will be ready for hearing with all evidence not later than fifteen (15) days after the date of the application," OAR 438-06-010, and "Filing of an application to schedule hearing constitutes a declaration of readiness to proceed." OAR 438-06-030. There was no delay of the hearing date for which sanctions might be imposed. See OAR 438-06-085.

Claimant did not request postponement nor continuance. The rules provide:

> "OAR 438-06-080 Postponement of Hearing. Postponement of a scheduled hearing must be requested in writing as soon as possible and shall be granted only upon reasonable justification. The request shall state the reasons therefor and indicate whether the adverse party agrees or objects to a postponement. Oral requests are permitted only in emergency and must be confirmed in writing. Parties shall not be permitted to delay resolution of the issues except when postponement is necessary to achieve substantial justice.
>
> "OAR 438-06-090 Continuances. Each party shall be prepared to produce at hearing all evidence to establish their case. Parties shall not be permitted to delay resolution of the issues except when continuance is necessary to achieve substantial justice."

Claimant had warning before the hearing that he was proceeding on less than all of the evidence that he might produce about his psychological condition and elected to proceed. He relied on the opinion of an independent examiner, dated 28 months before the hearing, in the context of vocational assessment and the lay testimony of himself and his wife. He sought no continuance nor postponement.

Circumstances which would be insufficient to reopen a hearing based on newly discovered or newly created evidence in a court may be sufficient before this agency. Bailey v. SAIF, 296 Or 41, 46, n. 4, (1983); Catherine C. Bailey, 36 Van Natta 280 (1984). However, claimant chose to go forward relying on the evidence at hand, and lost on the merits. He now seeks to reopen the hearing and introduce additional evidence which he planned to obtain after the hearing.

The considerations that motivated the Board and the

relevant procedural rules are still basically the same as they were in 1981. We find that claimant waived his opportunity to have the proffered evidence considered by the Referee when he failed to request that the hearing be postponed or that the record be kept open or the hearing continued. See Robert A. Barnett, 31 Van Natta 172, 174 (1981), aff'd mem, 59 Or App 133 (1982).

In the alternative, the question is whether the record was "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). The discretionary decision to remand depends on whether the evidence was material and whether it was obtainable with due diligence before the hearing. In this case we see on this record no reason why claimant could not have sought and obtained a psychiatric or psychological evaluation long before the hearing. Claimant was aware that he had undergone psychological evaluation at the Callahan Center in 1982, and he expressed interest in the results of the evaluation. Claimant's societal and familial problems are documented in the record, but there is no indication that they are related to his industrial injury nor that claimant considered that he needed psychological or psychiatric counselling. Claimant knew that he had gone to the Callahan Center in 1982 for vocational assessment but did not discover that the Callahan Center records were not among his medical and vocational records until just before the hearing. Claimant delayed seeking a medical evaluation of his psychological condition until after the hearing. In the context of this issue, whether claimant was medically stationary at the time of closure, we find that claimant failed to show that the psychiatrist's report was not obtainable with due diligence before the hearing and deny the request to remand to the Referee to reopen the hearing. Bob L. Farris, 37 Van Natta 252 (1985), aff'd mem., 77 Or App 276 (1986).

On the issue of premature closure, claimant relied on the 1982 psychological report and his lay testimony in an attempt to prove that he had a compensable disabling psychological condition, which was not medically stationary at the time of claim closure. There was no evidence that claimant's inability to work at the time of closure was caused by a psychological condition, regardless of compensability. Claimant was not being treated nor was he seeking treatment at the time of closure of his claim. None of the doctors who examined claimant in relation to his wrist and ankle injuries commented about related psychological conditions. The treating doctor concurrently treated claimant for apparently unrelated conditions which might have a psychological origin. The examining doctor at the Callahan Center specifically noted there was no obvious functional overlay.

The determination that claimant was medically stationary must be made on the basis of evidence known at the time of closure. Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985).

The Referee found claimant "appeared to be a credible witness" and commented in his opinion that claimant could make a claim for benefits for a psychological condition under ORS 656.245. The Referee's comment was not a finding on an issue of compensability of psychological or psychiatric services.

In Rogers v. Tri-met, 75 Or App 470 (1985), the court held that a Determination Order must be set aside if there is a psychological component of an industrial injury and the treating

physician's opinion whether the psychological component is medically stationary has not been obtained nor considered. Rogers is distinguishable on its facts in that the claimant was actively participating at the time of closure in curative therapy to overcome a disabling psychological condition. In the present case, claimant was not participating in any therapy and there was no persuasive evidence that claimant was unable to work due to an injury-related psychological condition. We find that, whatever relationship his psychological condition had to his industrial injury, claimant did not carry his burden of proof that at the time of closure the effects of his industrial injury, whether physical or psychological, were not medically stationary. Therefore, we affirm the Referee's finding that the claim was properly closed.

On review of claimant's award of compensation for scheduled permanent partial disability of his left ankle, the Board affirms the Referee's order with the following comment. Claimant argued before the Referee and the Board that the American Medical Association's publication Guides to the Evaluation of Permanent Impairment should be relied on as the exclusive method of evaluating impairment and that the Department and the Board have no authority to alter its definitions, specifically of the "leg" and "foot." ORS 656.214(2)(c) and (2)(d). See also, OAR 436-30-550. The Department's rules follow the statutory definitions of "leg" and "foot," and neither the Department nor the Board have the authority to depart from the statutory definitions.

Claimant has a subtalar fusion with loss of inversion and eversion but has retained plantar-flexion and dorsi-flexion. Claimant does not have a tibio-talar fusion. OAR 436-30-300. The insurer has not asked for reduction of the award and we find that claimant has not proven that he is entitled to an increased award. See Robert E. Martell, 37 Van Natta 1074 (1985).

ORDER

The Referee's order dated February 20, 1985 is affirmed.

JACK D. RICHARDSON, Claimant
Emmons, et al., Claimant's Attorneys
Acker, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 84-13066 & 85-00971
March 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Liberty Northwest Insurance Corporation (Liberty) requests review of that portion of Referee Michael Johnson's order, adhered to on reconsideration, which: (1) set aside its denial of claimant's "aggravation" claim for a left carpal tunnel syndrome condition; and (2) upheld the self-insured employer's denial of claimant's "new injury" claim. On review, the sole issue is responsibility.

Claimant was 41 years of age at the time of hearing. In May 1980 he filed his claim, contending that his work activities as a package mechanic for a food processing plant had caused a right wrist problem. Electrical studies were consistent with a "moderately severe right sided carpal tunnel syndrome and a moderate early left-sided carpal tunnel compression." Diagnosing

right carpal tunnel syndrome, Dr. Fleshman performed surgery on claimant's right wrist. Although claimant also experienced left wrist symptoms, he received no medical treatment.

Liberty subsequently closed the claim by a Notice of Closure. Claimant was awarded approximately three weeks of temporary disability and no permanent disability.

In June 1980 claimant returned to work. Initially, his duties were modified. However, after the plant changed ownership in 1981 his duties became more strenuous. Claimant credibly testified that the pain in both of his wrists has gradually worsened since his 1980 return to work. His symptoms would become particularly bothersome whenever he used "pneumatic equipment or [did] any drilling or hammering for a long period of time." He has never considered his left wrist a major problem and certainly not as severe as his right wrist problems.

Claimant did not seek further medical treatment until approximately November 1984. At that time, he complained of difficulty with both hands and wrists. Electrical studies indicated severe decompression through the right carpal tunnel and mild median nerve compression on the left. Diagnosing bilateral carpal tunnel syndrome, Dr. Ellison suggested further surgery to the right wrist. Thereafter, claimant underwent a second right carpal tunnel release surgery. Claimant describes his left wrist pain as a "little worse now than it was back in '80." However, he has never received any treatment for the left wrist.

In December 1984 claimant filed a claim for right carpal tunnel syndrome with his employer, who has been self-insured since approximately 1981. The employer denied responsibility for claimant's "carpal tunnel syndrome," contending that Liberty was responsible for his current problems. Liberty denied responsibility for claimant's aggravation claim for "bilateral carpal tunnel syndrome," contending that the employer was the responsible party. Thereafter, the parties requested an Order Designating a Paying Agent pursuant to ORS 656.307. In January 1985 a ".307" order issued, directing that the self-insured employer's claims administrator assume interim responsibility for claimant's "bilateral carpal tunnel syndrome" claim.

Concluding that claimant's left carpal tunnel problems constituted an aggravation of his old condition, the Referee set aside Liberty's denial. The Referee reasoned that claimant's left wrist had not suffered the significant recent change that the right wrist had experienced. Inasmuch as the left wrist was only slightly worse than it had previously been, the Referee concluded that Liberty remained responsible for claimant's current left wrist condition. We disagree.

Where the evidence shows that a disability is caused solely by an injury occurring during an earlier employment, there is no reason to apply the "last injurious exposure" rule. Boise Cascade Corp. v. Starbuck, 296 Or 238, 241 (1984). However, 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. Boise Cascade Corp. v. Starbuck, supra, 296 Or at 245.

In an occupational disease context, the last injurious exposure rule provides that, if a worker proves that the disease could have been caused by work conditions that existed at more than one place of employment, the last employment providing potentially causal conditions is deemed to have caused the disease. Boise Cascade Corp. Starbuck, supra, 296 Or at 241; Meyer v. SAIF, 71 Or App 371, 373 (1984). The onset of disability is the triggering date for determination of which employer is the "last potentially causal employer." Bracke v. Baza'r, 293 Or 239, 248 (1982). Where claimant's disability has not resulted in time loss, but merely has required medical treatment, the time disability occurs is generally determined to be the date claimant first sought medical treatment. SAIF v. Carey, 63 Or App 68 (1983); Adam J. Gabel, 36 Van Natta 263 (1984); William Vaandering, 36 Van Natta 1296 (1984). In order to shift responsibility to an earlier employer, the last employer whose employment conditions could have caused the disease must establish that the conditions at the earlier employer were the sole cause or that it was impossible for conditions at the last employment to have caused the disease. FMC Corp. Liberty Mutual Ins. Co., 70 Or App 370 (1984), clarified, 73 Or App 223 (1985).

Following our de novo review of the medical and lay evidence, we are not persuaded that either of claimant's employment exposures was the more likely cause of his left wrist "disability." In fact, the evidence suggests that claimant has not suffered any "disability" since he has apparently neither missed work nor received medical treatment as a direct result of his left wrist problems. However, because compensability has been conceded, the sole issue before us is which of these parties shall be deemed responsible for claimant's left wrist condition.

After conducting our review of the record, we are persuaded that claimant's post-1981 work exposure, while the employer was self-insured, either contributed to the cause of, aggravated, or exacerbated his left wrist condition. See Bracke v. Baza'r, supra; Boise Cascade Corp. v. Starbuck, supra. Furthermore, we find that the onset of "disability" for his left wrist condition occurred while the self-insured employer was on the risk.

Claimant's left wrist symptoms first arose in 1980 while Liberty was on the risk. Yet, his description of his complaints to his attending physician dealt exclusively with his right wrist. Testing administered at the time suggested "moderately early left-sided carpal tunnel compression." However, claimant received no medical treatment for these "early" symptoms. Moreover, a "left wrist" claim was not even filed at this time.

Upon returning to work, claimant's duties soon became more strenuous, which coincided with the employer's change of ownership in approximately 1981. Thereafter, his left wrist symptoms gradually worsened, albeit to a lesser extent than those of his right. Eventually, claimant returned for medical treatment in late 1984, but again only received treatment for his right wrist. It was after seeking this treatment that he received a diagnosis, for the first time, of bilateral carpal tunnel syndrome. In addition, this was the first time that a reasonable argument could be advanced that claimant missed time from work as a result of his left wrist problems.

Claimant has apparently never received medical treatment for his left wrist problems. However, when he left work in late 1984 to seek medical treatment, the description of his complaints specifically referred to bilateral difficulties. This was the first time that it could be reasonably argued that claimant missed time from work as a result of his left wrist condition. Moreover, it was at this time that his condition was diagnosed as bilateral carpal tunnel syndrome. Under these circumstances, we find that the onset of "disability" for claimant's left wrist condition should coincide with the date it can be argued that he first missed time from work due to left wrist problems, as well as the date his condition was diagnosed as bilateral carpal tunnel syndrome. Both dates took place while the self-insured employer was on the risk.

In conclusion, we are convinced that the "disability" was caused by successive work-related exposures, but are not convinced that any one exposure was the more likely cause. Consequently, it is necessary to apply the "last injurious exposure" rule. Because claimant's work activities while the employer was self-insured could have caused his left carpal tunnel syndrome and since he did not become "disabled" until he engaged in these activities, we conclude that the "last potentially causal employer" is the self-insured employer. See Boise Cascade Corp. v. Starbuck, supra, 296 Or 238, 241. Accordingly, the self-insured employer is deemed to have caused claimant' left carpal tunnel syndrome condition.

Claimant's attorney directed questions to claimant and otherwise participated at the hearing in setting forth the issue at hand. However, neither insurer contested compensability, the only issue being responsibility for claimant's bilateral wrist condition. Under these circumstances, his counsel's participation cannot be considered as "actively litigating a point bearing upon the claimant's entitlement to receive compensability or the amount thereof." Stanley C. Phipps, 38 Van Natta 13 (January 14, 1986). Accordingly, we conclude that claimant should be considered a nominal party and, as such, he is not entitled to an attorney fee for services at hearing pursuant to ORS 656.386(1), or on Board review pursuant to ORS 656.382(2). Petshow v. Farm Bureau Insurance Co., 76 Or 563, 571 (1985); Stanley C. Phipps, supra. See also Shoulders v. SAIF, (SC 531929, March 25, 1986).

ORDER

The Referee's orders dated August 16, 1985 and September 13, 1985 are reversed in part and affirmed in part. Liberty Northwest Insurance Corporation's denial of claimant's left wrist condition is reinstated and the self-insured employer's denial of the aforementioned condition is set aside. The self-insured employer shall reimburse Liberty for its claims costs incurred to date. The Referee's awards of attorney fees are reversed. The remainder of the Referee's order is affirmed.

JERRY W. WINE, Claimant
L. Thomas Clark, Claimant's Attorney
Garrett, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Marcus Ward, Defense Attorney

WCB 82-10473, 84-04838 & 85-03699
March 28, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Northwest Farm Bureau requests review of Referee Nichols' order that: (1) set aside its denials of compensability of and responsibility for a low back aggravation claim; (2) upheld the denial of the SAIF Corporation on behalf of a prior employer, Hoskinson Logging; and (3) ordered Northwest Farm Bureau to pay the costs of a deposition. SAIF insured the same employer that Northwest Farm Bureau insured for a period subsequent to the coverage by Northwest Farm Bureau. The issues on review are aggravation, responsibility, and costs of a deposition.

On the issues of aggravation and responsibility, the Board affirms the Referee's order.

On the issue of which insurer should pay the costs of the deposition of claimant's treating doctor, the Board reverses the order of the Referee. Claimant offered a letter into evidence which was the subject of SAIF's request for the right to cross-examine the doctor by deposition. The letter allegedly supported Northwest Farm Bureau's denial. The letter was not offered by Northwest Farm Bureau. The treating doctor was not appearing as Northwest Farm Bureau's expert, therefore, the responsibility to pay the costs of the deposition should lie with the SAIF Corporation as the insurer who requested the deposition on behalf of Hoskinson Logging. W. Craig Walker, 37 Van Natta 974 (1985).

ORDER

The Referee's order dated August 22, 1985 is reversed in part and affirmed in part. That part which ordered Northwest Farm Bureau to pay the costs of the deposition of Dr. Carroll is reversed and the SAIF Corporation, on behalf of Hoskinson Logging, is ordered to pay the costs of the deposition. The remainder of the order is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by Northwest Farm Bureau.

DAVID A. BERKEY, Claimant
Vick & Associates, Claimant's Attorneys
Roberts, et al., Defense Attorneys
Beers, et al., Defense Attorneys

WCB 83-05108 & 83-10234
March 20, 1986
Order of Abatement

The Board has received the employer/insurer's motion for abatement and reconsideration of the Board's Order on Review dated February 20, 1986.

In order to allow sufficient time to consider the motion, the above noted Board order is abated.

IT IS SO ORDERED.

DAVID C. DAINING, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09355
March 5, 1986
Order of Abatement

On February 18, 1986 the Board received a letter from claimant's attorney with a copy of the Board's Order on Review dated February 7, 1986 and a copy of an attorney fee agreement dated January 27, 1982 in which the claimant hired the firm of Roll, Westmoreland, Hansen and Wobbrock to act as his attorneys. On February 25, 1986 the Board received another letter from claimant's attorney with a copy of a more recent agreement between Peter O. Hansen and claimant signed on February 14, 1986. Claimant requests that the Board "approve an attorney fee for services performed through Board review." There is no representation nor certification that a copy of the fee agreements or the cover letters have been submitted to the parties on review. The Referee and the Board noted specifically in their orders that there was no attorney fee agreement of record in this case.

In order to consider this issue and to allow the parties time to advise the Board of their positions, if any, the Board withdraws its Order on Review dated February 7, 1986. The Board hereby requests the parties to respond with briefs on the issue whether claimant's attorney should be allowed an attorney fee out of compensation awarded to the claimant by the Referee and the Board. Brief must be received by the Board at the address below within 21 days of this order to be considered.

IT IS SO ORDERED.

DAVID D. ISAAC, Claimant
Gatti, et al., Claimant's Attorneys
Liberty Northwest, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-01679 & 84-13634
February 27, 1986
Order of Abatement

The Board has received the SAIF Corporation's request that we reconsider our Order on Review dated January 28, 1986.

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 request within 21 days.

IT IS SO ORDERED.

DARRELL L. RAMBEAU, Claimant
Bennett, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB TP-85011
March 13, 1986
Third Party Order of Abatement

Claimant has requested reconsideration of our Third Party Order dated February 18, 1986. The request is allowed and our previous order is withdrawn for reconsideration. The insurer's response to claimant's argument dated February 25, 1986 shall be filed within 14 days from the mailing date of this order. The Board will consider a reply argument from claimant if filed within ten days of the mailing of the insurer's response.

IT IS SO ORDERED.

WORKERS' COMPENSATION CASES

Decided in the Oregon Court of Appeals:

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Charlotte J. Johnson, Claimant.

JOHNSON,
Petitioner,

v.

SPECTRA PHYSICS et al,
Respondents.

(83-02119, 83-02685, 83-10719; CA A33862)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 17, 1985.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

Bruce L. Byerly, Portland, argued the cause and filed the brief for respondents Spectra Physics and Western Employers Insurance.

Jerald P. Keene, Portland, argued the cause for respondents EBI Companies and Junction City Center. On the brief were Craig A. Staples and Roberts, Reinisch & Klor, P.C.

David Runner, Assistant Attorney General, Salem, argued the cause for respondents SAIF Corporation and Marloc Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Gillette, Presiding Judge, Joseph, Chief Judge, and Young, Judge.

JOSEPH, C. J.

Reversed and remanded with instructions to accept occupational disease claim against Marloc and to set aside Junction City Center's denial of responsibility and for further proceedings not inconsistent with this opinion.

JOSEPH, C. J.

Claimant seeks review of the Workers' Compensation Board's denial of compensability of her carpal tunnel syndrome and its upholding the denial of responsibility by one employer. Claimant originally sought review of her claim against three employers, but she dismissed her claim against Spectra Physics and its insurer. We reverse.

Claimant was employed by Marloc Corporation from 1969 until January, 1981. Her job included shearing plastic, screen printing, hand sanding, box making, sawing raw materials, assembling products with hand tools and riveting. The activities involved using hand levers, hand cranks and manual squeegees, manually "flipping" large sheets of aluminum, using hand-held pneumatic and oscillating sanders, hammer-

ing and nailing, manually lifting heavy rolls of plastic, paper and canvas, and using hand-held pneumatic drills and drivers and a trigger-operated rivet gun. She then briefly worked at Spectra Physics before going to work for Junction City Center in June, 1982, where she remained until February, 1983. At Junction City Center, she carried trays of dishes and food to tables, bussed dishes in carriers weighing up to 40 pounds and washed dishes.

In September, 1982, claimant injured her mid-back and right arm while lifting containers of dishes from a bus cart to a drain table. She filed a claim against Junction City Center on November 4, 1982. Her carpal tunnel syndrome was first diagnosed on November 16, 1982, by Dr. Tsai, a neurosurgeon. He thought that the syndrome was related to her back injury and recommended that she continue only light work. On December 1, 1982, Junction City Center's carrier, EBI, accepted the claim.

In February, 1983, claimant consulted Dr. Campagna, a neurosurgeon, complaining of back pain and numbness and tingling in her hands. He asked her if she did repetitive work, such as needlepoint, and she said that she did some crocheting; he related her carpal tunnel syndrome to that activity. On the basis of his report, EBI notified claimant on February 10, 1983, that her previously accepted claim for the syndrome was denied as not related to her back injury. Campagna performed bilateral carpal tunnel release surgery in February, 1983, and saw her once for a post-operative visit

in March. Claimant filed an occupational disease claim against Marloc, which its carrier, SAIF, denied. Campagna later explained that the first time that he had heard of claimant's work activities at Marloc was during his deposition in January, 1984. On the basis of the repetitive nature of those activities he then concluded that they were a major contributing cause of the carpal tunnel syndrome. He did not believe that her work at Junction City Center either caused or worsened the carpal tunnel syndrome.

Dr. Jewel, a hand surgeon, examined claimant in October, 1983. He testified that claimant had recurrent carpal tunnel syndrome and that she probably had suffered a nerve injury at the time of her surgery. He testified that her carpal tunnel syndrome stemmed from the years that she had worked at Marloc performing repetitive hand motions and stated that he believed that that work was the major contributing cause of the syndrome. He also concluded that her job duties at Junction City Center could have exacerbated the syndrome. He did not believe that crocheting was a probable cause for her condition, because it does not require the sort of heavy work and repetitive hand motions on an eight-hour-a-day basis that generally cause carpal tunnel syndrome.

Claimant argues that the referee erred in not finding her syndrome a compensable occupational disease chargeable to Marloc. ORS 656.802(1)(a) defines an "occupational disease":

> "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."

When work conditions are the major contributing cause of a disease, it is compensable. *Dethlefs v. Hyster Co.*, 295 Or 298, 310, 667 P2d 487 (1983); *Gabriel v. Hyster Co.*, 72 Or App 377, 381, 696 P2d 542 (1985);

The referee concluded that claimant had failed to establish the compensability of the carpal tunnel syndrome, because it was just as likely to have resulted from her crocheting as from any work activity. He refused to rely on the preponderance of the medical evidence, because he determined that the medical opinions were based on historical facts provided by claimant and that she lacked credibility. Although

we generally defer to a referee's finding on credibility, *Condon v. City of Portland,* 52 Or App 1043, 1046, 629 P2d 1324, *rev den* 291 Or 662 (1981), the referee's finding in this case is so replete with illogical and irrelevant assertions that we will not rely on it. *See Mendoza v. SAIF,* 61 Or App 177, 180, 655 P2d 1096 (1982).

The evidence in this case includes reports from three medical doctors. All believe that claimant's carpal tunnel syndrome relates to her on-the-job activities. Only one, Campagna, ever related her condition to crocheting, but when he did so he was unaware of her work-related activities. The record corroborates her description of her various job duties, and none of the employers offered contradicting evidence. Both doctors who treated claimant agree that her work activity at Marloc was the major contributing cause of her carpal tunnel syndrome.

The referee's finding that claimant's crocheting met the level of repetitive activity that the physicians explained is necessary to cause carpal tunnel syndrome is not supported by the record. We conclude that claimant proved by a preponderance of the evidence that her carpal tunnel syndrome arose out of and in the scope of her employment at Marloc.

In her second assignment of error, claimant contends that Junction City Center and its carrier violated the rule in *Bauman v. SAIF,* 295 Or 788, 790, 670 P2d 1027 (1983), by denying responsibility for her carpal tunnel syndrome 69 days after they had accepted her claim. In *Bauman,* the court stated that, once a claim is accepted under ORS 656.262(6), which requires acceptance or denial of a claim within 60 days after the employer has notice or knowledge of it, the insurer may not subsequently deny compensability.

At the time that EBI accepted the claim for Junction City Center, it had knowledge of the carpal tunnel syndrome and was on notice that claimant claimed that it related to her back injury. It does not assert any of the exceptions to the *Bauman* rule of fraud, misrepresentation or other illegal activity. *See Liberty Northwest Ins. Corp. v. Powers,* 76 Or App 377, 380, ___ P2d ___ (1985). It could not, therefore, deny the compensability of the claim. We held in *Jeld-Wen v. McGehee,* 72 Or App 12, 15, 695 P2d 92, *rev den* 299 Or 203 (1985), that the prohibition stated in *Bauman* applies as well to denials of

responsibility. Therefore, we hold that Junction City Center's denial of responsibility for the carpal tunnel syndrome was unlawful.[1]

Reversed and remanded with instructions to accept occupational disease claim against Marloc and to set aside Junction City Center's denial of responsibility and for further proceedings not inconsistent with this opinion.

[1] An accepting employer is required to continue compensation and cannot retroactively deny the claim *unless and until* someone else is determined to be responsible. *Retchless v. Laurelhurst Thriftway*, 72 Or App 729, 696 P2d 1181, *rev den* 299 Or 251 (1985).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Eula L. Crowe, Claimant.

CROWE,
Petitioner,

v.

JELD-WEN, INC.,
Respondent.

(82-06883; CA A33475)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 1, 1985.

Thad Hettle, Salem, argued the cause for petitioner. With him on the brief was Rolf Olson, Salem.

Brian Pocock, Eugene, argued the cause and filed the brief for respondent.

Before Richardson, Presiding Judge, Joseph, Chief Judge,* and Warden, Judge.

WARDEN, J.

Reversed and remanded with instructions to reinstate referee's order.

* Joseph, C.J., *vice* Newman, J.

WARDEN, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board which reversed the referee's order holding that claimant had suffered an aggravation of her earlier compensable industrial injury. A back injury sustained in one employment, followed by a worsening of symptoms during a later employment, is involved. The issue is whether the "last injurious exposure" rule applies to impose liability on the second employer. We hold that conditions existed at the second employment that could have, but did not, contribute to the disability, that claimant merely suffered an aggravation of her compensable industrial injury and that the first employer is responsible. We reverse and remand with instructions to reinstate the referee's order.

There is no dispute as to the facts. They are set out in the findings of the referee:

"Claimant, presently forty-nine years old, injured her low back on April 20, 1979, while lifting a pallet of corrugated rail from one conveyer belt to another. Her employer at the time was Jeld-Wen. She filed a claim, was taken off work for one week, and returned to work and reinjured her low back and coccyx on August 10, 1979. She filed another claim which was accepted and treated by the insurer as an aggravation of the April injury. Prior to April 1979, she had had no back problems.

"Claimant saw Dr. Klump for neurological evaluation in mid-November 1979 for her continued low back and right leg pain. Lumbosacral strain related to work was diagnosed with right leg pain of undetermined origin. A program of physical therapy was instituted. Claimant improved and was released for work on January 7, 1980.

"A repeat examination and a myelogram were done by Dr. Campagna in late January 1980. Dr. Campagna found a normal lumbar spine but opined claimant had nerve root compression at L5-S1 on the right 'secondary to herniated nucleus pulposus as a result of industrial injury of April 20, 1979.' Pelvic traction and physical therapy were advised. An EMG failed to reveal evidence of motor root compression. Claimant was discharged from the hospital with a final diagnosis of lumbar sprain. Thereafter, she made a good recovery with minimal disability despite some occasional low backache and pain and numbness in the right leg. Claimant returned to work on March 10, 1980.

"Claimant ceased working with Jeld-Wen in May 1980 and sought lighter employment with Klamath County in the building maintenance department. An October 17, 1980, Determination Order awarded claimant temporary total disability only.

"Nothing much happened until March 19, 1982, when claimant returned to see Dr. Campagna for increasing complaints since July 1980, including constant low back pain and pain radiating down the right leg to the foot. Dr. Campagna now thought claimant to have nerve root irritation at S1, also secondary to the industrial injury of April 1979. Repeat EMG and X-rays were normal as was a repeat myelogram which showed no evidence of disc herniation. Again, final diagnosis was lumbar strain.

"In the intervening two years, claimant had worked primarily as a painter for the maintenance department. This involved considerable bending, stooping, stretching, lifting and carrying. Claimant ceased work on March 16, 1982, and quit entirely on April 2, 1982, due to increasing pain. She saw no doctors in the intervening period between July 1980 and March 1982.

"In June 1982 the insurer referred claimant to Dr. Donald Warren, who was unable to definitively state whether or not claimant's current problems related to the April 1979 industrial injury other than to note claimant's assertions in this regard. Dr. Warren found chronic back and right leg pain, with a trigger point just to the right of the coccyx, essentially in the area where she fell in August 1979. Claimant was treated in the area of the coccyx with steroid and anesthetic injection which resulted in about an 80-percent improvement of her pain. Dr. Campagna likewise opined in July 1982 that he was unable to relate claimant's condition to her April 1979 industrial injury.

"On June 22, 1982, the insurer denied claimant's aggravation claim on March 22 on the basis of lack of relationship to

the April 1979 industrial injury. As a result, no further medical bills were paid. Claimant requested payment of bills under ORS 656.245.

"Claimant then went to work in July 1982 as a cafe owner/operator and also as a part-time manager of a pizza parlor. These jobs were less demanding than her work with the county although standing any prolonged period tended to cause her back to hurt. Claimant is not presently employed.

"By January 13, 1983, some six months after his initial

opinion, Dr. Campagna changed his mind, stating claimant had become medically unstationary by March 19, 1982, and this disability represented a worsening of her low back condition arising from the April 1979 injury. This did not exclude the possibility that claimant's work activities for the county contributed at least in part to her back problems.

"According to claimant, her low back pain never subsided or went away for any length of time throughout the two years she worked for the county. About two months after she began employment there, her back pain became more constant and she missed some time from work due to back problems. About six months before she quit, she asked to be transferred to a clerical position. Two months before her resignation, she further indicated to the personnel manager that her back was becoming worse and that she could not stay in her present job.

"Claimant complained constantly about her back to her immediate supervisor. The supervisor did not know how much time claimant missed because of her back. To the best of his knowledge, claimant sustained no new injuries while working for the county. Claimant appeared to have most difficulty with climbing or standing on ladders. She states she lost up to five or six days per month of work due to her back, especially during the last six months."

The referee held that claimant's low back condition resulted from her April, 1979, industrial injury and had worsened and that Jeld-Wen was the responsible employer. The Board reversed, concluding from the evidence that employment with Klamath County contributed to claimant's disability. It approved Jeld-Wen's denial of claimant's aggravation claim.

The first inquiry is whether the claim is one for occupational injury or disease. Generally, injuries are caused by identifiable, discrete events. In contrast, diseases usually have a gradual onset, and their existence is often not perceived until after the time of affliction. *Bracke v. Baza'r,* 293 Or 239, 246, 649 P2d 1330 (1982). The fact that pain grows worse over a period of time does not make a condition gradual in onset. *Donald Drake Co. v. Lundmark,* 63 Or App 261, 266, 663 P2d 1303 (1983), *rev den* 296 Or 350 (1984).

Respondent argues that the activity at Klamath County caused an occupational disease. The fact that activity at the second employment caused a condition acquired in the

first employment to flare up or worsen does not convert the occupational injury into an occupational disease. *See, e.g., Donald Drake Co. v. Lundmark, supra.* "An occupational disease is stealthy and steals upon its victim when he is unaware of its presence and approach. Accordingly, he cannot

later tell the day, month or possibly even the year when the insidious disease made its intrusion into his body." *White v. State Ind. Acc. Com.*, 227 Or 306, 322, 326 P2d 302 (1961). To the contrary, in this case claimant knows precisely when her back troubles began—the dates of her two accidents at Jeld-Wen. She had never had back trouble before but has been plagued with it ever since. Claimant's condition is the result of an occupational injury, not a disease.

The "last injurious exposure" rule in a successive occupational injury context places full liability on the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. *Bracke v. Baza'r, supra,* 293 Or at 244 (quoting 4 Larson, Workmen's Compensation Law, § 95.12, 17-71 - 17-78). The rule operates to place liability on the last employer "[i]f the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability." *Boise Cascade Corp. v. Starbuck,* 296 Or 238, 245, 675 P2d 1044 (1984). However, when a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability, but which did not contribute to the disability, the "last injurious exposure" rule does not apply, and the first employer is liable. *Boise Cascade Corp. v. Starbuck, supra,* 296 Or at 244. Whether the work conditions at the later employment contributed to the disability is a question of fact. *Boise Cascade Corp. v. Starbuck, supra,* 296 Or at 244-45.

On *de novo* review, we find that the bending and stooping associated with claimant's second employment, although capable of causing a back disability, did not actually contribute to it. Claimant was never entirely free from back pain after the first injuries incurred at Jeld-Wen. The disability was in existence before she ever began work at Klamath County. She merely experienced continuing symptoms and increased pain from her original injury when she

engaged in continued activity for the county. Consequently, Jeld-Wen, the first employer, is responsible.

In determining that the "last injurious exposure" rule is not applicable, we take note of the fact that there was no new injury at Klamath County. "[F]or the last injurious exposure rule to apply at all under the employer's successive-injury theory of the case, there must be evidence of a second injury which materially contributed to the claimant's disability." *Peterson v. Eugene F. Burrill Lumber,* 294 Or 537, 543, 660 P2d 1058 (1983); *see also Firemen's Fund Ins. Co. v. Ore. Ptld Cement Co.,* 63 Or App 63, 66, 663 P2d 416 *rev den* 295 Or 617 (1983).

Although it is true that the identifiable event that distinguishes an injury need not be an instantaneous happening, it must occur in a discrete period, rather than over a long period of time. *Valtinson v. SAIF,* 56 Or App 184, 188, 164 P2d 598 (1982). That requirement is not satisfied here. The activity at Klamath County occurred over a period of approximately two years. In contrast, in *Valtinson,* the activity that

was deemed an injury occurred during one working day. *See also Donald Drake Co. v. Lundmark, supra,* 63 Or App at 266 (injury coincided with traumatic jolting of faulty loader). In sum, there was no new injury at Klamath County that concurred with the first injury to cause the disability. Like the situation in *SAIF v. Brewer,* 62 Or App 124, 129, 659 P2d 988 (1983), there "is no persuasive evidence that claimant's work at [the second employment] contributed to the *causation* of the chronic back condition; rather the evidence shows only that the [second employment] aggravated the continuing back problem and culminated in a second period of disability." (Emphasis in original.)

Reversed and remanded with instructions to reinstate the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert M. Rose, Claimant.

ROSE,
Petitioner,
v.
ARGONAUT INSURANCE COMPANIES et al,
Respondents.

(WCB No. 83-12041; CA A34412)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 18, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Robert J. Guarrasi, and Malagon & Associates, Eugene.

Kevin L. Mannix, Portland, argued the cause for respondents. With him on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Affirmed.

ROSSMAN, J.

Claimant seeks review of an order of the Workers' Compensation Board which affirmed the referee's decision that his injury was not work related.

Claimant played slow-pitch softball for the Guaranty Eggs, a team organized by the employes of Guaranty Chevrolet in Junction City. He broke and dislocated his ankle while sliding into first base during the first game of the season. He seeks compensation for his injury under the theory that it occurred during a recreational activity sanctioned by and indirectly beneficial to employer. The Board, affirming the

referee, held that employer's contribution to the team and the benefits it derived were not sufficient to justify compensation. We agree and affirm.

Claimant worked for employer as a car salesman and was not hired for his ability to play softball. He worked on straight commission, with a guaranteed minimum hourly wage. The softball team was organized and managed by Billy Steele, one of employer's leading salesmen, but not a manager or supervisor. The team was a part of a city league and played on a schedule established by the league. Steele, a sports enthusiast, intended to pay as much of the cost of the team as necessary, including league entrance fees and uniform and equipment costs. He approached Herb Nill, the owner of Guaranty, and Nill agreed to contribute personally $100 towards the team. He made his check payable to Steele. Nill's name was on the team roster, but he never played or appeared at a game. Steele selected the team uniform, which had the name "Guaranty" and the company logo on the jersey.

Claimant was asked by Steele to join the team and he did so voluntarily because, although he is not a good softball player, he thought it would be good for his job. Employes were not required to play. Those who did paid almost all of the costs of uniforms, equipment and fees. Games and practices were held at local parks and, for the most part, after work hours. Employes were frequently allowed to leave early for games, without pay. Now and then, during work hours, they would play catch on employer's premises. Games were occasionally discussed at sales meetings. Employer had a general policy of not sponsoring recreational teams.

In deciding this case, we must determine whether the relationship between claimant's injury and his employment is sufficient to justify compensation. *Rogers v. SAIF,* 289 Or 633, 642, 616 P2d 485 (1980). Only one Oregon case has addressed a similar set of facts. In *Richmond v. SAIF,* 58 Or App 354, 648 P2d 370 (1982), the claimant injured his knee while playing softball on a police department team. In reaching our decision that the injury was not compensable, we referred to 1A Larson, Workmen's Compensation Law, 5-71, § 22.200 (1979).[1] We again turn to Larson for guidance in deciding this case, this time referring to the most recent edition, 1A Larson, Workmen's Compensation Law, 5-131 to 5-158, §§ 22.24 to 22.35 (1985). There, Larson discusses the five determinative variables in a case such as this: the location of the recreational activity, on or off the employer's premises; the time of the activity, during, before or after work hours; the employer's initiative in organizing the team; the employer's contribution to the team; the quality and type of benefit derived by the employer. Considering each of these, we conclude that the evidence weighs decisively against claimant.

[1] 1A Larson, Workmen's Compensation Law, 5-71, § 22.200 (1979), states:

"Recreational or social activities are within the course of employment when

"(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or

"(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

"(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreational and social life."

Claimant was injured at a game which was played after work hours and off employer's premises. Employer did not organize, manage or sponsor the team and had no control over it. No effort was made by employer to advertise the games. Employes were encouraged but not required to play. The only contribution made by employer was a personal one of $100 by the owner. There is no evidence of the motivation for that contribution. Employer received only a minor and incidental benefit in the form of indirect advertisement received through the team jerseys.

Claimant makes much of the fact that employes were

encouraged to act professionally and to sell cars at the games. They brought demonstration models to the games. Claimant concedes that employer encouraged the same type of activity for employes at all times, whether employes were on or off the job.

We conclude that claimant's injury was not work related. The fact that employer sanctioned or even encouraged employes to play on the team and may have derived an incidental benefit in the form of advertisement is not sufficient to establish a work connection.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
MARVIN L. BROWN, Claimant.

BROWN,
Petitioner,

v.

WEYERHAEUSER COMPANY,
Respondent.

(81-0989; 82-09728; 83-04952; A34887)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 14, 1985.

Mike Stebbins, North Bend, argued the cause for petitioner. With him on the brief was Hayner, Waring, Stebbins & Coffey, North Bend.

Paul L. Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM.

Affirmed in part; reversed and remanded in part.

PER CURIAM

Claimant seeks review of a Worker's Compensation Board order that affirmed a referee's opinion denying the compensability of a 1983 back injury and denying temporary partial disability compensation, penalties and attorney fees for a previous claim. Claimant's physician's answer of "yes" to a compound question, only one part of which would support the claim, is too ambiguous for us to find that claimant has carried his burden of proving compensability. On *de novo* review we affirm the denial of compensability for the 1983 claim.

Claimant originally testified that he had not received benefits as required by a determination order for the period August 15, 1980, through October 1, 1980. After oral argument, however, the parties agreed that he was paid through September 19, 1980, but that there is no evidence of payment for the period of September 22, 1980, (a Monday) through October 1, 1980. We find from this agreement, in conjunction with claimant's testimony, that he was not paid through for period. Claimant is entitled to the unpaid amounts of compensation and to penalties and attorney fees, which the Board must determine on remand.

Affirmed in part; reversed and remanded in part.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Robert E. Lee, Claimant.

LEE,
Petitioner,

v.

FREIGHTLINER CORPORATION,
Respondent.

(WCB No. 82-08616; CA A33688)

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 was David A. Hytowitz, Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Bruce L. Byerly, Portland, argued the cause for respondent. With him on the brief was Frank Moscato, Portland.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to reinstate referee's order.

YOUNG, J.

Claimant seeks review of an order of the Workers' Compensation Board which reversed the referee's award of permanent total disability and awarded him 55 percent unscheduled disability of the low back. We review *de novo* and reverse.

Claimant is 62 years old, obese and has a tenth-grade education. He worked for 30 years as a cook before going to work for employer, where he was a janitor, a molder and, finally, a rinse/paint box operator. While working there, he suffered two compensable acute lumbar strains. The first occurred in June, 1979, resulting in a 10 percent unscheduled disability award. The second, the subject of this review, occurred in March, 1982, when claimant slipped and fell on a wet floor. He was awarded 25 percent unscheduled disability as a result of that injury. He requested a hearing. The referee found him permanently and totally disabled both on the basis of the medical evidence alone and under the "odd-lot" doctrine. The Board, after finding that claimant is capable of some work, found that he had failed to prove that he had made reasonable efforts to find work and that he had unreasonably failed to mitigate his injury by losing weight. The Board reversed the referee but increased the unscheduled disability award to 55 percent.

Claimant was examined by several physicians. They all basically agree that (1) he is obese; (2) he suffers from chronic recurrent strain of the lumbar muscles and ligaments, superimposed on moderately severe degenerative disc disease at L5-S1 and mild degenerative disc disease at L4-L5; (3) as a result, his physical capacities are limited, although there is some disagreement as to the extent of the limitation[1]; and (4) he is situationally depressed. Claimant testified that many

activities, including lifting, bending, standing, sitting, stooping, crawling, walking, going up or down hills and stairs and pushing and pulling are either impossible or exacerbate his chronic pain and the greater his activity, the more frequent his pain. The referee expressly found him to be "a completely credible and reliable witness."[2]

In December, 1982, a Callahan Center evaluation team concluded that he demonstrated the aptitude, ability and physical tolerances for his return-to-work objectives: bench assembly, delicatessen cutting and slicing and salad making. He was transferred to the Field Services Division Job Club for direct employment assistance.

[1] Dr. Maskell, claimant's treating physician, and Dr. Wade, a consulting physician, reported limitations, including no bending, squatting, crawling, climbing, twisting, working at heights above shoulder level and no lifting or carrying over 10 pounds. Orthopaedic Consultants, on the other hand, concluded that claimant could return to a light category of occupation with no lifting over 25 pounds, no repetitive lifting over 10 pounds and no repetitive bending, stooping or twisting. When medical evidence is divided, we tend to give greater weight to the conclusions of a treating physician, in the absence of persuasive reasons not to do so. *See Taylor v. SAIF*, 75 Or App 583, 585, 706 P2d 1023 (1985); *Weiland v. SAIF*, 64 Or App 810, 814, 669 P2d 1163 (1983).

[2] We defer to the referee's express finding of credibility in this case. *See Bush v. SAIF*, 68 Or App 230, 233, 680 P2d 1010 (1984); *Williams v. SAIF*, 66 Or App 420, 422, 674 P2d 78, *rev den* 296 Or 712 (1984).

Claimant testified that, before May, 1983, he unsuccessfully applied for salad preparation or other light duty work at eight or ten restaurants. In early May, the Field Services Division closed claimant's file at his request, because he did not know if he would ever work again. Dr. Rollins, a rehabilitation specialist with over 26 years experience, testified that, in his opinion, claimant would not be able to sell his services or work regularly in a suitable or gainful occupation and that he was not a candidate for retraining or rehabilitation. He based his opinion on a combination of factors: (1) claimant's physical limitations; (2) his lack of skills transferable to less physically demanding work; (3) his age and lack of formal education; (4) the reluctance of employers to hire persons with back injuries; and (5) his lack of capacity to adapt to other work areas. He also testified that, although claimant would rather be working, he is not as highly motivated as he may have been three or four years ago when his prospects for work seemed better. Claimant testified that he would accept retraining if he found something that he could do.

It is generally agreed that his back problems are exacerbated to some extent by his weight and that weight loss should improve his back condition. Although he lost twenty pounds during a stay at the Callahan Center after his first injury, he did not lose any weight in the Center's program

after his second injury. His weight has remained fairly stable for a number of years and did not prevent him from working before his second injury.

ORS 656.206(1)(a) provides:

> " 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

There are two types of permanent total disability: one arising entirely from medical or physical incapacity and the other from a less than total physical incapacity plus nonmedical conditions. *Clark v. Boise Cascade Corp.*, 72 Or App 397, 399, 695 P2d 967 (1985); *Wilson v. Weyerhaeuser*, 30 Or App 403, 409, 567 P2d 567 (1977). Claimant has the burden of proving that he is willing to seek regular employment and has made reasonable efforts to obtain such employment. ORS 656.203(6); *Clark v. Boise Cascade Corp., supra,* 72 Or App at 399. An award of permanent total disability is not appropriate if the employer proves that a claimant failed to mitigate the extent of his disability by unreasonably failing to follow medical advice that he lose weight. *Nelson v. EBI Companies,* 296 Or 246, 252, 674 P2d 596 (1984); *Christenson v. Argonaut Ins. Co.*, 72 Or App 110, 113, 694 P2d 1017, *rev den* 299 Or 37 (1985).

Although we tend to agree with the Board that the medical evidence alone does not show that claimant is totally disabled, we are persuaded, as was the referee, by Rollins' testimony that claimant falls within the odd-lot category,

because of his age, physical limitations, below average intelligence, lack of education, limited work experience, lack of transferable skills and lack of adaptability.[3] Thus, he is

entitled to an award of permanent total disability, unless the Board correctly found that he had failed to make reasonable efforts to find work or that he had failed to mitigate the extent of his injury.

ORS 656.206(3) provides:

> "The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment."

We think that claimant has met those requirements. After his return to work objectives were identified, he unsuccessfully applied at eight or ten restaurants, although Maskell had previously told him that he was probably unemployable. Claimant then left the Job Club, because he did not believe that he would ever work again.[4] Under the circumstances, claimant has met his burden of proving that he made reasonable efforts to find work. *See Butcher v. SAIF,* 45 Or App 313, 317, 608 P2d 575 (1980); *compare Fitzpatrick v. Freightliner,* 62 Or App 762, 662 P2d 8, *rev den* 295 Or 297 (1983), *with Home Insurance Co. v. Hall,* 60 Or App 750, 654 P2d 1167 (1982), *rev den* 294 Or 536 (1983).[5]

We turn to whether employer proved that claimant failed to mitigate the extent of his disability by unreasonably failing to follow medical advice that he lose weight. Although this is a close question, we conclude that employer did not

meet its burden of proof. It is true that several doctors told claimant to lose weight and stated that weight loss would lessen his back pain. It is also true that he lost 20 pounds after his first injury while attending the Callahan Center's weight loss classes and that the weight loss and exercises increased

[3] Employer argues that Rollins' testimony is entitled to little or no weight for myriad reasons. We disagree. Rollins is a rehabilitation specialist with over 26 years experience in vocational rehabilitation. He reviewed the Callahan Center files, checked their test results for accuracy and conducted several additional tests, which included observing claimant while he performed various tasks. He then took the test data and his profile of claimant and entered them into a computer which encompasses the job bank for the states of Oregon and Washington and the Dictionary of Occupational Titles. The computer summarized the variables to determine if there was suitable work.

[4] It is apparent from the record that claimant's "broken body has caused a broken spirit." *See Fitzpatrick v. Freightliner Corp., supra,* 62 Or App at 766; *Seaberry v. SAIF,* 19 Or App 676, 683, 528 P2d 1103 (1974). After his first injury, he participated in a rehabilitation program at the Callahan Center. The staff reports indicate that he was highly motivated to get better and return to work. His doctors released him to return to work, with some misgivings on their part, because he felt so strongly about returning to work that he would never feel right about doing something else until he tried. As noted above, after his last injury he tried to find new employment after being told that it was probably futile. Soon after claimant left the Job Club, Rollins also told claimant that he was unemployable.

[5] Employer cites *Waler v. SAIF,* 42 Or App 133, 600 P2d 442 (1979), in support of the Board's finding that claimant did not meet the requirements of ORS 656.206(3). *Waler* is distinguishable. The claimant there made *no* attempt to find work; here, claimant applied for exactly the kind of work identified in his return to work objectives. Moreover, there is no indication in *Waler* that the claimant had been told that she would probably never work again.

his endurance and lessened his back pain. *See Nelson v. EBI Companies*, 64 Or App 16, 23, 666 P2d 1360 (1983), *aff'd* 296 Or 246, 674 P2d 596 (1984). On the other hand, the record does not indicate that claimant was given a specific weight loss program which he failed to follow for reasons within his control. *See Christenson v. Argonaut Ins. Co., supra.* Although he attended weight loss classes at the Callahan Center, he failed to lose any weight. Wade stated that one of the reasons claimant has not lost weight is that he is depressed about his present status. On this skimpy and equivocal record, we cannot say that employer carried its burden of proving that he unreasonably failed to follow medical advice.

Reversed and remanded with instructions to reinstate the referee's order.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ronald M. Somers, Claimant.

SOMERS,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB No. 82-11066; CA A33845)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 16, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy.

John A. Reuling, Jr., 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 Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed; referee's order reinstated.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order reversing the referee and holding that claimant failed to prove that his myocardial infarction was compensable. On *de novo* review, we reverse.

Claimant is 48 years old. He has practiced law since 1962. In addition, he serves as municipal judge and a bankruptcy trustee. Before June, 1982, he had no known cardiovascular problems. On the morning of June 24, 1982, he was served with a default order in one of his estimated

thirteen to fourteen hundred open case files. Investigation disclosed that the default had been taken approximately one hour before claimant had filed an answer in the case. The other attorney did not notify claimant of his intent to seek a default. Claimant became immediately and acutely upset. He had his secretary "throw" his clients out of the office, and he became consumed with the default matter. Several witnesses related that claimant appeared unusually angry. He testified that he was so upset that he could not remember how to move to set aside a default order. He called another attorney for assistance. He felt that he had "completely lost control" of his practice.

That afternoon, claimant succeeded in setting aside the default. After that court appearance, he visited another attorney, who testified that claimant was very upset and under a great deal of stress. Claimant eventually went back to his office, where, except for a short break, he stayed until 1:00 or 2:00 a.m., working through his files to determine whether the attorney who had taken the default was involved in any of his other cases. He did not sleep well that night.

The next morning, claimant spent two or three hours performing his duties as a municipal judge. Later that morning he discovered that the other attorney had "ex parteed" the trial judge regarding his decision to set aside the default order and that the judge had to ask the attorney to leave his office. Claimant described feeling as though he were in a trash compactor which was closing in on him. During the afternoon, he suffered some gastric distress. He took Gaviscon, which gave him no relief. He did not eat during the day.

At about 6:30 p.m., claimant conducted a wedding in

his role as municipal judge. At the reception he ate some food and drank two or more glasses of champagne and talked with a number of friends and clients. On his way home, he stopped to talk with clients that he had "thrown" out of his office the day before. After spending approximately two and one-half hours with them, he arrived home about 11:30 p.m. He immediately went to sleep.

After sleeping for about an hour, he awoke sweating and experiencing severe chest pain, shortness of breath and nausea. He telephoned a doctor and was taken to the hospital, where it was determined that he had suffered the acute myocardial infarction on which the claim is based. SAIF denied the claim. The referee set aside the denial, finding that claimant had proved compensability. The Board reversed.

To establish a compensable heart condition, a claimant must prove that the work activity was both the legal and the medical cause of the condition. *Bush v. SAIF,* 68 Or App 230, 232, 680 P2d 1010 (1984). Legal causation, in cases of emotional stress, can be established by a showing of chronic emotional stress or an episode of acute stress. *Harris v. Farmers' Co-op Creamery,* 53 Or App 618, 621, 632 P2d 1299, *rev den* 291 Or 893 (1981). The medical causation question is whether the stress was, within reasonable medical probability, a material contributing cause of the infarction. *Coday v. Willamette Tug & Barge,* 250 Or 39, 47, 440 P2d 224 (1968); *Adams v. Gilbert Tow Service,* 69 Or App 318, 321, 684 P2d

1254 (1984). Medical causation must be established by medical experts. *Bush v. SAIF, supra,* 68 Or App at 232.

The parties agree that legal causation is established. As to medical causation, claimant does not argue that chronic work-related stress caused his underlying atherosclerosis. He instead argues that the acute stress suffered on June 24 and 25 precipitated the infarction. The question becomes whether claimant established by a preponderance of the evidence that the acute stress was a material contributing cause of the infarction. We conclude that he did.

Four doctors agree that claimant was at high risk of developing coronary atherosclerosis because of smoking, elevated serum cholesterol, mild exogenous obesity and a family history of heart disease. Only Dr. Hodge, however, was of the

opinion that the acute stress was a material contributing cause of claimant's myocardial infarction.

When there is a dispute between medical experts, we give more weight to those medical opinions which are both well-reasoned and based on complete information. *See Hammons v. Perini Corp.,* 43 Or App 299, 302, 602 P2d 1094 (1979); *Harris v. Farmer's Co-op Creamery, supra,* 53 Or App at 625. We find that only Hodge's opinion meets both criteria and accordingly give his testimony the greatest weight. We give little weight to the opinion of Dr. Lee, because it is conclusory and because it is based on incomplete facts. Lee's letter, in its entirety, states:

> "I received your letter of September 24, 1982 requesting that I review the report of the examination of Mr. Ronald M. Somers by Dr. Wasenmiller. I have reviewed that report.
>
> "It is my opinion that Mr. Somer's work activity was not a significant or material contributing cause of his acute myocardial infarction of June 26, 1982."

Lee fails to explain *why* he believed that the acute stress was not a material contributing cause of claimant's heart attack. Moreover, there is no indication in the record that Lee was fully informed of the facts about June 24 and 25. Dr. Wasenmiller's report, on which Dr. Lee based his opinion, states only:

> "[Claimant] does describe unusual emotional stress occurring two or three days prior to his heart attack, apparently precipitated by a default which had been filed by another attorney practicing in The Dalles, directed against Mr. Somers. Even though this default was later shown to be nonvalid, he states that the emotional trauma during that period of time was significant."

Although Dr. Kloster's report is well-reasoned, he had an incomplete factual basis to evaluate the extent of claimant's stress. He did not interview claimant. His evaluation is on the basis of a series of medical reports. The only reference to claimant's stress which we can find in those reports is the above-quoted passage from Wasenmiller's letter. On the basis of the letter's description of claimant's stress, Kloster concluded:

> "There is no indication that there was any work-related

stress, either physical or emotional, during the hours immediately preceding [*sic*] the onset of the symptoms of his myocardial infarction. Accordingly, I can find no evidence that his work activity was a material factor provoking or precipitating the acute myocardial infarction by aggravating the preexisting and underlying coronary heart disease."

Wasenmiller did interview claimant, and we conclude from his letter that he obtained a more extensive history than did Lee and Kloster. However, Wasenmiller does not explain why he concluded:

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

Because Wasenmiller failed to explain *why* contribution of the stress to the heart attack was "speculative," we likewise accord his opinion little weight.

In contrast, Hodge's testimony was both well-reasoned and based on a complete factual history. For example, the following exchanges took place at the hearing:

"Q [claimant's attorney]: Are you familiar with an incident which caused stress in Mr. Somers' life a day or two before the heart attack?

"A [Hodge]: I know there was * * * serious stress in the two days preceding the heart attack, oh, involving legal action taken by another attorney here in town.

"Q: Did you know how upset he was?

"A: I heard that he was about as angry as some long-time acquaintances had ever seen him.

"Q: Okay. Did you know that he had some symptoms the afternoon and evening prior to the heart attack?

"A: I don't think I elicited that history initially.

"Q: Let me ask you this question, then, Doctor.

"A: Okay.

"Q: I ask you to assume that for the purpose of this question that Mr. Somers was extremely upset for a day, two days, leading up to the heart attack, oh, with symptoms of an acute acid stomach, heartburn, starting in the afternoon the day of the evening before the heart attack, oh, until he went to bed about 11:00 or 12:00 p.m., and that he had in fact treated it with Gaviscon, that he woke up sometime between 12:00 and 1:00 a.m., why, sweating, with chest pain, and now knowing that part of the diagnosis includes atherosclerosis, do you have an opinion whether the stress incident which was related to his work on those two days was a major contributing factor to the heart attach, Doctor?

"A: Yeah. I think that it certainly was — stress, that is. We know that emotions have a profound influence on the heart, and I think that the history of that emotional upset and the degree to which he was upset is just too much to dismiss as a coincidence.

"Q: That opinion, can you relate that - tie that to a reasonable medical probability?

"A: I think it's reasonable medical probability that the stress precipitated the heart attack in a person with underlying atherosclerosis.

Q: Okay. What * * * is the effect that stress has on an individual? I mean, oh, acute stress?

"A: Well, there are several things that are very important. It causes the pulse to increase, the blood pressure to increase. It causes the heart to beat more forcefully. Actually, those are three of the major determinants of the heart's oxygen consumption. So it causes all of those things to increase, and the heart oxygen requirements to go dramatically up. Also, the coronary arteries are richly enervated by fibers of the sympathetic nervous system. And the sympathetic nervous system is what is activated when we're under stress. And we know that spasm of the coronary arteries does occur, and so in addition to increasing the myocardial oxygen requirement, why, such spasm may occur and decrease the supply.

"Q: Okay. Do you find the symptoms the evening prior to the heart attack to be * * *.

"A: They may not have been gas. They may very well have been myocardial ischemia.[1]

"* * * * *

"Q [SAIF's attorney]: Considering, doctor, in this case that we have an individual who at the time of the infarction is 44 years old, has a history of — a history as indicated in your medical record as a heavy smoker, has a positive family history, oh, as we have in this case, such an individual would be susceptible to having a myocardial infarction with or without any sort of stress, isn't that correct?

"A: That's true.

"Q: Okay. So you can't say with certainty in this particular case that the myocardial infarction suffered by Mr. Somers on the date in question, the 26th of June, was caused by any acute, chronic stress?

"A: To say that the acute stress played no role in the events of that night, why, I think is just — that is just asking too much. I think that there is a reasonable probability that the acute stress precipitated a myocardial infarction with underlying atherosclerosis."

Reversed; order of the referee reinstated.

[1] Hodge's testimony as to the effects on the heart of acute stress is uncontradicted, as is his testimony that myocardial ischemia, which can precede a myocardial infarction, is often mistaken for gas or heartburn.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

HAYDEN et al,
Respondents,
v.
WORKERS' COMPENSATION DEPARTMENT et al,
Appellants.
(A8312-07460; CA A34212)

Appeal from Circuit Court, Multnomah County.

James D. Case, Judge Pro Tempore.

Argued and submitted December 20, 1985.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for appellants. With him on the briefs were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Dan O'Leary, Portland, argued the cause for respondents. With him on the brief were Robert K. Udziela, and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Before Richardson, Presiding Judge, and Joseph, Chief Judge, and Warden, Judge.

JOSEPH, C. J.

Judgment vacated; action dismissed.

JOSEPH, C. J.

Plaintiffs are injured workers who receive permanent total disability (PTD) workers' compensation benefits and Social Security disability benefits. Defendants are the Workers' Compensation Department and the director of its Compliance Division. In August, 1983, pursuant to ORS 656.209,[1] defendants authorized employers and insurers responsible for plaintiffs' PTD benefits to offset their federal disability payments from their workers' compensation benefits to a greater extent than had previously been authorized.[2] The department also promulgated temporary rules, OAR 436-57-001 to 436-57-998, reflecting its new criteria for offsets under ORS 656.209. Plaintiffs then brought this circuit court action for declaratory and mandatory relief, contending that defendants' actions were premised on a misinterpretation of relevant provisions of the Oregon Workers' Compensation Law and the federal Social Security Act and seeking reinstatement of plaintiffs' PTD benefits "in the correct amount."

Defendants moved to dismiss the action on the ground that the trial court lacked subject matter jurisdiction and that "exclusive jurisdiction is vested in the Workers' Compensation Board and its Hearings Division." The trial court denied the motion. Defendants do not challenge that

[1] ORS 656.209(1) provides, in part:

"With the authorization of the Department, the amount of any permanent total disability benefits payable to an injured worker shall be reduced by the amount of any disability benefits the worker receives from federal social security."

[2] Defendants' action was apparently based on their understanding of the effect of amendments to the Social Security Act. Plaintiffs maintain, *inter alia*, that defendants' understanding is wrong.

ruling on appeal, but we must nevertheless consider the jurisdictional issue.

In *SAIF v. Harris,* 66 Or App 165, 672 P2d 1384 (1983), we held that the district court lacked jurisdiction over an action by the insurer to recover overpayments under ORS 656.268(4) and that the action involved a "matter concerning a claim" which was subject exclusively to ORS 656.283 to 656.298, the hearing, review and appeal provisions of the Workers' Compensation Law. *See* ORS 656.704; ORS 656.708(3). We noted:

> "The legislature has unequivocally provided that the Hearings Division and the Director shall have jurisdiction over 'all cases, disputes and controversies' arising under ORS 656.268(4), which governs recovery of an overpayment. In another portion of the act, specific provision is made for resolution in circuit court of a dispute over attorney fees. ORS 656.388(2). If the legislature had intended that other kinds of disputes arising under the workers' compensation law be heard in trial courts, it could have expressly so stated. On the contrary, a review of the entire act reveals a deliberate purpose to separate jurisdiction over workers' compensation cases almost totally from the trial courts. The District Court had no jurisdiction." 66 Or App at 168.

Like the purported overpayments in *Harris,* the offsets in question here directly involve the workers' "right to receive compensation, or the amount thereof," and they are therefore "matters concerning a claim," ORS 656.704(3), subject to the initial jurisdiction of the department's Hearings Division.

ORS 656.209 states that payors may deduct Social Security disability payments "[w]ith the authorization of the department," and that statute makes no reference to review rights of the recipients. However, there is no reason to conclude that the legislature intended ORS 656.209 to create an exception to the administrative and judicial review procedures that other provisions of the Workers' Compensation Law establish for matters concerning claims. We held in *Schlect v. SAIF,* 60 Or App 449, 653 P2d 1284 (1982), that those provisions of ORS chapter 656 were applicable to the worker's appeal from a third party distribution order of the Workers' Compensation Board, although ORS 656.593 provided that the board was to resolve any conflict over third party distributions and did not itself state that the ORS chapter 656 hearing, review and appeal procedures were available. Similarly here, we conclude that the general administrative and judicial review provisions of ORS chapter 656 apply to offsets under ORS 656.209[3] and, therefore, that plaintiffs have sought relief in a forum other than the one that has exclusive jurisdiction.[4]

Judgment vacated; action dismissed.

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[3] The department apparently agrees. OAR 436-57-998, a section of the temporary rule, states:

> "(1) Any worker aggrieved by any offset authorization of the Department may apply to the Compliance Division for a reconsideration of that authorization prior to requesting a hearing.
>
> "(2) Any party aggrieved may request a hearing pursuant to the provisions of ORS 656.283."

[4] Although the department's authorizations of offsets in individual cases are reviewable only in accordance with ORS 656.283 to 656.298, the validity of the department's rules may be subject to challenge through an original proceeding in this court under ORS 183.400. *See* ORS 183.315(1).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
CHARLES M. KEPFORD, Claimant.

KEPFORD,
Petitioner,

v.

WEYERHAEUSER CO.,
Respondent.

(82-10296; CA A33652)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 10, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Nicholas M. Sencer and Malagon & Associates, Eugene.

Paul L. Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded for determination of extent of disability.

BUTTLER, P. J.

Claimant seeks review of a Workers' Compensation Board order which affirmed and adopted the referee's determination that surgery necessitated by claimant's degenerative disc disease was not compensable.

Claimant, a logger, injured his back at work in 1971 and 1972. By stipulation entered April, 1974, he received an award of 5 percent permanent partial disability. In August, 1974, he suffered yet another back injury. A claim for compensation was closed by a November 17, 1978, determination order, which provided for intermittent temporary total disability over more than four years, but no permanent partial disability. Claimant requested a hearing, and the referee determined that claimant's back condition was not the result of the 1974 injury, but was due to a preexisting disc disease which had not been permanently worsened by the injury. Accordingly, no permanent disability compensation was awarded. The Board affirmed in July, 1980; there was no appeal.

Claimant's back condition continued to deteriorate until the surgery in question was performed in October, 1981. He sought compensation for the surgery, claiming that it was necessitated by the degenerative disc disease, which he alleged had been worsened by work conditions. Employer denied the claim. At the hearing, the referee held that she was bound, as a matter of law, by the 1979 order which held that the disc disease had not been permanently worsened by the 1974 injury.

We do not understand why the 1979 order, which dealt with the extent of claimant's disability caused by the 1974 injury, should control here. Although it is true that the referee in 1979 determined that the 1974 injury had not permanently worsened claimant's disc disease as of that time, that does not mean that the injury, along with all of the job conditions to which claimant has been subjected, might not be the major causes of a worsening of the disc disease by this time. An aggravation of a preexisting disease may be a separate compensable condition. *Wheeler v. Boise Cascade,* 298 Or 452, 683 P2d 550 (1985). The present claim for occupational disease seeks a determination that the cumulative effect of claimant's injuries and the conditions of

his employment have caused a worsening of his disc disease, which necessitated the October, 1981, surgery. That issue is a new one that was not involved in the 1979 determination and, therefore, is not controlled by it.

The referee also held that, in determining whether claimant's work as a logger was the major contributing cause of the worsening of the disc disease, the residuals of previously accepted injuries should not, as a matter of law, be considered. The order states that claimant already has been compensated by the benefits he has received for any residuals of the 1971, 1972 and 1974 injuries that might have caused a worsening of the disease.

The 5 percent disability award for the 1971 and 1972 injuries compensated claimant for permanent disability then known to have been caused by those injuries. It did not compensate for any permanent disability from a worsening of the disc disease which might later develop. The referee should have considered whether the job injuries for which compensation had been paid, along with the conditions of employment, were the major contributing cause of the worsening of the disc disease. *See SAIF v. Gygi,* 55 Or App 570, 639 P2d 655, *rev den* 292 Or 825 (1982).

Employer argues, citing *Million v. SAIF,* 45 Or App 997, 610 P2d 285 (1980), that claimant is precluded by the doctrine of *res judicata* from claiming compensation for the worsening of a preexisting disease, because that theory should have been argued in 1979. There is no evidence, however, that in 1979 claimant's back condition had reached the point that it necessitated additional treatment. The evidence presented at the 1983 hearing, including the post-surgical findings regarding the cause of the worsened condition, constituted a new set of facts that could not have been litigated in 1979.

The uncontroverted medical opinion is that claimant's work as a logger and mill worker, including the 1974 injury, was the major contributing cause of the worsening of claimant's preexisting disc disease. Dr. Whitney, who performed the surgery, stated in a 1984 report:

> "I feel that Mr. Kepford's employment was the major contributing cause of his degenerative spinal disease. There is a certain amount of aging that would cause degenerative spinal disease. However, the spinal stenosis and the degree of

> disc degeneration in this gentleman, would be more than one would anticipate under normal circumstances for his age, without intervening trauma."

That report may be interpreted to mean either that claimant's employment *caused* the disease or that his employment caused the disease to worsen. In either case, the condition is compensable, because a worsening of the disease necessarily means that the underlying condition has worsened. *See Weller v. Union Carbide,* 288 Or 27, 602 P2d 259 (1979).

We conclude that claimant's preexisting back disease was worsened by work injuries and conditions and that he is entitled to compensation.

Reversed and remanded for determination of the extent of disability.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
The Beneficiaries of Charles W. Owen
(Deceased), Claimant.

THE BENEFICIARIES OF CHARLES W. OWEN
(Deceased),
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(82-11633; CA A33203)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 2, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. On the brief were Victor A. Calzaretta and Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded with instructions to remand to Division for determination order on deceased's worker's claim.

BUTTLER, P. J.

The issue in this workers' compensation case is whether the widow of a deceased worker is entitled, under ORS 656.208,[1] to a hearing on the question of whether the worker was permanently and totally disabled at the time of his

death. The Board affirmed the referee's dismissal of her request for a hearing.

The decedent injured his back on November 27, 1967. The original determination order, issued March 22, 1968, awarded time loss, but no permanent disability. After a hearing, the worker was awarded 10 percent permanent partial disability. His claim was reopened in June, 1972, for additional treatment; the parties stipulated that his back condition had worsened, entitling him to medical benefits and time loss. On June 18, 1974, a second determination order was issued, re-closing the claim and awarding time loss and an additional 15 percent permanent partial disability. At that time, although the worker's aggravation rights had expired, he was entitled to and did request a hearing on the June 18 determination order. A hearing was held, and on October 25, 1974, the referee issued an order setting aside the determination order and remanding the claim to SAIF for continuing medical care and time loss benefits until the claim was properly closed under the statute. Following that order, the claim was and remained in an open status.

About three years later, without the claim having been closed, claimant sought additional treatment, and his doctor advised SAIF of the need for additional surgery. Apparently, SAIF treated the letter as an aggravation claim on which claimant's rights had expired, and the matter was submitted to the Board on its "own motion" calendar. On April 14, 1977, the Board issued what purported to be an "own motion determination," awarding temporary total disability

and an additional 10 percent permanent partial disability. The Board later "reopened" the claim, effective September 4, 1981, for additional treatment. On June 4, 1982, it issued a new "own motion" determination, awarding additional temporary total disability. On August 31, 1982, the worker requested the Board to award him permanent total disability as of April 25, 1982. The Board held that he had not shown that he was permanently and totally disabled and denied the request. In the meantime, on September 13, 1982, he died as the result of a noncompensable heart attack.

Claimant, as the surviving spouse, filed a claim under ORS 656.208, contending that she is entitled to an independent hearing under that statute for the purpose of determining whether her husband was permanently and totally disabled at death, despite the fact that the decedent did not prevail before the Board on the merits of his own claim and could not have appealed from that determination. SAIF argues that her only

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[1] ORS 656.208(1) (*amended by* Or Laws 1985, ch 108, § 2) provided:

"(1) If the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving:

"(a) A spouse who was the husband or wife of the worker either at the time of the injury causing the disability or within two years thereafter; or

"(b) Any dependents listed in ORS 656.204, payment shall be made in the same manner and in the same amounts as provided in ORS 656.204."

right to benefits is derived from ORS 656.218[2] and that, as the widow, she has no independent right under ORS 656.208 to a

hearing on whether the worker was permanently and total disabled if the worker's right to a hearing had expired. The application of that statute has been considered under a variety of circumstances, in *Mikolich v. State Ind. Acc. Com.*, 212 Or 36, 316 P2d 812, 318 P2d 274 (1957), *Mayes v. Boise Cascade Corp.*, 46 Or App 333, 611 P2d 618 (1980), and *Bradley v. SAIF*, 38 Or App 559, 590 P2d 784 (1979), but we do not reach the question as it is posed in the briefs for the reasons set forth below.

At oral argument, it came to light that the deceased worker's claim had never been properly closed after it was reopened in 1974. The purported aggravation claim that was submitted to the Board in 1977 was not properly before the Board on its own motion calendar, because the worker was entitled to a determination order under ORS 656.268, from which he could appeal. Had the claim been properly closed by determination order, the worker would have been entitled to another hearing on the issue of the extent of his disability, *Coombs v. SAIF*, 39 Or App 293, 592 P2d 242 (1979), as well as to Board review of the referee's decision and judicial review of the Board's decision. Instead, the Board issued a series of "own motion" orders, including the order addressing the issue of whether the worker was permanently and totally disabled, from which he could not appeal. At the time those orders were issued, the Board did not have "own motion" jurisdiction.

The widow did not raise the issue of nonclosure before the Board; instead, she filed a claim for widow's benefits, citing ORS 656.208 as authority for her right to an independent determination of permanent total disability; the referee and the Board held that she was not entitled to a hearing. Because the worker's claim was never properly closed, there has been no determination made under ORS 656.268 from which she could establish a right to benefits under ORS 656.218. After such a determination order is

[2] ORS 656.218 provides:

"(1) In case of the death of a worker entitled to compensation, whether eligibility therefor or the amount thereof have been determined, payments shall be made for the period during which the worker, if surviving, would have been entitled thereto.

"(2) If the worker's death occurs prior to a determination having been made under ORS 656.268, the insurer or the self-insured employer shall so notify the director and request the claim be examined and compensation for permanent partial disability, if any, be determined.

"(3) If the worker has filed a request for a hearing pursuant to ORS 656.283 and death occurs prior to the final disposition of the request, the persons described in subsection (5) of this section shall be entitled to pursue the matter to final determination of all issues presented by the request for hearing.

"(4) If the worker dies before filing a request for hearing, the persons described in subsection (5) of this section shall be entitled to file a request for hearing and to pursue the matter to final determination as to all issues presented by the request for hearing.

"(5) The payments provided in subsections (1),(2), (3) and (4) of this section shall be made to the persons who would have been entitled to receive death benefits if the injury causing the disability had been fatal. In the absence of persons so entitled, a burial allowance may be paid not to exceed the lesser of either the unpaid award or the amount payable by ORS 656.204.

"(6) This section does not entitle any person to double payments on account of the death of a worker and a continuation of payments for permanent partial disability, or to a greater sum in the aggregate than if the injury had been fatal."

issued, she will be entitled to a hearing, ORS 656.218(4), and will be able to raise the issue of the worker's permanent total disability.

Given our conclusion that the widow will be entitled to a hearing on the nature and extent of the worker's disability as of the time the claim should have been closed, that is, when he became medically stationary, which may not have been

before his death, the issue sought to be presented to the referee, the Board and this court is premature, because it may be moot. Accordingly, we do not decide it but reverse and remand the case to the Board with instructions to remand it to the Division for entry of a determination order on the deceased's worker's claim.

Reversed and remanded with instructions to remand to the Division for a determination order on the deceased's worker's claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Stephen R. Martin, Claimant.

MARTIN,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(83-05921; A35582)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 4, 1985.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

No appearance for respondent Mazama Timber Products.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

GILLETTE, P. J.

Reversed and remanded.

GILLETTE, P. J.

Claimant was compensably injured in 1980. In the following years he had increasing and disabling back pain, along with occasional limb weakness resulting in falls. The source of his problems was undetermined. He was declared

medically stationary and the claim was closed in June, 1983, when he finished a vocational rehabilitation course. On October 5, 1983, his chiropractor reported to SAIF that claimant's symptoms had increased and that he was no longer able to work. SAIF treated the letter as an aggravation claim and denied it on October 19, 1983. The denial was timely appealed. Myelograms later revealed a bony growth in claimant's cervical spine which was pressing on his spinal cord. Claimant's physicians related this growth to his injury. He had surgery for this condition in January, 1984, and SAIF reopened his claim on February 6, 1984, but still maintained the 1983 denial. Claimant seeks temporary total disability for the period from the closure in June, 1983, until the reopening in 1984.

The closure was proper on the record as it then existed. However, the chiropractor's letter was an aggravation claim. ORS 656.273(3); *Haret v. SAIF*, 72 Or App 668, 697 P2d 201, *rev den* 299 Or 313 (1985). The medical evidence shows that an aggravation had occurred. SAIF is responsible for temporary total disability beginning October 5, 1983, the date of the letter.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Robert C. Miller, Claimant.

MILLER,
Petitioner,

v.

WEYERHAEUSER COMPANY,
Respondent.

(WCB No. 82-07083; CA A33389)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 4, 1985.

Mike Stebbins, North Bend, argued the cause for petitioner. With him on the brief was Hayner, Waring, Stebbins & Coffey, North Bend.

Paul L. Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed and remanded for payment of claimant's medical expenses under ORS 656.245.

WARDEN, J.

Claimant seeks judicial review of a decision of the Workers' Compensation Board affirming the referee's affirmance of employer's denial of his aggravation claim. We

reverse and remand for payment of medical expenses under ORS 656.245.

Claimant has worked for employer as a sawmill worker since 1971. On March 10, 1977, he hurt his back while lifting lumber at work. His family doctor diagnosed the injury as acute lumbosacral strain and prescribed rest and medication. Claimant lost no time from work because of the injury; employer accepted it as compensable and paid his medical bills.

The claim was never closed. ORS 656.268(3). Employer continued to pay for treatment until claimant submitted a new claim in April, 1982. Employer's "Denial of Claim Reopening" stated:

> "This is to notify you that we have reviewed your notice of accident dated April 20, 1982 stating that you were injured on April 20, 1982? *[sic]* and we have investigated the circumstances regarding your claim for compensation. The company hereby denies your claim for the reason that: The condition in *[sic]* which you now recite and the original injury of 3/10/77 are unrelated in that medical information is unsupportive of your claim that the present condition is related to your accident of 3/10/77 claim #2-77-547."

The referee affirmed employer's denial on the theory that claimant's participation in a martial arts class had caused his back problems, and the Board affirmed summarily. Claimant assigns as error, first, that the Board refused to treat employer's denial as a "backup denial" under the rule in *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983); second, that the Board failed to conclude that claimant suffered a compensable aggravation of his original injury; and, third, that the Board failed to conclude that claimant's condition is an occupational disease.

We need not consider the assignments individually. Even though claimant treats his claim as an "aggravation claim," ORS 656.273, his brief makes clear that he is not seeking compensation for temporary or permanent disability:

> "[I]t is important to note that at no time has Mr. Miller lost any time from work or claimed any temporary total disability benefits as a result of his back injuries. He is merely seeking payment for his medical treatment."

Claimant does not have to make an aggravation claim to obtain payment for his medical treatment.[1] ORS 656.245(1) requires:

> "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 recovery requires * * *. The duty to provide such medical services continues for the life of the worker."

The only issue is whether claimant's back problems are

[1] Claimant could not, in fact, make a valid aggravation claim here, because his April, 1982, claim was filed more than five years after his original injury on March 10, 1977. Thus, an aggravation claim would be barred by the period of limitations in ORS 656.273(4)(b):

> "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."

"conditions resulting from the injury" that claimant suffered on March 10, 1977.

We disagree with the referee's resolution of that issue. He wrote:

> "The chiropractor in his letter opinion discounted the martial arts activity, but his own chart notes show that on some occasions that activity was linked to claimant's back complaints. The chiropractor has also stated that the 1982 condition was a physical worsening of the original on-the-job injury, but the chiropractor was then assuming the original injury was in 1980, rather than 1977. As noted, there is no medical evidence of any treatment for claimant's back for a period of more than three years following the 1977 work incident. The attending orthopedic surgeon has not causally related the 1982 back condition to the 1977 work incident. Also, the orthopedist has declined to state that claimant's work activity was the major cause of the 1982 back condition."

We interpret the record differently. Claimant testified that his back pain had been in the same location since his original injury in 1977. His treating chiropractor, Dr. McCrory, filed a

medical report in 1980 stating that claimant "presents with low back pain, chronic recurrent for years * * * ." The referee attributed unwarranted importance to McCrory's mistaken reference to a 1980 injury in a December, 1983, letter to claimant's counsel. There was no injury in 1980. McCrory obviously had in mind the 1977 injury. He wrote in the same letter:

> "[I]t is my impression that the care rendered to this patient by myself in 1982 was due to a physical worsening of his original on the job injury."

Claimant began treatment with Dr. Whitney, an orthopedic surgeon, in April, 1982. In April, 1983, Whitney wrote:

> "I feel that Mr. Miller's diagnosis of low back strain was probably specifically related to his work activity as a bar edger, as given to me in his history."

In response to questions from counsel for employer concerning the possible contribution of Mr. Miller's participation in the martial arts program, Whitney said:

> "The reason I told Mr. Miller to stay off his karate in '82 was because I thought there was a possibility that this was aggravating his back pain, although once he got off the karate it did not seem to make any significant difference in his level of pain."

McCrory addressed questions from claimant's counsel:

> "There is little doubt that this patient's strenuous job description while employed at Weyerhaeuser Co. was the major causative factor that led to his acute low back complaints. * * *
>
> "The fact that this patient is involved in martial arts has little or nothing to do with his original complaints, since he started his karate training after his acute low back injury. Also, his karate workouts, for the most part, actually decrease the severity of his low back complaints."

The reports of claimant's treating physicians make

clear that his 1977 injury remains at least a material contributing cause of the back condition for which he sought treatment.

Reversed and remanded for payment of claimant's medical expenses under ORS 656.245.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lillie G. McClendon, claimant.

MC CLENDON,
Petitioner,

v.

NABISCO BRANDS, INC.,
Respondent.

(83-10845; CA A33908)

Judicial Review from Workers' Compenation Board.

Argued and submitted May 24, 1985.

Elliott Lynn, Beaverton, argued the cause and filed the brief for petitioner.

Cynthia S.C. Shanahan, Portland, argued the cause for respondent. With her on the brief were Lawrance L. Paulson and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed; referee's order reinstated.

WARDEN, J.

Claimant petitions for judicial review of a Workers' Compensation Board order reversing the referee's opinion which ordered employer to accept her claim. On *de novo* review, we reverse and reinstate the referee's order.

Claimant was an assembly line worker with Nabisco for 13 years, working primarily on the high volume chocolate chip, Oreo and cracker lines. Her work involved quick, repetitive motions, twisting, reaching and lifting loads of approximately two pounds. The arm movements ranged from waist to eye level. She first experienced shoulder irritation in the summer of 1982. She went to the company nurse for aspirin and heat application and apparently saw the nurse on other occasions for her shoulder problem after the first visit. In April, 1983, she took a one-month vacation, during which her condition improved. When she returned to work, her shoulder worsened substantially. She again reported to the nurse and was seen by the company physician, Dr. Eisendorf, for the first time. She continued to experience pain, and Eisendorf suggested that she come to his office for an x-ray of

the shoulder. Thereafter, he referred her to Dr. Post, an orthopedist.

Post reported, after comparing x-rays of June, 1982, and September, 1983:

> "The right A-C joint is partially obscured by the 'right' marker but there do seem to be two areas of escallop change in the distal clavicle. the acromion, less well seen, does not show the superior defect seen on the later A-C joint films of September 1983 . . . I think it is clear that pre-existing changes as long as a year and a half ago were present.
>
> "* * * This type of picture is seen sometimes with degenerative arthritis of the A-C joint as reported in weightlifters. With these changes clearly evolving over the past year and a half and yet with symptoms only over the past half year or so, this would seem to be a pre-existing condition without specific industrial relationship."

Claimant was examined by Dr. Cherry, an orthopedist, in October, 1983, and he has been her treating physician since then. He was apprised of her history, and she demonstrated for him the repetitive movements performed at her employment. Cherry reported that "[i]t is my impression

that this woman does have osteoarthritic change of the right acromioclavicular joint due to or aggravated by her occupation." Later he stated:

> "Repeat x-rays on December 5, 1983, showed what appeared to me as more involvement in this joint with probable destructive process at this right AC joint.
>
> "It is my opinion that this is probably an occupational disease type involvement of this joint."

At the request of employer's attorney, Eisendorf wrote:

> "I am quite familiar with the patient's background and history and with Dr. Post's reports and have again reviewed them.
>
> "After careful consideration of her right shoulder problem, it is my opinion that the process in her right shoulder and acromioclavicular joint is probably of medical origin and not directly due to her employment. She may have had an occupational aggravation of her shoulder problem."

Claimant does not drive and has few outside activities. There is no evidence that she engaged in any activity which required repetitive arm movements similar to those performed at work. In fact, housework, yard work and cooking at claimant's home have been performed by claimant's husband and sons for many years.

Employer denied the claim, concluding that claimant's condition did not arise from employment. The referee found claimant credible and the medical evidence persuasive and reversed the denial. The Board reversed the referee's decision and reinstated the denial.

The referee correctly concluded that this was an occupational disease case. ORS 656.802(1)(a) defines an "occupational disease" as "[a]ny 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."

Although the statute appears only to cover situations in which work activities have caused the disease itself, the Supreme Court has interpreted the statute broadly and has held a disease compensable when work activities have caused a worsening of a preexisting disease as well. *Weller v. Union*

Carbide, 288 Or 27, 31, 602 P2d 259 (1979). The cause, aggravation or exacerbation of the disease must be one ordinarily encountered only on the job. *James v. SAIF,* 290 Or 343, 350, 624 P2d 565 (1981); *SAIF v. Gygi,* 55 Or App 570, 573, 639 P2d 655, *rev den* 292 Or 825 (1982). If the condition preexisted employment, a claimant must prove that work activities worsened the underlying condition resulting in an increase in pain to the extent that it caused disability or required medical services. *Wheeler v. Boise Cascade,* 298 Or 452, 693 P2d 632 (1985); *Weller v. Union Carbide, supra,* at 35; *Devereaux v. North Pacific Ins. Co.,* 74 Or App 388, 391, 703 P2d 1024, *rev den* 300 Or 162 (1985). If the condition did not preexist employment, a claimant must prove that work activities were the major contributing cause of the condition itself. *Devereaux v. North Pacific Ins. Co., supra; SAIF v. Gygi, supra,* 55 Or App at 574.

We are confronted with conflicting medical opinions as to the causation and worsening of the disease. On *de novo* review, we are required to choose which medical hypothesis is correct. *Coday v. Willamette Tug & Barge,* 250 Or 39, 49, 440 P2d 224 (1968); *SAIF v. McCabe,* 74 Or App 195, 200, 702 P2d 436 (1985). In the absence of persuasive reasons requiring a contrary practice, we generally accord greater weight to the treating physician's opinion. *Weiland v. SAIF,* 64 Or App 810, 669 P2d 1163 (1983). We find that practice appropriate in this case.[1]

Cherry has treated claimant since October 21, 1983, and is familiar with the treatment begun by the two previous examining physicians and the results that they obtained. He

has compared earlier x-rays with later ones that he ordered, enabling him to ascertain whether the condition had worsened. He attributed claimant's condition to her occupation.

The Board noted that Cherry did not quantify the magnitude of occupational causation. It stated that, "[w]hile 'magic words' are not essential, Dr. Cherry offers little in the way of explanation or analysis which could form the basis of a finding of *major* causation." Although Cherry did not use the

[1] The Board discredited Cherry's diagnosis, stating:

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

We disagree with the Board's analysis and conclusion. The perceived problem is due to Cherry's letter of October 24, 1983, in which he states that claimant "worked at Nabisco and worked fast and with the arms up, often above her shoulders or head." The statement is supported by the evidence. Claimant testified that she worked with her arms up. Many of the movements were at waist or chest level but, when she worked on the chocolate chip line, she had to place bags on a conveyor belt at eye level. That had to be done at least 12 times per minute. A co-worker fully corroborated that testimony.

words "major contributing cause," he did state that claimant's condition was "due to or aggravated by her occupation." He also referred to her condition as an "occupational disease type involvement." This language sufficiently strongly suggests that he found claimant's occupation to be the major cause, if not the sole cause, of her disability. Cherry's language supports the conclusion that it is more likely than not that work activities were the major contributing cause of claimant's condition or its worsening. When his opinion is juxtaposed with the evidence of claimant's repetitive arm movements at work, her lack of repetitive arm movements outside work and Eisendorf's opinion that her condition may have been aggravated by work, we are persuaded that claimant has satisfied her burden of proof.

We are not persuaded by Post's opinion, after comparing claimant's x-rays, that "[w]ith these changes clearly evolving over the past year and a half and yet with symptoms only over the past half year or so, this would seem to be a preexisting condition without specific industrial relationship." His conclusion rests on the assumption that claimant's symptoms were present only for about six months before his September, 1983, examination. However, claimant testified to irritation as early as the summer of 1982, and Eisendorf reported that claimant had given a "history of right shoulder problems on and off since 1982." Because Post's opinion is directly predicated on an erroneous assumption, we give it little weight. Furthermore, his conclusion that the condition was preexisting is ambiguous. It is uncertain whether he meant that it preexisted claimant's employment or just that it preexisted her symptoms. She worked for Nabisco for 13 years. There is no evidence that the condition preexisted her employment.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Ollie A. Rater, Claimant.

RATER,
Petitioner,

v.

PACIFIC MOTOR TRUCKING COMPANY,
Respondent.

(82-09665; CA A33477)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 31, 1985.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Lindsey H. Hughes, Portland, argued the cause for respondent. With him on the brief were Frank M. Parisi and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed; referee's amended order reinstated.

WARDEN, J.

Claimant seeks judicial review of a decision of the Workers' Compensation Board which reversed the portion of the referee's order setting aside employer's denial of his aggravation claim. We reverse the Board and reinstate the referee's amended order.

Claimant worked for employer as a truck driver for 16 years, ending in February, 1982. During that time he suffered compensable back injuries on January 23, 1978, and September 27, 1979. He was found medically stationary as of September 24, 1980. On July 7, 1982, he was awarded 15 percent unscheduled disability for loss of earning capacity attributable to the first injury, ORS 656.214(5), and temporary total disability benefits for the second injury. ORS 656.210. In addition, employer paid claimant's medical expenses throughout the proceedings below, as required by ORS 656.245. The only question here is whether claimant is entitled to have his claim reopened under ORS 656.273 for reassessment of his loss of earning capacity and for additional TTD compensation.

Dr. Murphy began treating claimant in March, 1982, and diagnosed his condition as chronic low back strain and degenerative disc disease with facet hypertrophy. He indicated that claimant could work but could only drive short distances and could lift no more than 25 pounds. In July, 1982, claimant started work as a truck driver for another employer (Meyer Brothers), apparently without informing that company of his lifting restriction.[1]

Claimant worked for Meyer Brothers through September, 1982, but began experiencing additional pain on September 17. After an examination on September 27, Murphy noted the development of additional pain but concluded that claimant's condition remained essentially the same. On September 29, 1982, Murphy reported to employer that he had released claimant to return to work with a lifting restriction of 30 pounds, and claimant called Meyer Brothers to inform the

company of that restriction. Meyer Brothers then laid claimant off, because it believed that he could not perform the job without lifting more than 30 pounds.

Employer responded to Murphy's letter as if it were an aggravation claim[2] and issued a denial letter dated October 12, 1982. The letter stated that Murphy had failed to relate

[1] Neither party suggests that Meyer Brothers bears any responsibility for claimant's condition.

[2] ORS 656.273(3) provides:

"A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation."

claimant's condition to the job claimant performed for employer. At a hearing on March 29, 1983, the parties agreed to keep the record open for supplemental evidence from Murphy. Claimant then submitted an April 8, 1983, letter from Murphy, which stated:[3]

> "I saw this individual again on [November] 29, 1982, and at that time, he was having increasing symptoms in his low back. He had increased pain in his low back on straight leg raising tests. My recommendation at that time was that he not return to work and that he limit his activities and utilize local measures, such as heat to his low back."

Employer subsequently deposed Murphy and focused its questions to determine as precisely as possible when claimant's condition had worsened. Murphy identified some worsening of symptoms between September 27 and November 29, but made clear that the change in his opinion concerning claimant's ability to work had very little to do with that worsening:

> "Well, it was my opinion after seeing him [on November 29] that my recommendations for his restrictions in terms of what he could comfortably do, that is, I think no interstate trucking, no lifting greater than twenty-five pounds, was just not working.
>
> "This was an opinion which I arrived at over a period of several months of seeing him and * * * it was at that point that I * * * felt that it probably wasn't reasonable for him to pursue that line of work anymore because * * * over a period of seven or eight months he was having one symptom after another, and I just didn't think it was going to be a viable working situation for him in the long run.

> "* * * * *
>
> "I don't think you can say there's any specific date. I think there's just a cumulation of episodes, of problems this fellow had, not only with any attempt at going back to trucking, but attempts at * * * everyday activities * * * that in my mind just indicated that he was not going to be successful as a truck driver even with these restrictions, and the fact that this letter was dated whenever it was * * * doesn't mean that's the date I said, 'You can't go back to work.' I mean, no acute event occurred. It was just an impression I arrived at over a period of time."

The referee set aside employer's denial of the aggravation claim, stating:

> "On [November 29, 1982,] Dr. Murphy found increased symptomatology and increased low back tenderness. There was no clinical evidence of increased neurological function, but Dr. Murphy concluded that the claimant's condition had deteriorated to the extent that truck driving, even with the imposed limitations was no longer a reasonable occupational pursuit for claimant."

Employer moved for clarification of the referee's order on the ground that the opinion failed to make its findings clear on the question of when claimant's aggravation had taken place. Employer correctly noted that, "[i]n his deposition testimony, Dr. Murphy confirmed that claimant's condition on September 27, 1982, was the same as it had been in March, April

[3] The letter actually states that Murphy saw claimant the second time on *September* 29, 1982. The parties agree that he meant November.

and August." The referee then amended the order to read:

> "IT IS THEREFORE ORDERED that the denial of the claim of aggravation by the employer is reversed and disapproved and the employer is ordered to accept said claim and to pay to claimant, *effective as of November 29, 1982* and until the claim is again determined, all benefits provided by law." (Emphasis supplied.)

The Board reversed, stating:

> "The Referee found that claimant had established an aggravation beginning November 29, 1982, even though the Referee noted that claimant had not previously presented such a claim to the employer and thus that the employer had never denied such a claim. If we affirmed the Referee's order, we would be taking the illogical action of setting aside an October 1982 denial of a November 1982 aggravation claim."

That reasoning would be correct *if* claimant had

actually made two separate aggravation claims. We hold that he did not, because Murphy's description of the November 29 examination was relevant to the question placed in issue by claimant's hearing request. That question was not simply whether employer had reasonably denied the claim on October 12, 1982, given the evidence available at that time. The question was, instead, whether "the evidence as a whole shows a worsening of the claimant's condition * * *." ORS 656.273(7). Evidence that was unavailable at the time of the denial may properly be considered under that standard.

In *Vandehey v. Pumilite Glass & Building Co.*, 35 Or App 187, 580 P2d 1068 (1978), we considered an analogous problem raised by a *claimant* who found it advantageous to treat a doctor's report, relevant to a pending claim, as a new and separate claim. The problem there was different, but the reasoning upon which we rejected the claimant's attempt to fragment the hearing process applies equally well here:

> "Claimant's September 29, 1976, request for a hearing specifically placed in issue the need for further medical evaluation of claimant on a claim he had already made. Dr. Hickman's letter of January 4, 1977, supported that prior claim and was appropriate evidence to be received at the subsequent hearing. It was proffered evidence of a *pending* claim, not assertion of a *new* one. Any other rule would encourage similarly situated claimants to "keep an anchor to windward" by labeling all new medical evidence as either a new claim or an aggravation claim, instead of concentrating on the hearing process they have already invoked. This approach would seriously undermine the hearing process. We decline to adopt it." 35 Or App 192. (Emphasis in original.)

Here, as in *Vandehey*, it would seriously undermine the hearing process to treat Murphy's report of the November 29 examination as a separate aggravation claim. It would create situations in which multiple hearings concerning a single claimant could proceed simultaneously, each concerned with essentially the same issue. That would not contribute to the efficient operation of the workers' compensation system. It would also not contribute to the fairness of worker's compensation hearings when, as here, neither party is prejudiced by allowing the claimant to base some or all of his claim on evidence regarding his condition that developed after his request for a hearing.

Employer argues that *Syphers v. K-W Logging, Inc.*, 51 Or App 769, 627 P2d 24, *rev den* 291 Or 151 (1981), deprives the referee of jurisdiction to rule on the "November claim," because it had been neither accepted nor denied. That argument assumes that there was a November claim. There was not. Murphy's letter of April 8, 1983, was not intended as an assertion of a new claim but as evidence in the pending hearing on the denied claim. *See Vandehey v. Pumilite Glass & Building Co., supra.*

Reversed; referee's amended order reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Sylvester A. Bergstrom, Claimant.

WEYERHAEUSER COMPANY,
Petitioner,

v.

BERGSTROM,
Respondent.

(83-09353; CA A34322)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 21, 1985.

Cynthia S.C. Shanahan, Portland, argued the cause for petitioner. With her on the brief were Lawrance L. Paulson and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Richard Alan 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.

WARDEN, J.

Reversed.

WARDEN, J.

Employer petitions for judicial review of an order of the Workers' Compensation Board which affirmed the referee's order awarding claimant interim compensation and assessing a five percent penalty against employer for an untimely denial. We reverse.

Claimant had retired on March 31, 1983, after 23 years of work for employer. Claimant alleged that he was forced to retire and filed a grievance. Employer offered claimant his job back in May, 1983. Claimant refused the offer. Meanwhile, in April, 1983, claimant's attorney wrote a letter to employer making a claim for an occupational disease. Employer responded by sending claimant an 801 form.

Employer did not deny the claim until October 18, 1983, and claimant did not return the 801 form before that date.

At the hearing, the referee found the claim to be noncompensable. However, because employer did not accept or deny the claim within 14 days of the letter, the referee found employer liable for interim compensation payments to the date of the denial. In so doing, the referee relied on *Bono v. SAIF,* 66 Or App 138, 673 P2d 558 (1983). We agree with employer that the Supreme Court's reversal of *Bono v. SAIF, supra,* decided after the order before us on review, requires reversal. *Bono v. SAIF,* 298 Or 405, 692 P2d 606 (1984).

In *Bono,* the Supreme Court held that interim compensation is not required when a worker has not demonstrated absence from work because of a compensable injury. Claimant tries to distinguish *Bono* from his situation, arguing that in *Bono* the worker never left work, whereas here claimant had to retire because his physical condition presented an industrial hazard.

The distinction does not take this case out of the holding of *Bono.* As the Supreme Court pointed out, the policy behind interim compensation is to compensate an injured worker for having to leave work. Claimant did not "leave work" as that phrase is used in ORS 656.210(3). *Bono v. SAIF, supra,* 298 Or at 410. Whatever the merits of claimant's grievance about his retirement, the fact remains that he was retired at the time he filed his claim. Like the claimant in

Bono, supra, he did not establish that he had been absent from work or that his earning power was diminished.

Because interim compensation was not required, it follows that the penalty assessment must be reversed. 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." (Emphasis supplied.)

Because no amounts were due, there is no amount on which to base a penalty. *See Kosanke v. SAIF,* 41 Or App 17, 596 P2d 1013 (1979).

Reversed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
JEPHTHA ORRIGGIO, Claimant.

ORRIGGIO,
Petitioner,

v.

STATE ACCIDENT INSURANCE
FUND CORPORATION,
Respondent.

(WCB 83-04706; CA A33972)

Judicial review from Workers' Compensation Board.

Argued and submitted November 1, 1985.

William H. Skalak, Milwaukie, argued the cause and submitted the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed and remanded with instructions to award permanent total disability.

WARREN, J.

Claimant, a 57-year-old carpenter, seeks review of an order of the Workers' Compensation Board. He was injured on the job when he slipped and fell six feet to a concrete floor. He struck his head, and a piece of steel reinforcement bar pierced his left wrist. Claimant claims that as a result of this injury and other physical and mental impairments he is permanently and totally disabled. The referee held that claimant was not entitled to an award of permanent total disability, because he had not sought employment since his injury. He ordered an award of 160 degrees for 50 percent unscheduled left shoulder and seizure disability and 45 degrees for 30 percent left forearm disability. The Board affirmed the referee. We reverse and remand for an award of permanent total disability.

Claimant was born in Jamaica and learned his carpentry skills there. At the age of 35 he moved to England and then to the United States in 1975. He has been a carpenter for approximately 38 years. All doctors agree that he is physically unable to continue with construction carpentry and is limited to light work. In addition to permanent physical impairments to his arm and shoulder, the record indicates that he suffers from seizures as a result of his injury which prevent him from working at heights or around dangerous machinery. Doctors have also noted possible brain damage as a result of the fall, as evidenced by a poor memory and low comprehension.

Claimant has the equivalent of a sixth grade education but is functionally illiterate, with poor verbal skills. His intelligence is below average. He was admitted to the Callahan Center for vocational evaluation. He performed poorly on vocational tests and failed to qualify for any of the 66 occupational aptitude patterns. A counselor reported that he has no transferable skills. A private rehabilitation counselor was of the opinion that claimant is "employable in some capacity," but could not recommend retraining in a specific area:

> "It is consultant's opinion that Mr. Orriggio is employable in some capacity, and that due to his severely deficient academic skills and physical limitations that have rendered him unable to return to his former position, the [vocational assessment] status is seen as appropriate. However, the task of arriving at a feasible vocational direction will be a difficult

> one due to client's almost insurmountable limitations which pertain to his physical condition, his academic status and his narrow vocational background."

The same counselor was of the opinion that claimant had no marketable skills and recommended that he not consider employment in a new field due to the combination of his cultural and mental limitations. In the opinion of Dr. Colistro, a psychologist, claimant is not able to train for any activity because of his extremely poor aptitude, lack of education and memory problem.

Claimant has not sought work since his injury. The referee believed that he "has consistently made valiant efforts to present himself in the worst possible light and that his demonstrations and representations are only worthy of belief to the extent that they are supported by objective medical evidence." The referee also doubted the credibility of claimant's poor vocational test results because of the degree of skill that claimant must have acquired in 38 years as a carpenter. While the opinion of the referee as to credibility is ordinarily entitled to deference, *Erikson v. SAIF,* 47 Or App 1033, 615 P2d 420 (1980), here there is no evidence that claimant imagined or invented his symptoms or has tried to appear more disabled than he is. The evidence is quite to the contrary.

As we view it, this case does not involve a question of credibility. All doctors agree as to the extent of claimant's physical impairment. His representations are indeed supported by objective medical evidence. The only question is whether he is employable. Although claimant has participated enthusiastically in vocational rehabilitation, no employment has been suggested. From our examination of the record, we conclude that claimant is not now capable of being employed at regular and gainful employment and that he should not be required to undergo the futile act of searching for work. *See Welch v. Bannister Pipeline,* 70 Or App 699, 690 P2d 1080 (1984).

Reversed and remanded with instructions to award permanent total disability.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

ROCK,
Plaintiff,
v.
PETER KIEWIT SONS' CO.,
Defendant - Third-Party Plaintiff - Appellant,
v.
GRAYSTONE CORPORATION,
Third-Party Defendant - Respondent.
(81-1182-J-1; CA A34709)

Appeal from Jackson County.

L. A. Merryman, Judge.

Argued and submitted November 4, 1985.

Hugh B. Collins, Medford, argued the cause and filed the briefs for appellant.

Robert L. Cowling, Medford, argued the cause for respondent. With him on the brief was H. Scott Plouse, Medford.

Before Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

This is a negligence action for bodily injury, involving the exclusive liability provisions of the Workers' Compensation Act. ORS 656.018(1)(a), (c); and ORS 656.018(3). The issue is the constitutional validity of those provisions, which the trial court sustained. We affirm.

Peter Kiewit Sons' Co. (Kiewit) appeals the dismissal of its complaint in which it sought enforcement of an indemnity agreement against Graystone Corporation. The main action by Rock against Kiewit was for damages for bodily injury. It was pleaded on two theories: (1) common law negligence and (2) failure to meet the duties created by the Employer Liability Law (ORS 654.305 *et seq*). Rock was an employe of Graystone, which was Kiewit's subcontractor. Kiewit filed a third party complaint for recovery from Graystone, alleging breach of a contract to provide liability insurance against claims such as Rock's, negligent supervision of Graystone's employes, implied indemnity and breach of an express contract of indemnity. We conclude that the indemnity agreement is void. *Roberts v. Gray's Crane and Rigging,* 73 Or App 29, 697 P2d 985, *rev den* 299 Or 443 (1985).

Virtually all of Kiewit's state and federal constitutional arguments were considered in *Roberts v. Gray's Crane and Rigging, supra.* One argument raised by Kiewit in this case was not considered in *Roberts*: that the exclusive liability

provision of ORS 656.018 violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the Oregon Constitution, Article I, section 20.

We hold that classification as a subject employer under the Workers' Compensation Act, and the exclusive liability provisions contained therein, is rationally related to the legitimate state purpose of maintaining a balanced Workers' Compensation scheme. *Roberts v. Gray's Crane and Rigging, supra,* 73 Or App at 35; *see Leech v. Georgia Pacific,* 259 Or 161, 167, 485 P2d 1195 (1971). We find no merit in Kiewit's argument.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of James W. Wiley, Claimant,

WILEY,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION et al,
Respondents.

(83-04506; CA A34363)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 12, 1985.

Kathryn Tassinari, Eugene, argued the cause for petitioner. With her on the brief were Jerome F. Bischoff and Bischoff & Strooband, P.C., Eugene.

Philip Schradle, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Darrell E. Bewley, Assistant Attorney General, James E. Mountain, Jr., Solicitor General and Dave Frohnmayer, Attorney General, Salem.

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 reversing the referee's order that held that claimant was permanently and totally disabled. ORS 656.206. The Board awarded claimant 256 degrees for 80 percent permanent partial unscheduled disability. On *de novo* review, we reverse the Board and reinstate the referee's order.

Claimant, a 51 year-old timber cutter, was injured on the job in January, 1981, when he was pinned underneath a

tree. He suffered serious pelvic trauma, including bilateral sacroiliac joint separation, bilateral sacral and iliac fractures, separation of the symphysis pubis and three fractures of the left pubic rami. He also sustained an injury to the right knee and suffered sciatic nerve neuropathy. Employer does not dispute that the injuries were both disabling and compensable.

Claimant underwent a long program of treatment and therapy. Dr. Filarski, his treating physician, reported in April, 1981, that he was walking with crutches and in September that he was walking short distances on his heels and toes. On October 21, 1981, however, Filarksi reported that claimant's prognosis was poor and that his only potential for vocational rehabilitation would be in a "very sedentary type of activity."

Also in October, the Workers' Compensation Department referred claimant to Bittersweet Consultant Services to develop a training program. Claimant, who had dropped out of school in the third grade, is functionally illiterate. Bittersweet proposed a tutorial reading program as a preliminary step in his rehabilitation. Although claimant was initially receptive to vocational retraining, he became frustrated with the rate at which he was recuperating physically. In January, 1982, claimant asked Bittersweet to discontinue services.

In July, 1982, employer offered claimant a job as a watchman. Employer proposed to construct a small building from which claimant, seated in a special recliner, could observe gate traffic. It also offered to adjust his working hours to his physical capabilities. He was neither medically stationary nor released for work at the time of the offer, and he rejected it.

In September, Crawford Rehabilitation Services

tested and evaluated claimant's work potential for the Workers' Compensation Department. Crawford concluded:

> "At this point it appears that Mr. Wiley can only stand a job that would allow for frequent changes in sitting, standing, and walking. Even with this, it would probably only be possible for him to work if his pain minimized to the level where he could concentrate more fully on a task. Combined with his inability to read or write, it is unlikely that such a job exists for him on today's labor market. It appears that his physical condition lowered his performance potential on every task attempted."

Six weeks later, Dr. Degge, an orthopedist, performed a closing evaluation. He found that claimant had made an excellent recovery from a "very serious pelvic injury." He stated that "after reviewing the job description of Security Watch as proposed by the Bohemia Company, it is this examiner's opinion that [claimant] would be able to work in that capacity * * * starting on an initial duration of 2-4 hours * * *." Filarski responded:

> "As a decision must be made, I could not disagree with Dr. Degge's considerations for return to light duty work anywhere from two to four hours and progress [sic] if tolerable. I feel on the other hand that Mr. Wiley's side of this circumstance is to be well understood in the fact that he has had serious pelvic fractures, probably has SI joint arthritis, and is a very serious surgical candidate. Therefore, remaining conservative and considering a permanent disability status might be our only other alternative."

A determination order awarded claimant 65 percent permanent partial disability. In June, 1983, Filarski found that claimant's condition was "slightly worse" than six months before. He stated, "I don't feel the patient could consider even light duty work activity in which standing or walking was required." Claimant requested a hearing on the extent of his disability. Following the hearing the referee ruled:

> "This claimant is undoubtedly in an extremely serious condition. I cannot see any work, from a practical standpoint, that the claimant can do. He certainly is not very well motivated to return to work. He refused a token offer made by Bohemia, but I cast some doubt on that offer. It was basically the same as a protective workshop. It does not really represent any real work for the claimant. The doctor said it probably

> would have to be limited to three or four hours a day and he'd have to be in a special recliner. There is some question whether claimant could or could not tolerate even that activity. There is certainly very little this claimant can do. I believe that, based on his inability to read and write, his age of 54, and his significant impairment, claimant is permanently and totally disabled, and should be granted that award."

The Board reversed:

> "Dr. Degge stated that claimant is capable of performing the security job for two to four hours per day. He stated that it would benefit claimant to make the attempt. Dr. Filarski agreed. Thus the medical evidence establishes that from a physical standpoint alone, claimant could have performed the security job. * * * We find that it would not be futile for claimant to attempt the security job offered by the employer. Because this attempt would not be futile and because claimant has not searched for work and has refused the offered employment we find that he has failed to satisfy the work-search requirements of ORS 656.206(3). Accordingly, we hold that claimant has failed to prove permanent total disability."

We do not agree with the Board's conclusion that petitioner failed to prove that he is permanently and totally disabled.

> "The determination of permanent total disability status does not turn upon whether the claimant has money-earning capacity, but rather upon whether the claimant is currently employable or able to sell his services on a regular basis in a hypothetically normal labor market. * * *
>
> "* * * * *
>
> " '*The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by* such factors as business booms, *sympathy of a particular employer* or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.' " *Harris v. SAIF,* 292 Or 683, 695, 642 P2d 1147 (1982). (Emphasis supplied; citations omitted.)

Although claimant could possibly perform for short time periods, the duties of the security job that employer offered, the medical evidence and the vocational report of Crawford support a conclusion that he could not "sell his services on a regular basis in a hypothetically normal labor market."

Wilson v. Weyerhaeuser, 30 Or App 403, 409, 567 P2d 567 (1977).

Although claimant's condition satisfies the definition of "permanent total disability" in ORS 656.206(1)(a),[1] he still must show that he is "willing to seek regular gainful employment" in order to qualify for permanent total disability status, unless the attempt would be futile. ORS 656.206(3); *Butcher v. SAIF*, 45 Or App 313, 608 P2d 575 (1980).[2] Employer argues that, because it offered claimant a job that he refused, he did not show that he is willing to seek employment. Accordingly, it argues that he is not permanently and totally disabled.

We find, however, that the proffered position as security guard, to work in a specially constructed building lying on a special recliner for a few hours a day, does not qualify as "regular" employment within the meaning of ORS 656.206(3). We find that claimant could not get a "regular" gainful job and that it would be futile for him to seek one. *See Phillips v. Liberty Mutual*, 67 Or App 692, 679 P2d 884 (1984). His crippling handicaps prevented him from selling his services in a competitive labor market undistorted by the sympathy of his employer. *See Harris v. SAIF, supra.* Employer's special offer, and claimant's rejection of it, do not preclude our finding that, as a result of his injuries, claimant is permanently and totally disabled.[3]

Reversed; referee's order reinstated.

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[1] ORS 656.206(1)(a) provides:

"(1) As used in this section:

"(a) 'Permanent total disability' means the loss, including preexisting disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. As used in this section, a suitable occupation is one which the worker has the ability and the training or experience to perform, or an occupation which the worker is able to perform after rehabilitation."

[2] ORS 656.206(3) provides:

"The worker has the burden of proving permanent total disability status and must establish that the worker is willing to seek regular gainful employment and that the worker has made reasonable efforts to obtain such employment."

[3] There is evidence in the record that plaintiff was not well motivated to return to work. His lack of motivation, however, does not bar us from finding on this record that he is permanently and totally disabled.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Stephen F. Taaffe, Claimant.

TAAFFE,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND
CORPORATION et al,
Respondents.

(83-09684, 84-10308; CA A34348)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 12, 1985.

Ronald L. Bohy, Salem, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondents. With her on the brief were James E. Mountain, Jr., Solicitor General and Dave Frohnmayer, Attorney General, Salem.

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 the referee's order allowing claimant's aggravation claim.[1] We reverse and reinstate the referee's order.

In February, 1980, claimant, age 26, suffered a compensable contusion and strain of the right lumbocostal muscle of the back while employed by Luoto Logging Company. Dr. Rissberger treated his injury and released him for work approximately three weeks later. His claim for compensation was closed without an award of permanent disability, and claimant did not appeal. Between April, 1980, and September, 1983, claimant saw Rissberger on three occasions but did not complain about his back. Claimant concedes that he did not seek medical treatment for his back during that period. Claimant testified, however, that during that period he frequently suffered pains in his back in the same area that was injured in February, 1980. His wife corroborated his testimony. During that period he continued to work in the woods, primarily for Luoto Logging.

On September 1, 1983, he began to work as a choker

[1] Claimant did not seek Board review of the portion of the referee's order that denied his "new injury" claim against Von Logging Company, his employer at the time of the September, 1983, injury. Although it is designated as a respondent here, no issue is presented with respect to its liability.

setter for Von Logging Company. The work was strenuous. He testified that during his two days of work for Von Logging his back felt tense and that he occasionally felt sharp pain in the area he injured in 1980.

On September 6, 1983, claimant went jogging, according to his testimony, to ease the tension in his back. He testified that, while jogging, "I experienced a sharp pain in my back, and the muscle just went out, and I couldn't even bend over and tie my shoe or sit down, or anything." His wife again corroborated his testimony. He returned to Rissberger, who prescribed medication and ordered him to stay off work for at least a week. The next day claimant went to see Dr. Stellflug. He diagnosed "lumbar strain with attendent myofibrosis" and prescribed treatment. Stellflug subsequently stated that in his opinion claimant's condition was "a material worsening of his previous condition with no real intervening cause."

The referee found that claimant and his wife were credible witnesses. He believed claimant's testimony that, during the more than three years between the original compensable injury and the jogging incident, he had suffered frequent intervals of pain to the same area of his back. On the basis of Stellflug's opinion and the testimony of claimant and his wife, the referee held that claimant had "borne his burden of proof" and that the 1980 injury was a material contributing cause of his 1983 back problem. ORS 656.273(1)[2]; *see Grable v. Weyerhaeuser Co.*, 291 Or 387, 400, 631 P2d 768 (1981); *see also Coddington v. SAIF*, 68 Or App 439, 681 P2d 799 (1984).

The Board reversed, asserting "that claimant has not satisfied the *Grable* burden of proof primarily because we are not persuaded by Dr. Stellflug's analysis." Apparently, the Board did not believe claimant's testimony that he had frequently suffered pain in the same area of his back during the intervening time. It therefore discounted Stellflug's testimony as based on "inaccurate history."

We disagree with the Board and find the referee's reasoning more persuasive. He heard the witnesses, observed their demeanor and found claimant credible. Although Stellflug did not examine claimant before the jogging incident, the evidence does not support the Board's conclusion that Stellflug's opinion was based on an inaccurate history.[3] Moreover, the only competent medical evidence produced at the hearing was Stellflug's opinion. Rissberger did not testify; neither did respondent introduce any opinion letter from him. The only evidence that suggests what Rissberger's opinion may have been is claimant's statement on cross-examination that Rissberger was not willing to support an aggravation claim.[4] Respondents could have called Rissberger as a witness but did not do so.

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[2] ORS 656.273(1) provides:

"After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

[3] The Board's belief that Stellflug's characterization of the triggering event as "some mild exercise" and not specifically as "jogging" detracts from the weight of his opinion is not justified.

We find that claimant's 1980 injury was a material contributing cause of his 1983 back problems. Claimant is entitled to compensation for aggravation of his 1980 injury.

Reversed; referee's order reinstated.

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[4] Claimant testified on cross-examination:

"Q. And did you ask [Rissberger] to support you in making a Workers' Comp. claim for this?

"A. I told him that I would like to file an aggravation claim on that, yes.

"Q. And he wouldn't support you in that, is that right?

"A. That's true."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of John Pache, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,

v.

JOHN PACHE,
Respondent.

(83-07481; CA A34670)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1985.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for petitioner. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

David Hittle, Salem, argued the cause for respondent. With him on the brief was Callahan, Hittle & Gardner, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

PER CURIAM

Affirmed.

PER CURIAM

SAIF seeks review of an order of the Workers' Compensation Board reversing the referee's order, which had upheld SAIF's denial of claimant's aggravation claim. We affirm.

On *de novo* review, we find that claimant has established by a preponderance of the evidence that his 1980

compensable injury, which involved his head, neck and upper back, has worsened since the last award or arrangement of compensation. Claimant does not contend that his aggravation claim includes his low back condition, which arose following an off-the-job injury in 1981 and evidently has since worsened. There is no proof that the worsening of his low back condition is related in any way to the 1980 compensable injury. SAIF is responsible for only "worsened conditions resulting from the original injury." ORS 656.273(1). On the record before us, SAIF is responsible only for the worsening of claimant's head, neck and upper back injuries.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
RAY A. STERN, Claimant.

FRED SHEARER & SONS et al,
Petitioners,

v.

RAY A. STERN et al,
Respondents.

(83-05299, 82-11791; CA A33706)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 2, 1985.

Jerald P. Keene, Portland, argued the cause for petitioners. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Ann F. Kelley, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

James L. Francesconi, Portland, waived appearance for respondent Ray A. Stern.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded.

BUTTLER, P. J.

Employer and EBI seek review of a Board order which held that EBI, and not SAIF, is responsible for claimant's compensable injury.

EBI initially accepted a new injury claim filed on February 28, 1983, and paid claimant time loss for the short period of time for which he was entitled to it. On May 26, 1983, it denied the claim retroactively, having determined that the injury was an aggravation of an earlier injury for which SAIF

was responsible. Within six days of the denial, EBI requested the Workers' Compensation Department to issue an order designating a paying agent under ORS 656.307.[1] The department did so, assigning interim responsibility to SAIF, pending resolution of the responsibility dispute. The short period of time loss incurred by claimant had been paid by EBI, and SAIF undertook payment of all subsequent obligations under the order issued pursuant to ORS 656.307. The Board later held that EBI could not deny the claim retroactively.

In *Jeld-Wen, Inc. v. McGehee,* 72 Or App 12, 695 P2d 92, *rev den* 299 Or 203 (1985), we held that the rule stated in *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), prohibiting "back-up denials," applies to denials of responsibility. We stated that the rule should be applied to all back-up denials, whether or not the claimant was at risk of losing benefits for having filed against the wrong employer. In *Retchless v. Laurelhurst Thriftway,* 72 Or App 729, 696 P2d 1181, *rev den* 299 Or 251 (1985), we held that the original accepting employer was required to continue paying compensation and could not deny the claim retroactively *unless and until someone else is determined to be responsible.* In that case, after the original claim for aggravation was closed, the claimant filed a

new claim against a later employer, alleging that the same incident that gave rise to the aggravation claim was a new injury for which the later employer was responsible. That claim was denied; then the first employer retroactively denied the claimant's aggravation claim. The claimant requested a hearing on both denials, and the referee determined that the incident was a new injury. Although the Board on review agreed with the referee, on reconsideration it held that *Bauman* prohibited the first employer from denying the aggravation claim. We reversed, because it had been determined, at the claimant's behest, that the second employer was responsible and, therefore, there was no reason to apply *Bauman.*

The situation here is analogous to *Retchless;* however, instead of the employer that retroactively denied the claim having to remain liable until the responsibility of another has been determined, SAIF, as the paying agent under ORS 656.307, became liable to make the payments until responsibility was determined. When the referee and the Board determined that the claim was for an aggravation for which SAIF is responsible, EBI's denial became effective retroactively. At no time was claimant at risk. The only issue has been that of responsibility, and the .307 order assured that payment of benefits would not be interrupted. Accordingly, there is no reason to apply the *Bauman* rule.

Reversed and remanded.

[1] ORS 656.307(1) provides, in part:

"(1) Where there is an issue regarding:

"* * * * *

"(c) Responsibility between two or more employers or their insurers involving payment of compensation for two or more accidental injuries

"* * * * *

the director shall, by order, designate who shall pay the claim, if the claim is otherwise compensable. * * *"

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Clarence C. Martin, Claimant.

MARTIN,
Petitioner,

v.

STATE ACCIDENT INSURANCE
FUND CORPORATION,
Respondent.

(80-08201; CA A31486)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 25, 1985.

Thomas A. Caruso, St. Andrew Legal Clinic, Portland, argued the cause and filed the brief for petitioner.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Affirmed.

WARDEN, J.

Claimant petitions for judicial review of an order of the Workers' Compensation Board, claiming that the Board erred in affirming a 1980 determination order, upholding SAIF's denial of his aggravation claim and denying penalties and attorney fees. We affirm.

On February 3, 1975, claimant sustained a back injury diagnosed as a "sacrococcygeal strain," a compensable, nondisabling injury. He had no back pain before the injury but had intermittent pain afterward. In the fall of 1979 the pain became worse. He left work on January 25, 1980. His physician, Dr. Ross, submitted his aggravation claim on February 4, 1980, and SAIF accepted it. Claimant was released to return to modified work on February 20. On April 23, Ross wrote to SAIF, stating that claimant was medically stationary. A determination order issued on May 20, awarding temporary total disability from January 25 through February 19, 1980, but no permanent disability. On May 27, Ross submitted a second aggravation claim, stating that claimant had become disabled April 21 and "continues to be unable to work." On August 1, 1980, SAIF issued a denial of that second aggravation claim.

Claimant's first assignment of error is that the Board erred in affirming the May, 1980, determination order. He argues that he was not medically stationary at the time the

determination order issued and that it must be set aside as having been issued prematurely. He relies on *Brown v. Jeld-Wen, Inc.*, 52 Or App 191, 627 P2d 1291 (1981).

In *Brown*, the claimant's doctor had informed the employer on January 18, 1979, that his condition was stationary and that the claim could be closed as of December 8, 1978. Then, on January 22, the doctor sent a second report to the employer indicating the need for further treatment. Apparently, at the time when the Evaluation Division considered closure of the claim, it was unaware of the doctor's second report to the employer. On February 8, 1979, a determination order issued. We agreed with the referee that the closure was premature.

In this case, unlike *Brown*, neither the employer nor the insurer had any notice that claimant's condition might not

be medically stationary before the determination order issued. Ross' letter of April 23 states that claimant was seen on April 21, and that "Mr. Martins [*sic*] condition is currently stationary." The division justifiably relied on the letter. As we said in *Alvarez v. GAB Business Services*, 72 Or App 524, 527, 696 P2d 1131 (1985):

> "The Board correctly refused to exercise hindsight in determining whether the claim was prematurely closed. To support a conclusion that a claimant is 'medically stationary,' ORS 656.005(17) requires only that 'no further material improvement would reasonably be expected from medical treatment, or the passage of time.' The reasonableness of medical expectations at the time of claim closure must be judged by the evidence available at the time, not by the subsequent development of the case. * * * " (Citations omitted.)

The first indication that SAIF had that claimant was off work and undergoing treatment was Ross' letter dated seven days after the determination order had issued. The Board did not err in upholding the May 20 determination order.[1]

Claimant's second assignment is that the Board erred in affirming SAIF's denial of his May 27 aggravation claim on August 1, 1980. The denial stated, in part:

> "Medical reports now indicate that your injury of 1975 is medically stationary, and that your current problems are not related to that injury. We see no relationship between your current condition and your original industrial injury of February 3, 1975."

Claimant argues that the purported denial is of a previously accepted claim and that, therefore, SAIF is precluded from denying the claim under *Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983), and its progeny.

The evidence here does not support a conclusion that the August 1 letter was a denial of an already accepted claim, the situation in *Bauman*. Claimant was medically stationary after his first aggravation claim of February 4, 1980. The doctor's letter of May 27 constituted a second aggravation

[1] Claimant also argues that, if the closure was not premature, he should be found to be permanently and totally disabled. We agree with the Board's determination that claimant's loss of earning capacity is not due to the compensable injury of 1975.

claim, which was filed after the five-year limitation had expired and was rejected for that reason. ORS 656.273(4).[2]

Finally, claimant assigns error to the refusal of the Board to impose penalties and attorney fees for unreasonable delay in paying compensation on the first aggravation claim, filed February 4, 1980. The determination order of May 20, 1980, awarded temporary disability only, and it was paid timely. Because we affirm the Board's decision that that is all claimant is entitled to and, because its payment was not unreasonably delayed, penalties and attorney fees are not recoverable.

Affirmed.

[2] Claimant argues that he should at least be entitled to payment for medical expenses. ORS 656.273. The medical evidence does not demonstrate that claimant's current problems resulted from his compensable injury.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Ace L. McElmurry, Claimant.

McELMURRY,
Petitioner,

v.

ROSEBURG SCHOOL DISTRICT et al
Respondents.

(83-05729; CA A35225)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 4, 1985.

James L. Edmunson, Eugene, argued the cause and submitted the brief for petitioner. With him on the brief were Robert J. Guarrasi, and Malagon & Associates, Eugene.

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 Gillette, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant seeks review of a Workers' Compensation Board order that denied his aggravation claim. On *de novo* review, we affirm.

Claimant was injured in December, 1980, while helping move a 600-pound planter. His claim was originally closed as non-disabling. In 1981, he filed an aggravation claim. That

claim was closed by stipulation on September 23, 1982, with claimant receiving ten percent unscheduled permanent partial disability. By December, 1982, he believed that his condition had worsened; the pain in his back and arms and the headaches, all of which had previously been intermittent, had become constant. He received some temporary relief from electrical stimulation equipment, but the increased pain continued essentially unchanged to the date of the hearing.

Treating and examining physicians had some difficulty determining the source of increased pain. Dr. Patterson, a neurologist who had seen claimant previously, examined him again and noted some objective changes from his previous findings. However, he did not relate those changes to claimant's compensable injury and stated that claimant was not neurologically disabled from working as a custodian, his previous job. Orthopaedic Consultants re-evaluated claimant and could find no organic basis for his increased pain. Both Patterson and Orthopaedic Consultants believed that most, if not all, of the pain was the product of functional overlay.

Dr. Norris-Pearce, a neurologist, believed that claimant's physical condition had worsened. However, he had not seen claimant before the September, 1982, stipulated determination order and so was unable to make a direct comparison between his present and his previous condition.

Claimant has shown that his pain has increased since the last arrangement of compensation. However, he has not shown that his physical condition has worsened. Increased pain can, by itself, be an aggravation if it produces an impairment that reduces earning capacity below what it was at the time of the previous determination order. *See Harwell v. Argonaut Insurance Co.*, 296 Or 505, 678 P2d 1202 (1984). Expert testimony is not necessary to show that a claimant suffers increased pain or that the pain has caused decreased

earning capacity. *See Garbutt v. SAIF*, 297 Or 148, 151-52, 681 P2d 1149 (1984).

The question is whether claimant's evidence of increased pain shows a worsening of his condition. He testified that the pain he has had since the injury became significantly worse in late 1982 and that it has stayed consistently that bad. His only relief came from electrical stimulation equipment and, to the date of the hearing, he had been able to use the equipment only on a temporary basis.

We accept claimant's description of his condition. However, there is no evidence from which we can determine that his earning capacity has diminished. His previous intermittent pain interfered with his working. He was not employed on September 23, 1982, and he has not been employed since. His physicians believe that, from a physical standpoint, he remains employable in his previous occupation. Claimant has not proved any present or prospective employment in which he could have engaged but cannot now. Thus, he has not carried his burden of showing an aggravation.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of The Beneficiaries of Thomas W.
McBroom (Deceased), claimant,

THE BENEFICIARIES OF THOMAS W.
McBROOM, (Deceased),

Petitioner,

v.

CHAMBER OF COMMERCE OF THE U.S. et al,
Respondents.

(81-07286; CA A32173)

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.

R. Kenney Roberts, Portland, argued the cause for respondents. With him on the brief were Jerald P. Keene and Roberts, Reinisch & Klor, P.C., Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed; referee's order reinstated.

NEWMAN, J.

Claimant petitions for review of a Workers' Compensation Board order which reversed the referee and held that decedent's death is not compensable. *See* ORS 656.204. We hold that the decedent's death arose "out of and in the course of employment" and reverse. ORS 656.005(8)(a).

Decedent was a membership salesman for the United States Chamber of Commerce in Portland. On the morning of Saturday, May 9, 1981, he flew to Los Angeles to attend employer's annual conference at the Marriott Hotel for its western division representatives. Employer required decedent to attend the conference and paid his related expenses, including the cost of transportation and overnight lodging.

Decedent began drinking intoxicating liquor before his 8:15 a.m. flight to Los Angeles and continued drinking on the flight. Between 1 p.m. and 5 p.m. he attended a conference business session at which no drinks were served. Then he attended an employer-sponsored cocktail party and banquet. Employer paid for drinks served at the cocktail party and made drinks available for purchase at the banquet. At approximately 10 p.m., decedent left the banquet and went to his room.

Several witnesses testified as to decedent's condition at various points during the day and in the evening. Their

accounts of his condition range from "reasonably normal" to "obviously inebriated." When decedent returned to his room at 10 p.m., he telephoned his wife in Portland. She testified that he sounded perfectly normal.

Decedent's activities for the next four hours are unknown. At about 2 a.m. on May 10, he asked hotel personnel where the whirlpool bath, or Jacuzzi, was. They told him that it was closed. At approximately 7 a.m., a fellow employe discovered decedent's body, clad in swimming trunks, floating face down in the Jacuzzi. A single pint bottle of vodka, one quarter full, was found in his room. Subsequent tests revealed that decedent's blood alcohol level at the time of his death was .40.

The referee concluded that decedent's activity at the time of death was related to his work and that his death was compensable. He held that decedent was

> "a traveling employee required to be at the Los Angeles Marriott Hotel who was engaged in company business and or satisfying physical needs including relaxation just prior to his death. * * * As such, his death is compensable."

The Board reversed:

> "[W]e do not believe that decedent's death can be said to have arisen out of the necessity of the decedent's stay away from home. * * * Nor do we think it can be said that consuming *such a quantity* of alcohol following conclusion of business and related social activities was a reasonable activity for the decedent to engage in, even considering the fact that he was traveling and away from home." (Emphasis in original.)

Petitioner has the burden of proving that decedent's death arose out of and in the course of his employment, that is, that the relationship between decedent's death and his employment is sufficient to allow compensation. *See Phil A. Livesley Co. v. Russ,* 296 Or 25, 28, 672 P2d 337 (1983); *Rogers v. SAIF,* 289 Or 633, 639-44, 616 P2d 485 (1980). Generally, "traveling employes are considered to be within the scope of employment while away from home," *Slaughter v. SAIF,* 60 Or App 610, 615, 654 P2d 1123 (1982), even if their voluntary intoxication leads to their injury. *See Simons v. SWF Plywood Co.,* 26 Or App 137, 552 P2d 268 (1976) (compensation allowed for intoxicated employe injured in accident when intoxicated fellow employe drove wrong way on Interstate 5); *Fowers v. SAIF,* 17 Or App 189, 521 P2d 363, *rev den* (1974) (compensation allowed for employe killed in automobile accident while driving with .18 blood alcohol level); *Boyd v. Francis Ford, Inc.,* 12 Or App 26, 504 P2d 1387 (1973) (compensation allowed for employe killed in automobile accident while driving with .37 blood alcohol level). If, however, the injury to a traveling employe occurs while he is engaged in "a distinct departure on a personal errand," the injury is not compensable. *Slaughter v. SAIF, supra,* 60 Or App at 615; *see Hackney v. Tillamook Growers,* 39 Or App 655, 593 P2d 1195, *rev den* 286 Or 449 (1979) (employe's broken arm sustained while arm-wrestling in a tavern not compensable where stopover was contrary to employer's explicit instructions).

Employer asserts that the claim is not compensable, because decedent's activities that led to his death were both personal and unreasonable. We disagree. The excessiveness of

defendant's alcohol consumption does not preclude our finding that his death was work related. *Boyd v. Francis Ford, Inc., supra.* That is particularly true here, where a significant portion of that consumption occurred during work related activities.[1] Neither does the Jacuzzi's being "closed" make decedent's activity so unreasonable and so unexpected as to prevent compensation.[2] After examining the totality of the circumstances we find that decedent was a "traveling employe" and that his presence at the weekend conference was directly connected with his employment. Accordingly, we hold that his death arose out of and in the course of his employment and not out of a distinct departure or personal errand.

Reversed; referee's order reinstated.

[1] On the basis of decedent's wife's testimony that he sounded perfectly normal on the telephone at 10 p.m., the Board found that decedent consumed almost all the alcohol found in his blood after that time. We find, however, that decedent had been drinking throughout the day and evening. Therefore, his blood alcohol content must already have been significantly elevated at 10 p.m.

[2] Thomas Ames, National Membership Sales Manager for the United States Chamber of Commerce, who conducted the 1981 conference, testified that he had met decedent in the same Jacuzzi at 2 a.m. at the conference in 1980. On the night decedent drowned, Ames went to the Jacuzzi at 2 a.m.:

> "In fact I went to the Jacuzzi to see if there was any of my staff that I knew. Finding they were not [there], I decided to go to bed. That's exactly the same experience I had a year prior with [decedent]."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Lorri K. Day, Claimant.

DAY,
Petitioner,

v.

S & S PIZZA COMPANY,
Respondent.

(82-07346; CA A32774)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 4, 1985.

On Petitioner's petition for reconsideration filed November 22, 1985. Affirmed without opinion October 23, 1985, 76 Or App 212, 707 P2d 643.

Peter W. McSwain and Francesconi & Cash, P.C., Portland, for petition.

No appearance contra.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reconsideration granted; reversed; referee's order reinstated.

NEWMAN, J.

Claimant petitions for reconsideration of our decision that affirmed without opinion an order of the Workers' Compensation Board. *Day v. S & S Pizza Company,* 76 Or App 212, 707 P2d 643 (1985). The Board had reversed an order of the referee that awarded compensation and penalties and attorney fees for denial of medical treatment for her compensable back injury. In light of the intervening decision of the Supreme Court in *Reynaga v. Northwest Farm Bureau,* 300 Or 255, 709 P2d 1071 (1985), we grant reconsideration, reverse the Board and reinstate the referee's order.

Claimant injured her lower back in June, 1981, while employed as a waitress. She underwent a myelogram and, in January, 1982, Dr. Whitney, her orthopedist, recommended a laminectomy and discectomy. Three months later he reported:

> "[Claimant] still needs surgery. She is having a lot of pain in both legs * * *. The insurance people and lawyer are still playing games, and she does not want to go ahead until some of this is taken care of, but the results will be compromised the longer we wait."

The insurer denied compensability on the ground that the injury was not related to claimant's employment. In June, 1982, the referee set aside the denial. Employer appealed, and in March, 1983, the Board affirmed the referee. This review does not involve that decision.

Claimant, however, was reluctant to undergo a laminectomy. In June, 1982, she learned of a surgical procedure called a percutaneous neuclectomy, in which a needle is inserted into the lumbosacral area, and fragmented disc material is removed mechanically. In contrast to a laminectomy, there is no loss of blood or blood replacement and no incision; only a local anesthetic is used, the hospitalization period is much shorter and the total cost is about one-fourth of that for a laminectomy. Claimant contacted Dr. Morris, Chief of Orthopedic Surgery at the University of California Medical School in San Francisco. Morris and a physician in Florida were the only physicians in the country who performed this operation. Morris was fully qualified to perform it.

In a series of telephone conversations during August, 1982, claimant discussed Morris' treatment with the insurer's

claim representative, Henry. Claimant provided Henry with Morris' name, address, and telephone number. Henry promptly responded by letter:

> "Per our telephone conversation of Tuesday, August 24, 1982, I am enclosing a photocopy of Oregon Workers' Compensation Statute 656.245, which states that we will not be responsible for expenses and payments generated by your choice of a treating physician outside the state of Oregon."

The insurer did not investigate the surgical procedure, recommend any other physician than Morris or object to Morris or to the University of California facility. Henry thought that claimant should be evaluated by Dr. Rosenbaum in Portland, but she did not arrange an appointment for claimant, and no examination was performed.

In a letter of September 29, 1982, to claimant's counsel, insurer's counsel stated:

> "Under the Court of Appeals decision in *Rivers v. SAIF* [45 Or App 1105, 610 P2d 288 (1980)], *the carrier has control of the claimant's out-of-state treatment.* * * * You ask that we spend time and money in an effort to investigate a new method of medical treatment which we may or may not subsequently authorize for this claimant. At this time, it is *not* authorized.
>
> "Under the circumstances, if you want us to spend time and money looking into this procedure further, I suggest you write to the Board dropping your request for a hearing on the issues of penalties and attorneys' fees. My client will feel much better about cooperating with you if they see something happening in return. The withdrawal would naturally have to be permanent on those issues up to the date of your letter to the Board.
>
> "Once this is done, if your client will provide the doctor's name and/or the name of the facility involved, [the insurer] has informed me they will diligently investigate the possibility of the proposed surgical procedure." (Emphasis supplied.)

At that time, claimant had already provided the insurer with Morris' name and the facility involved.

On October 3, 1982, claimant was examined by Morris, who advised her that the results of the operation would be compromised if she delayed further. On October 12, an administrator of the medical school hospital in San Francisco telephoned the insurer's claim representative, advised her

that claimant was being operated on later that morning and requested authorization for the surgery. The insurer again denied authorization. Morris performed the percutaneous neuclectomy. Claimant was released from the hospital on October 13.[1]

On receipt of billings for the surgery, the insurer wrote the hospital and Morris that payment could not be made without chart notes and reports. In March, 1983, Morris provided a surgical report to claimant's counsel describing the operation. In July, 1983, Morris wrote to claimant's counsel:

> "It appears that the percutaneous nuclectomy was successful in alleviating her sciatica symptoms. This procedure is done under local anaesthesia using a standard posterolateral approach. The results are similar to those for chymopapain injection. Chymopapain removes nuclear material chemically while this procedure does so mechanically. The success rate in relieving sciatica in carefully selected patients is seventy percent. The surgery costs of $2,000.00 compared to $10,000.00 for a laminectomy. The length of hospital stay is two days compared to seven or eight days for a laminectomy. The procedure has been covered by at least some of the workman compensation carriers in California."

Morris also wrote: "She is doing quite well. She has been working full time * * * since March 1983. She experiences only occasional pain in the left lower extremity with prolonged walking." Claimant provided the insurer with a copy of Morris' report before the hearing before the referee. Whitney concurred in Morris' assessment of claimant's progress.

ORS 656.245(1) provides:

> "For every compensable injury, the insurer * * * 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 * * *."

Under ORS 656.245(3),[2] an injured worker may choose an

attending doctor within Oregon, but if she chooses one outside Oregon, the insurer has a limited right to veto the worker's choice. The insurer may refuse to pay for the treatment after it has properly objected to the worker's choice of an out-of-state doctor.

Reynaga v. Northwest Farm Bureau, supra, emphasizes that the insurer's power to veto claimant's choice of an out-of-state physician under ORS 656.245(3) is not unlimited. That power does not limit claimant's right to receive medical services under ORS 645.245(1), wherever she is. "ORS 656.245(1) requires insurers to provide reasonable medical services without regard to the injured worker's geographic location." 300 Or at 261. *See also Mogliotti v. Reynolds Metal Co.*, 67 Or App 142, 676 P2d 919 (1984).

In *Reynaga* the insurer had refused to approve any treatment by out-of-state chiropractors. The court held that, notwithstanding ORS 645.245(3), that was improper. The court explained:

> "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." 300 Or at 262.

The court defined the limited scope of the insurer's veto power. The court recognized that, because out-of-state doctors are beyond the reach of state process, insurers have an interest in assuring that claimants receive treatment only from out-of-state doctors who will cooperate with them.

> "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." 300 Or at 259.

Here, the insurer did not object to Morris, and nothing in the record suggests that he was unlikely to cooperate with reporting requirements fully. Employer contends, however, that the insurer had "a right under ORS 656.245(3) to control claimant's choice of physicians and *treatment* outside of Oregon." (Emphasis employer's.) The insurer's letter of September 29, 1982, advised claimant that "the carrier has control of the claimant's out-of-state treatment," and Henry stated at the hearing that the insurer has "an

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[1] Ordinarily hospitalization following a laminectomy is about seven days.

[2] ORS 656.245(3) provides:

> "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 attendingn physician four times without approval from the director. If the worker thereafter selects another attending physician the insurer or self-insured employer may require the director's approval of the selection and, if requested, the director shall determine with the advice of one or more physicians, whether the selection by the worker shall be approved. Nothing in this section shall be construed to permit the director to determine specific treatment criteria."

absolute right to refuse out-of-state treatment" to an injured worker.[3] The insurer exercised its limited authority in order to deny claimant a particular type of surgical treatment. That is inconsistent with *Reynaga*. Under the circumstances, the insurer waived its limited right under ORS 656.245(3) to pre-authorize claimant's choice of Morris.

Insurer does not dispute that claimant's percutaneous neuclectomy was reasonable and necessary medical treatment for her compensable back injury. Accordingly, she is entitled to compensation under ORS 656.245(1). *Linn Care Center v. Cannon*, 74 Or App 707, 704 P2d 539 (1985).[4]

Because the insurer used its power over claimant's choice of an out-of-state doctor to deny claimant reasonable and necessary medical treatment, the subsequent denial of her claim for medical treatment was unreasonable. Accordingly, claimant is entitled to penalties and attorney fees.

Reconsideration granted; reversed; referee's order reinstated.

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[3] At the hearing Henry testified:

"Q Did you on or about August 23, 1982 send a letter to Ms. Day stating that you're enclosing a photocopy of [ORS 656.245] and stating that that statute states that you would not be responsible for expenses and payments generated by her choice of a treating physician outside of the state?

"A Yes, I did.

"Q Does that continue to be your primary reason for rejecting Lorri Day's surgery, that she was out of the state of Oregon?

"A Yes, it is.

"Q And, in fact, you have to offer us here today no documented medical basis for doubting the percutaneous nuclectomy as a valid procedure?

"A Right.

"* * * * *

"Q And is that your position that with regard to any injured worker who elects to go out of state for treatment you're free to refuse that treatment as an absolute right?

"A That's correct."

[4] Our decision that the operation was reasonable and necessary is based both on the medical evidence of claimant's condition before the operation and on her subsequent improvement. *Linn Care Center v. Cannon, supra*, 74 Or App at 710.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
David M. Lindamood, Claimant.

LINDAMOOD,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(82-04069; CA A34516)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Christopher D. Moore, and Malagon & Associates, Eugene.

Richard D. Wasserman, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

No appearance for respondent Springfield Utility Board.

Before Richardson, Presiding Judge, and Warden and Newman Judges.

RICHARDSON, P. J.

Reversed and remanded.

RICHARDSON, P. J.

In this workers' compensation case, claimant entered into a disputed claim settlement with SAIF for $9,500 "in full and final settlement of all claims." The agreement was approved by a referee pursuant to ORS 656.289(4). Two days later his employer notified him that, pursuant to the union contract, a portion of his accrued sick leave would be deducted as a result of the time loss due to the injury. Claimant requested a hearing, seeking recourse for employer's "failure to abide by disputed claim settlement" and its attempt to "collect overpayment not provided for."

The referee found that there had been a material mistake of fact, set aside the approved settlement and reinstated the original request for a hearing on the compensability of the claim. The referee then issued an "Amended Interim Order," which required claimant to return the money paid pursuant to the settlement, and denied SAIF's request to designate the order as final and appealable. SAIF appealed to the Board, arguing that the referee had exceeded her authority in setting the settlement aside and that, in any case, there was no material mistake of fact sufficient to justify setting the settlement aside. Claimant argued that the referee's order was not final, and thus not appealable, because the issue of

compensability remained to be resolved by a hearing before the referee.

The Board, citing *Price v. SAIF,* 296 Or 311, 675 P2d 479 (1984), concluded that the order was final, because all the issues presented for determination—the terms and enforceability of the settlement, and by implication its validity—had been resolved at the hearing level. However, the Board reversed the referee and ordered reinstatement of the approved settlement, because it concluded that the effect of the union contract provision was not a material consideration of either party in resolving their dispute. This order is now before us on claimant's petition for review.

Claimant contends that, because the referee's order was not final, the Board did not have jurisdiction to review. We agree. The referee's order left unresolved the fundamental issue of compensability. This court has consistently held that such orders are not final and may not be appealed.

In *Mendenhall v. SAIF,* 16 Or App 136, 517 P2d 706, *rev den* (1974), the Board held that a claim was not untimely filed, reversed the referee's order of dismissal and ordered that the case be remanded for a hearing on compensablity. We held that that was not an appealable final order, citing *Winters et al. v. Grimes et al.,* 124 Or 214, 264 P 359 (1928), for the requirement that an order "must be one which determines the rights of the parties so that no further questions can arise before the tribunal hearing the matter." 16 Or App at 138. We concluded: "A decision which does not either finally deny the claim, or allow it and fix the amount of compensation, is not a final decision." 16 Or App at 139; *see also Jones v. SAIF,* 49 Or App 543, 619 P2d 1342 (1980) (order reopening claim upon finding claimant was not vocationally stationary held not appealable).

SAIF contends that this case is analogous to *Price v. SAIF, supra,* which involved a compensable back injury and a heart condition allegedly caused by the same injury. The Supreme Court held that review of the portion of the order which denied the heart claim was proper even though the extent of disability on the compensable back claim had not been resolved. In *Dean v. SAIF,* 72 Or App 16, 695 P2d 90, *rev den* 298 Or 822 (1985), we concluded that *Price* was limited to the partial denial situation and did not otherwise change existing law regarding what is a final order. We reaffirm that holding.

Assuming, without deciding, that the referee did not exceed her authority, we hold that the order was not a final reviewable order. Accordingly, the Board's order is reversed, and the case is remanded for a hearing on the issue of compensability.

Reversed and remanded.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
THOMAS D. CRAFT, Claimant.

CRAFT,
Petitioner,

v.

INDUSTRIAL INDEMNITY COMPANY et al,
Respondents.

(82-01461; CA A34443)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 23, 1985.

Kenneth D. Peterson, Jr., Hermiston, argued the cause and filed the brief for petitioner.

Marshall C. Cheney, Portland, argued the cause and filed the brief for respondents.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded for determination of extent of disability.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board which reversed the referee and held that his claim was in open status after having been reopened voluntarily by the insurer and that he was not yet entitled to a determination of the extent of disability. The referee had held that claimant is permanently and totally disabled.

Claimant requested a hearing on a determination order of February 3, 1982, which awarded him no additional permanent partial disability for head injuries. Among other things, the request specifically sought a reopening of the claim on the ground that claimant was not medically stationary. After many postponements, a hearing was finally held on May 31, 1983. Six days before the hearing, the insurer voluntarily reopened the claim on the ground that claimant was not "vocationally stationary" and that it was exploring various avenues of rehabilitation. The insurer stated that it was reopening the claim pursuant to claimant's initial request. Claimant, on the other hand, challenged the reopening, asserting that during the delay between his request for reopening and the hearing he had become medically stationary.

The referee found that claimant was medically and psychologically stationary, that the claim was not prematurely closed and that he was permanently and totally disabled. The employer argued successfully before the Board that a determination of the extent of claimant's disability could not be made while his claim was in open status, apparently without regard to the reason for reopening.

The uncontroverted medical evidence is that claimant was medically and psychologically stationary both at the time of closure and the time of the hearing. Accordingly, he was entitled to claim closure and a determination of the extent of his disability, unless the last minute reopening of the claim by employer because he was not "vocationally stationary" requires a reclosure of the claim by the Division. ORS 656.268. We know of no basis for refusing to close or to reopen a claim for the reason stated.[1] Although the evidence indicates that

two months before the hearing claimant was also determined to be stationary from a vocational standpoint, we do not see the relevance, because the parties agree that he was not involved in an authorized vocational program. We know of no reason why the employer's reopening of the claim at the last minute and for an unauthorized reason should prevent a determination of the extent of disability. The fact that the insurer believes that there is a potential for rehabilitation does not affect claimant's right to a determination of the extent of his disability if he is medically stationary and is not participating in an authorized vocational program. *See Gettman v. SAIF,* 289 Or 609, 616 P2d 473 (1980); *Leedy v. Knox,* 34 Or App 911, 581 P2d 530 (1978).

Reversed and remanded for determination of the extent of disability.

[1] In *Jones v. SAIF,* 49 Or App 543, 619 P2d 1342 (1980), the *Board* reopened the claim and remanded it to the referee for further hearings. We held that the order was not appealable. Here, the Board did not order that the claim be reopened; it held that it was in open status by virtue of employers' action.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Lynn O. Nelson, Claimant.

NELSON,
Petitioner,

v.

SAIF CORPORATION,
Respondent

(84-02707; A34757)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 10, 1986.

Richard A. Lee, Eugene, argued the cause for petitioner. With him on the brief was Velure & Bruce, Eugene.

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, pro tempore, and Van Hoomissen and Young, Judges.

GILLETTE, P. J., Pro Tempore.

Affirmed.

Van Hoomissen, J., dissenting.

GILLETTE, P. J., pro tempore.

Claimant seeks judicial review of a Worker's Compensation Board order reversing the referee's decision in claimant's favor. The issue, one of first impression in Oregon, is whether employer-paid medical insurance and pension benefits should be included in the Workers' Compensation Act definition of wages in the calculation of benefits. ORS 656.005(27).[1] The Board held that they are not encompassed by the definition. We agree.

Claimant suffered a compensable injury on October 11, 1983. At the time of the injury, he was a member of the Oregon Public Employees Union. Under the union's negotiated labor contract with the state, he was entitled to employer-paid fringe benefits, including pension benefits and medical and dental insurance. The benefits were provided in lieu of a salary increase. Claimant argues that employer's contributions to the pension fund and medical and dental insurance should be considered wages for purposes of calculating temporary total disability benefits due as a result of the compensable injury. ORS 656.210.

On review of the referee's order to include employer paid benefits as wages, the Board stated:

> "A general principle of statutory construction states that where general words follow an enumeration of specific items or classes, the general words will be construed as restricted by the specific designation so that they include only items of the same kind or class as those specifically enumerated. *State v. Brantley*, 201 Or 637 [271 P2d 668] (1954). In ORS 656.005(27) the general phrase 'or similar advantage received from the employer' follows a specific enumeration of 'board, rent, housing [or] lodging.' Thus, 'similar advantages received from the employer' must be of the same class as the specifically enumerated items. In [*Morrison-Knudson Const v. Dir. Wkrs. Comp. Prog.*, 461 US 624, 103 S Ct 2045, 76 L Ed 2d 194 (1983)], the court applied this principle to pension contributions.

> " 'The narrow question is whether these contributions are a "similar advantage" to board, rent, housing or lodging. We hold that they are not. Board, rent, housing or lodging are benefits with a present value that can be readily converted into a cash equivalent on the basis of market values.' *Morrison-Knudson Const. v. Dir. Wkrs.*

[1] ORS 656.005(27) provides, in pertinent part:

"(27) 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including reasonable value of board, rent, housing, lodging or similar advantage received from the employer * * *."

Comp. Prog., supra, 76 L Ed 2d at 199.[2]

"The court concluded that pension benefits are of a different class because they cannot readily be converted into a cash equivalent on the basis of market values. We agree with the analysis and find that contributions to PERS are not 'similar advantages' under ORS 656.605(27) and are, therefore, not 'wages' under the worker's compensation statutes.

"Further, the enumerated items in the statute are all benefits received by the employe from the employer. In other words, the employe has an immediate right to use and control them as soon as the employer makes them available. The PERS payments as well as the medical and dental premiums are benefits which are paid by the employer on the employe's behalf. The employe does not immediately receive them because there is no immediate right to use and control these employer paid benefits. Accordingly, we conclude that neither the PERS contributions nor the medical and dental premiums are 'similar advantages' under ORS 656.055(27). Therefore, these employer paid benefits should not be considered as wages in computing claimant's temporary disability rate."

We agree with and adopt the Board's reasoning.

Affirmed.

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[2]*Morrison-Knudson Const. v. Dir. Wkrs. Comp. Prog., supra,* 461 US at 624, construed section 2(13) of the Longshoremen's & Harborworkers' Compensation Act, 33 USC 902(13), which defines wages as

"the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer * * *."

In *Morrison-Knudson,* the Court held that employer contributions required by a collective bargaining agreement of which the worker was a beneficiary are not "wages."

VAN HOOMISSEN, J., dissenting.

I respectfully dissent for the reasons stated by the referee in his well reasoned opinion:

"The principal dispute between claimant and SAIF is a

simple one. Claimant contends that the amounts contributed by the State of Oregon under the negotiated contract for Public Employees' Retirement System and medical and dental insurance are to be considered as part of his salary for computation of temporary disability compensation as defined by ORS 656.005(27) which provides the definition for wages; specifically, encompassed within the statutory language which provides for inclusion of certain benefits other than the exchange of money for services rendered, namely ' * * * including reasonable value of board, rent, housing, lodging *or similar advantage* * * *'. SAIF contends that such 'fringe benefits' are not to be included or considered as a part of claimant's salary. [Emphasis in original.]

"No Oregon cases have been cited determining this question. However, I conclude that the language contained in the definition of wages as set forth in the statute is sufficiently clear that such amounts are to be included within the definition. There is no question that the amounts involved and in dispute were part of the recompense to be paid to the worker for his services as a part of the contract for hire. There is no dispute that those amounts were provided in lieu of salary

increases for the covered workers under the negotiated contract.[1]

"In today's world, it seems to me there is also no question that the contributions in dispute are part of the normal financial elements which are considered to be part of a worker's ordinary standard of living:

"1. The Public Employees Retirement contribution was provided to fund a worker's post-retirement income. Certainly, at the present time, he does not have the benefit of that contribution so he must, on his own, make other arrangements for post-retirement income. Part of that salary adjustment through temporary disability compensation would enable him, for example, to fund an IRA.

"2. He is not receiving unlimited medical and dental benefits through workers' compensation, but only medical services for injurious conditions resulting from his injury. Furthermore, he is no longer receiving the contribution of premiums for medical and dental insurance from the state; consequently, he must make his own separate provisions for medical and dental coverage to provide for contingencies not related to his worker's compensation injury. Such items

particularly are normally included in ones consideration of his standard of living.

"There can be no controversy that in today's society the requirements for post-retirement income are significant as are the contingency arrangements for medical and dental services; both areas are very critical and are the subject of very intense contract negotiations.

"Considering the statutory language with which we are faced, are such financial elements 'of similar advantage' to the employee and employer as board, rent, housing and lodging, *i.e.*, the food and shelter elements of the worker's ordinary standard of living? The use of the language 'or similar advantage' was clearly intended to provide a comprehensive phrase to encompass other benefits of equal or similar intent within those employment contract agreements between employee and employer. It is my opinion that the specific items in dispute here are of similar benefit in the normal contemplation of ordinary living which equally result in helping maintain the worker's financial responsibility for himself and his family. Therefore, I conclude that claimant is entitled to have his contributions for Public Employees' Retirement System and medical and dental insurance premiums included within his salary for purposes of temporary disability computation."

See Livingston v. State Ind. Acc. Com., 200 Or 468, 472, 266 P2d 684 (1954) (workers' compensation law should be interpreted liberally in favor of workers).

[1]It is undisputed that the benefits are being paid by the employer in lieu of salary increases in 1979, 1981 and 1983.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Allan Kytola, Claimant

KYTOLA,
Petitioner,

v.

BOISE CASCADE CORPORATION,
Respondent.

(WCB 82-06536; A34647)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 8, 1985.

David C. Force, Eugene, argued the cause and submitted the brief for petitioner.

Brian Pocock, Eugene, argued the cause and submitted the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Affirmed.

WARREN, J.

Claimant seeks review of an order of the Workers' Compensation Board which concluded that Boise Cascade (employer) had sustained its burden of proving that claimant is no longer permanently and totally disabled. He contends that the Board applied an incorrect standard to terminate his award of permanent total disability and that employer did not sustain its burden of proof.

Claimant suffered a compensable neck injury while working as a timber faller in 1974. He previously had suffered other disabling injuries. The present claim was first closed by a determination order in July, 1975, which awarded time loss and 35 percent unscheduled permanent partial disability for injury to claimant's neck, left shoulder and low back. Claimant was treated subsequently for physical and mental problems stemming from his injuries. A second determination order issued in February, 1977, awarded temporary total disability for March 30, 1975, through January 20, 1977, and permanent total disability beginning January 20, 1977. Employer did not appeal that order.

Employers have an obligation periodically to reexamine permanent total disability awards. ORS 656.206(5). In so doing, in this case, employer conducted surveillance of claimant and re-opened the claim on December 8, 1981, after it became aware of evidence indicating that claimant might not be totally disabled. It requested the Board to redetermine claimant's continued entitlement to permanent total dis-

ability. The Board subsequently issued an order on its own motion, referring this request for reevaluation to the Evaluation Division.

The department issued another determination order on July 1, 1982, which found that claimant was no longer permanently and totally disabled, but was only permanently partially disabled. It ordered permanent total disability benefits terminated as of December 8, 1981, and future payments for 40 percent unscheduled permanent partial disability. Claimant requested a hearing. The referee held that employer had the burden to prove that there had been a material change in claimant's condition since the original award of permanent total disability *and* that, because of the improvement, claimant had become employable. He found that employer had

proved that claimant is employable but had failed to prove that claimant's condition had improved since the original award of permanent total disability. The referee specifically found that claimant was not a credible witness and that he had performed gainful work since he was awarded permanent total disability. He also found that claimant is not and never was permanently and totally disabled.

Because the referee did not find a material change in claimant's condition, stating that "it is virtually impossible to prove a 'change' when the baseline never existed," he held that employer had failed to sustain its burden, despite the finding that claimant is currently employable.

Employer appealed to the Board, which held that the referee had applied the wrong standard to determine when an award of permanent total disability can be modified. The Board held that an employer need prove only that a claimant is presently capable of performing some work and that that capacity may be indicated either by proof of improvement in the claimant's medical condition *or* by circumstantial evidence of his employability. Finding evidence that claimant's condition had improved *and* that he is employable, the Board reversed the referee. Claimant claims that the Board applied the wrong standard and that employer failed to sustain its burden of proof under either standard.

We deal at the outset with claimant's argument that, because of procedural defects in the proceedings below, the Board never had jurisdiction to issue an order in this case. The argument is completely without merit. ORS 656.278(1) provides that the Board has continuing jurisdiction to modify, change or terminate former awards on its own motion. Claimant asserts that the Board itself must exercise the power in the first instance and that it improperly delegated the authority to the Evaluation Division. Claimant points to no legal authority to support his assertion. The Board had the authority to delegate the initial redetermination to the Evaluation Division. Claimant should not be heard to complain of the fact that the Board initially delegated the redetermination, when the Board ultimately made the final administrative decision on the issue.

On the merits, we agree with employer that the Board applied a proper standard to determine claimant's continued eligibility for permanent total disability. In *Gettman v. SAIF*, 289 Or 609, 614, 616 P2d 473 (1980), the court stated that an "award of compensation for permanent total disability can be reduced only upon a specific finding that the claimant presently is able to perform a gainful and suitable occupation." That holding was reaffirmed in *Harris v. SAIF*, 292 Or 683, 642 P2d 1147 (1982), where the court held that the claimant could be disqualified from permanent total disability if the Board found that he is presently able to perform a gainful occupation, even though the "claimant's disability remained essentially unchanged since his accident." 292 Or at 686. The Board correctly ruled here that claimant's award of permanent total disability could be modified if employer proved by a preponderance of the evidence that he is presently employable.

It remains for us to review the Board's finding that claimant is presently capable of performing a gainful and suitable occupation. A panel at Southern Oregon Medical Consultants examined claimant on December 8, 1981, and concluded that he was capable of performing light work and indicated several job descriptions which were within his physical capabilities. The referee found, from films and other evidence, that claimant was capable of gainful work and had, in fact, been employed during the period of his purported total disability. Films showed claimant chopping, unloading and stacking firewood and jacking up and working on his vehicle. Records indicated that claimant sold 118 cords of firewood to a California company in 1980, earning approximately $5,000. He took a job falling trees for six weeks in 1983. He testified that he worked at that job a few hours each day, starting at sunrise because at that early hour he could walk on top of the frozen snow as he cut the trees. He earned $650 for those six weeks. He also worked as a firewatcher fulltime in the summer of 1983, earning about $2,000. The referee also found that claimant is an expert welder and had earned approximately $1,500 at that occupation in 1981. In addition to the direct evidence of employability, the record is replete with medical evidence that claimant is not totally disabled.

We affirm the Board's order terminating claimant's

award of permanent total disability and awarding him permanent partial disability. Employer does not contest that award in any respect.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Sharon Bracke, Claimant.

BRACKE,
Petitioner,

v.

BAZA'R, INC.,
Respondent.

(83-02130; CA A33433)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 5, 1985.

Eugene L. Parker, Portland, argued the cause for petitioner. With him on the brief were Parker & McCann, Portland.

Scott M. Kelley, Portland, argued the cause and filed the brief for respondent.

Before Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to reinstate the referee's award of penalties and attorney fees; to take further evidence of time worked since January 1981 and of wages received since May 14, 1977; and to compute TTD.

YOUNG, J.

Claimant seeks review of an order of the Workers' Compensation Board which modified the referee's award of temporary total disability (TTD), penalties and attorney fees. Claimant argues that the Board erred (1) in holding that, once employer had been ordered to accept her denied claim, employer could unilaterally determine when claimant became medically stationary; (2) in finding claimant medically stationary as of September 12, 1978; and (3) in reducing the referee's award, made pursuant to ORS 656.262(10), of penalties and attorney fees. We reverse and remand.

Claimant worked as a meat wrapper for Baza'r until March 30, 1977. She also worked part-time as a meat wrapper for Albertson's and Thriftway until May 14, 1977. She quit working as a meat wrapper, because she was suffering from "meat wrappers' asthma," a form of reactive airway disease caused by exposure to polyvinyl chlorides (PVC) and thallic anhydride. She filed a claim against Baza'r in January, 1978, which was denied in March, 1978. The referee upheld Baza'r's denial, and the Board affirmed. The Supreme Court held that claimant had become disabled on January 12, 1977, from a compensable disease which was the responsibility of Baza'r and its insurer. *Bracke v. Baza'r,* 293 Or 239, 646 P2d 1330 (1982).

On April 4, 1983, the Supreme Court's mandate

issued. On April 12, the insurer requested claim closure. On April 20, the insurer paid claimant TTD in the amount of $1,976.04, for the period March 30, 1977, through June 30, 1977. The claim was closed by a May 12, 1983, determination order that granted claimant TTD from January 12, 1977, through March 30, 1977. In June, 1983, after pulmonary tests, Dr. Keppel determined that claimant had persistent reactive airway disease, which was not present before her work as a meat handler. Claimant's attorney supplied that information to the Workers' Compensation Department. As a result, the department, on July 14, 1983, set aside its May 12, 1983, determination order on the ground that it had been issued in error, because claimant was not medically stationary.

On August 25, 1983, a new determination order issued, granting TTD from January 12, 1977, through September 13, 1978, and awarding 10 percent unscheduled permanent partial disability for the injury to claimant's respiratory

system. That award apparently was based on Dr. Bardana's report that, when he saw claimant on September 13, 1978, she was capable of gainful employment, provided that there was no undue exertion and that she work in a reasonably pollutant free environment. He explained that, because of the meat wrappers' asthma, she had become permanently sensitized to lung irritants such as PVC and cigarette smoke and that she probably would remain asymptomatic so long as she avoided an environment with those triggering agents.

On November 3, 1983, the department set aside the August 25 determination order, apparently on the basis of new reports by Doctors Keppel and Colistro. In September, Keppel, after referring claimant to Colistro, a psychologist, and after receiving his report, had informed claimant's attorney that her emotional condition had had a significant negative impact both on her ability to cope with her disease and on her ability to return to gainful employment, that she was not then stable either emotionally or physically, that she was not released to return to work and that he had not released her. Colistro had reported:

> "In summary, Sharon Bracke is seen as suffering from depression, which is reactive to her physical condition, as it is greatly exacerbated by her physiological symptoms. Given her emotional instability as well as her personality structure, Ms. Bracke is unable to deal with her depression on her own, and psychological or psychiatric treatment is seen as being necessary and appropriate at the present time in order to assist her in coping in a more adaptive manner and assisting her in the return-to-work process.
>
> "* * * * *
>
> "With regard to the reactive component of her depression, benefits should be derived in a relatively brief period."

Intertwined with the described proceedings relating to claim closure was claimant's request, in February, 1983, for a hearing on the issues of TTD, penalties and attorney fees.[1]

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[1] In October, 1983, the referee considered Baza'r's motion to consolidate its requested claim closure hearing with the TTD hearing. Claimant opposed the consolidation, because substantial delay had already occurred in resolving the initial request for a hearing on TTD and because that delay had caused her a substantial economic hardship. The referee refused to consolidate the hearings, stating:

> "Absent the financial hardship being experienced by this claimant, my decision would be to consolidate these cases * * *."

Thus, in this case we review only the orders arising from the TTD hearing.

That hearing was held on July 18, 1983. Claimant sought penalties and attorney fees for the insurer's failure to pay TTD, as well as for the insurer's failure to provide claimant with a requested medical report. After testimony, the case was continued, pending submission of additional exhibits and written closing arguments. At the time of the hearing, claimant had received no TTD benefits except the payment in April, 1983. All of the above-mentioned doctors' reports were submitted as exhibits in the TTD hearing record, which was closed December 5, 1983; the referee's opinion issued December 9.

The referee held that, once the insurer was obligated to pay TTD,[2] it could not unilaterally terminate or refuse to pay TTD unless claimant returned to her regular work, was released to return to her regular work or her claim was closed under ORS 656.268. The referee found that none of those events had occurred and accordingly ordered insurer to pay TTD from July 1, 1977, until the claim is closed. The referee also awarded penalties of 25 percent of the amounts due claimant until the date of hearing and attorney fees of $1,500.[3]

Baza'r sought Board review, contending that the period of TTD was excessive and that penalties and attorney fees were unwarranted. The Board found that claimant had never returned, or been released to return, to her regular employment. The Board also agreed with the referee that, when neither of those events has occurred, an insurer *usually* cannot terminate TTD until a determination order issues.

However, the Board noted that this was not a usual case, because the claim had been in denied status, and stated:

> "[T]he question presented is, if the claimant has not returned or been released to return to regular work and the claim has been in denied status, is the insurer upon being ordered to accept the claim required to pay time loss until a Determination Order issues if the claimant has become medically stationary in the interim?"

The Board found that claimant had become medically stationary on September 13, 1978, and that any disability she had suffered after that date was a function of her permanently sensitized condition and should be considered in evaluating her permanent disability. It then held that, once an insurer is ordered to accept a denied claim, the insurer may

[2] It is not clear whether the referee thought that the obligation arose when the Supreme Court mandate issued, or instead arose at some other time. Although the referee correctly held that, under *SAIF v. Castro*, 60 Or App 112, 652 P2d 1286 (1982) *rev den* 294 Or 491 (1983), Baza'r had no duty to pay TTD until the mandate issued, she then stated that Bardana had authorized TTD and

> "[t]he fact that Dr. Bardana did not see claimant for over a year after claimant first left work does not mean that his authorization of time loss was insufficient to trigger the insurer's duty to pay compensation, *Hedlund v. SAIF*, 55 Or App 313, 637 P2d 1329 (1981).
>
> "Once the carrier was obligated to pay time loss, it could not unilaterally stop paying it unless claimant had returned to her regular work (as a meat wrapper), been released to return to her regular work or claimant's claim had been closed by the Evaluation Division, *Georgia Pacific v. Awmiller*, 64 Or App 56, 666 P2d 1379 (1983)."

[3] The referee also awarded attorney fees in the amount of 25 percent of the additional compensation, limited to $750. The Board did not modify that award; neither is it the subject of any argument on appeal.

determine unilaterally whether a claimant has become medically stationary, pay the TTD to which it believes the claimant is entitled and request claim closure. If the Evaluation Division refuses to close the claim because the claimant is not medically stationary, the insurer may request a hearing. If the referee finds that the insurer's termination of TTD decision is unreasonable, the referee may impose penalties and attorney fees.

The Board found that this insurer had basically followed the described procedure but that its refusal to pay TTD from January 12, 1977, to September 13, 1978, was unreasonable in light of the August 25 determination order, which awarded TTD for that period. The Board ordered the insurer to pay TTD from May 15, 1977, through September 13, 1978, less time worked, assessed a penalty of 25 percent of the amount of TTD awarded by the August 25 determination order, less the three months of TTD already paid, and reduced the referee's award of attorney fees to $1,000.

As noted above, claimant makes three assignments of error. We need not address her first assignment, because, after reviewing the record *de novo,* we hold that the Board erred in finding that claimant was medically stationary as of September 13, 1978.[4]

A claimant is "medically stationary" when "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). A mental condition may require continuance of TTD even after a claimant has become medically stationary physically. *See Grace v. SAIF,* 76 Or App 511, 709 P2d 1146 (1985); *Rogers v. Tri-Met,* 75 Or App 470, 706 P2d 209 (1985); *Berliner v. Weyerhaeuser,* 54 Or App 624, 635 P2d 1055 (1981).

Assuming that claimant's *physical* condition is stationary, the reports of Keppel, the attending physician, and Colistro, the psychologist to whom Keppel referred her, demonstrate that she is still suffering from depression, as a result of her meat wrappers' asthma. Both doctors believe that claimant will improve with short-term psychotherapy. Thus, claimant was not medically stationary on September 13, 1978, and the Board erred in finding that she was.[5]

Because we hold that claimant is not yet medically stationary, she is entitled to TTD from May 14, 1977 (the date she stopped work as a meat wrapper) until the Evaluation

Division determines that she is medically stationary and closes her claim. *Humphrey v. SAIF,* 58 Or App 360, 364, 648 P2d 367 (1982). Because she has been able to work sporadically, the TTD will be awarded "less time worked." *See*

[4] The Board addressed the "medically stationary" issue, even though it was not addressed by the referee or raised by the parties. We have held that it may do so when the issue raised *sua sponte* is related to the subject of the hearing. *See Larsen v. Taylor & Co.,* 56 Or App 404, 406 n 1, 642 P2d 317 (1982). In some cases, however, "the proper procedure would be for the Board to remand the case to the referee, ORS 656.295(5), for the taking of evidence on that issue." *Neely v. SAIF,* 43 Or App 319, 323, 602 P2d 1101 (1979), *rev den* 288 Or 493 (1980). No one has argued that the latter procedure should have been followed in this case.

Humphrey v. SAIF, supra, 58 Or App at 365 n 3; OAR 436-54-222(3).[6] We find, as did the referee and the Board, that claimant worked at the Chinese Village from June, 1977, to August, 1977, at the Healthway Food Store from March, 1980, to May, 1980, at the Portland Public Schools for four days in June or July, 1980, at the Gourmet Rabbit from October to November, 1980, at the Gateway Gourmet in November, 1980, and at Oregon Drapery from November, 1980 to January, 1981. The record is devoid, however, of evidence as to the amount of wages that she earned or of time worked since January, 1981. Because an award "less time worked" is based on a comparison of earning power before and after the disability, ORS 656.212;[7] OAR 436-54-222(3), we must remand the case to the Board for determination of the amount of wages she received.[8]

ORS 656.262(10) provides:

> "If the insurer or self-insured employer unreasonably * * * refuses to pay compensation, * * * the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due * * *."

[5] In finding claimant medically stationary, the Board stated:

> "Giving claimant the benefit of the doubt, we find that claimant was medically stationary when she was examined by Dr. Bardana on September 13, 1978. We find that any medical treatment claimant received or disability she suffered after that date was a function of her permanently sensitized condition and should be considered in evaluating her permanent disability."

Given Colistro's uncontradicted opinion that claimant's preexisting psychological problems were exacerbated by her asthma and that she would improve with short-term psychotherapy, we are unable to determine why the Board so held, unless it was confused by the following statement of Colistro:

> "At present her psychological condition is adversely affecting her recovery, reducing the threshold for respiratory disturbance and exacerbating its symptoms. However, at this juncture it would only be speculative as to the degree to which Ms. Bracke's emotional disturbance actually contributed to her physical condition since the physiologic reactions would also have significantly affected her emotional stability."

However, the question here is not whether claimant's emotional disturbance contributed to her physical condition, but the reverse, *i.e.*, whether her occupational disease materially contributed to her depression. *See Berliner v. Weyerhaeuser, supra*, 54 Or App at 626; *Patitucci v. Boise Cascade Corp.*, 8 Or App 503, 507, 495 P2d 36 (1972). Colistro did not say that it would only be speculative on that point; he stated that her physiological condition exacerbated her underlying psychological condition.

[6] OAR 436-54-222(3) 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."

[7] ORS 656.212 provides:

> "When the disability is or becomes partial only and is temporary in character, the worker shall receive for a period not exceeding two years that proportion of the payments provided for temporary total disability which his loss of earning power at any kind of work bears to his earning power existing at the time of the occurrence of the injury."

[8] This is probably why the referee stated:

> "The record before me does not provide sufficient information for what periods claimant should have received temporary total or temporary partial disability after June 1977. This requires an exchange of information between the employer/insurer and claimant."

Insurer argues that claimant is not entitled to more TTD than the $1,976.04 paid on April 20, 1983, because she was released to return to work by Bardana and because she returned to her regular work after January 12, 1977, the date when the Supreme Court said that she had become disabled. Even assuming that those arguments have merit, which they do not, insurer did not cross-petition and, therefore, is not entitled to a judgment more favorable than that awarded by the Board. *R. A. Gray & Co. v. McKenzie*, 57 Or App 426, 427, 645 P2d 30 (1982).

The referee awarded a penalty of 25 percent of the amounts due claimant from June, 1977, until "the date of hearing." The Board modified the award, holding that employer was unreasonable only in refusing to pay the TTD awarded by the August 25 determination order (*i.e.*, January 12, 1977, to September 13, 1978). Because the Board's reduction of the penalty award was based on its erroneous holding that claimant had become medically stationary, we hold that the Board erred in reducing the penalty. *See Hedlund v. SAIF,* 55 Or App 313, 318, 637 P2d 1329 (1981).

However, it is unclear whether the referee meant the date of the TTD hearing (December 5, 1983)[9] or instead the date of some future hearing on claim closure. Because a penalty can be imposed only on "amounts then due," ORS 656.262(10), we assume that the referee meant the former date. In the light of our holding that claimant is not medically stationary and the fact that the claim was *open* at the time of the TTD hearing, we agree with the referee that employer has unreasonably refused to pay TTD, and we reinstate her penalty award. ORS 656.268(1),(2).[10]

We also reinstate the referee's award of attorney fees. ORS 656.262(10) and 656.382(1) provide for an award of attorney fees where an employer or insurer has unreasonably resisted payment of compensation. We have held that it is an

error for the Board to reduce attorney fees based on an erroneous reduction of TTD. *Hedlund v. SAIF, supra,* 55 Or App at 318. Because the board apparently reduced the referee's attorney fee award on the basis of its erroneous reduction of TTD, we reinstate the referee's award.

Reversed and remanded with instructions to reinstate the referee's award of penalties and attorney fees; to take further evidence of time worked since January 1981 and of wages received since May 14, 1977; and to compute TTD.

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[9] Although the hearing was held on July 18, 1983, the record was not closed until December 5.

[10] ORS 656.268 provides in part:

"(1) * * * Claims shall not be closed nor temporary disability compensation terminated if the worker's condition has not become medically stationary * * *.

"(2) When the injured worker's condition resulting from a disabling injury has become medically stationary, * * * the insurer or self-insured employer shall so notify the Evaluation Division, the worker, and employer, if any, and request the claim be examined and further compensation, if any, be determined. * * * If the attending physician has not approved the worker's return to the worker's regular employment, the insurer or self-insured employer must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Grover J. Johnson, Claimant.

JOHNSON,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(WCB 83-03059; CA A34242)

Judicial review from Workers' Compensation Board.

Argued and submitted September 16, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief were Jeffrey S. Mutnick, 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 Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order dismissing his claim for asbestosis. The Board affirmed the referee's dismissal of the claim, because claimant's last exposure to asbestos occurred before the enactment of the Occupational Disease Law, Or Laws 1943, ch 442, effective July 1, 1943 *See* Or Laws 1943, ch 442, § 14), now ORS 656.802- 656.807. We affirm.

The dispute centers on the compensability of an asbestos-related occupational disease. Claimant was exposed to airborne asbestos fibers from December, 1941, through December, 1942. On January 18, 1983, he filed a claim for an asbestos- related disease.[1] SAIF denied the claim, and claimant requested a hearing. The referee granted SAIF's motion to dismiss on the ground that occupational diseases were not compensable in 1942, when claimant was last exposed.

Claimant argues that his claim is compensable, because (1) his right to compensation did not accrue until he became disabled by the disease, at which time the Occupa-

[1] At oral argument, SAIF's counsel argued that the claim was untimely, because it was not filed within 40 years of the last exposure as is required by ORS 656.807(4). Claimant's attorney responded that he believed the parties had stipulated below that that was not an issue. We are unable to find such a stipulation in the record. However, the record was not sufficiently developed on this issue, and, therefore, we are unable to reach it.

tional Disease Law was in effect, or (2), in any event, the Occupational Disease Law should be applied retroactively. We discuss the arguments in turn.

Occupational diseases were not compensable under the Oregon's Workers' Compensation Law before July 1, 1943. *See White v. State Ind. Acc. Com.*, 227 Or 306, 310, 362 P2d 302 (1961); *Ryan v. State Ind. Acc. Com.*, 154 Or 563, 567, 61 P2d 426 (1936); *Iwanicki v. State Industrial Acc. Com.*, 104 Or 650, 664, 205 P 990 (1922). The 1943 statutory definition of an occupational disease was essentially the same as the present definition. ORS 656.802(1)(a) provides:

> "(1) As used in ORS 656.802 to 656.824, 'occupational disease' means:
>
> (a) Any disease or infection which arises out of and in the scope of the employment, and to which an employe is not

> ordinarily subjected or exposed other than during a period of regular actual employment therein."

An occupational disease is considered an injury" under the Workers' Compensation Law. ORS 656.804. The procedure for processing occupational disease claims is the same as that for accidental injuries. ORS 656.807(5).

ORS 656.202(2) provides:

> "Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time *the injury giving rise to the right to compensation occurred.*" (Emphasis supplied.)[2]

Claimant argues that, because his right to compensation for an occupational disease could not have accrued until he became disabled, his injury" for the purposes of ORS 656.202(2) occurred when he became disabled, not when he was last exposed to asbestos. Because the Occupational Disease Law was in force when he became disabled, claimant continues, his claim is covered. We do not agree.

The question of when the injury" resulting from an occupational disease occurs has not been addressed in Oregon. ORS 656.804 provides:

> "An occupational disease * * * is considered an injury for employes of employers who have come under ORS 656.001 to 656.794, except as otherwise provided in ORS 656.802 to 656.824."

The statute fails to specify whether the injury" occurs when a claimant is last exposed to the injurious conditions or when the disease becomes disabling.[3]

We believe that using the date of last exposure is consistent with the language of ORS 656.202(2), which provides that the controlling law is the law in force at the time the

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[2] The emphasized language in ORS 656.202(2) was enacted in 1951. Or Laws 1951, ch 332, § 6. The legislative history is unavailable.

[3] The legislatures of some states have avoided the ambiguity by expressly choosing between these alternatives. For example, NC Rev Stat § 97-52 (Michie 1979) provides:

> "*Disablement or death* of an employee resulting from an occupational disease * * * shall be treated as the happening of an injury by accident * * *." (Emphasis supplied.)

injury *giving rise to* the right to compensation occurred." ORS 656.202(2). (Emphasis supplied.) That language indicates that an injury is *separate* from a right to compensation. Had the legislature intended otherwise, it could have provided that the controlling law is the law in effect when the right to compensation accrues. We recognized the distinction in *United Pac. Reliance Inc. v. Banks,* 64 Or App 644, 669 P2d 831 (1983),[4] and we adhere to it here.

Moreover, we are convinced that using the date of last exposure is the better rule. This is not the view of Professor Larson, who states[5] that the date of disability provides the most workable solution to the difficult problem of determining which law to apply in occupational disease cases:

> "Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. *In the search for an identifiable instant in time which can perform such necessary functions as to* start claim periods running, establish claimant's right to benefits, *determine which year's statute applies,* and fix the employer and insurer liable for compensation, *the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues* * * *." 4 Larson, *Workmen's Compensation Law,* § 95.21, 17-79—17-86 (1979). (Emphasis supplied; footnotes omitted).[6]

We do not agree that, *for the purpose of determining which*

year's statute applies, the date of disability is more satisfactory than the date of last exposure. We are not persuaded by Larson's argument that the date of disability should control because a claimant's right to compensation accrues only upon disability. He overlooks the fact that, in the present context, using the date of disability would impose a new obligation with respect to a past transaction, and thereby work a retroactive application of a compensation statute.

In workers' compensation law, the obligation to pay compensation arises *solely* from the employment relationship.[7] Here, the entire employment relationship took place before the enactment of the Occupational Disease Law. At the time of the employment transaction, the employer

[4] In *Banks,* we rejected the argument that the date of disability controls in accidental injury cases. The claimant was injured while United Pacific (U.P.) was the carrier, but he did not become disabled until after Argonaut Insurance became the carrier. We held that U.P. was the responsible carrier, stating:

> "U.P. argues that, because claimant did not miss work or seek medical treatment while U.P. was the carrier, it should not be responsible. The referee stated that 'compensation payments are not for the injury. They are for disablement.' We agree with the Board that the insurer covering the risk at the time of the injury bears responsibility for that injury, *even if resulting disability develops later.* That is the arrangement contemplated by the compensation statutes. *See, e.g.,* ORS 656.005(19), ORS 656.202(2)." 64 Or App at 651. (Emphasis supplied; footnote omitted.)

[5] The quoted language has been deleted from the current edition of *Larson.*

[6] In *Bracke v. Baza'r,* 293 Or 239, 247, 646 P2d 1330 (1982), the court held that, for the purpose of determining which of two successive insurers is the responsible insurer, the date of disability controls. Claimant argues that we should adopt the same date for the purpose of determining which year's statute applies. We disagree. The concerns which lead us to adopt the date of last exposure, *i.e.,* implicit retroactivity and the language of ORS 656.202(2), were not present in *Bracke.*

would have had no obligation to pay compensation, because occupational diseases were not then compensable. In contrast, if we were to adopt claimant's date of disability argument, there would be an obligation to pay compensation. Thus, using the date of disability would, in effect, work a retroactive application of a compensation statute. *See Walker v. Johns-Manville,* 311 So 2d 506, 508 (La App 1975); *Anderson v. Sunray Electric,* 173 Pa Super 566, 98 A2d 374 (1953).[8] As discussed below, we have refused to apply compensation statutes retroactively without some support for doing so in the legislative history. We will not do implicitly what we have refused to do explicitly. To avoid an implicit retroactive application of a compensation statute, we believe that using the date of last exposure is the better rule. For those reasons, we hold that, for the purposes of ORS 656.202(2), the injury" resulting from an occupational disease occurs on the date of last exposure.

Claimant's final argument is that the Occupational Disease Law should be applied retroactively, because the 1981 enactment of a 40-year statute of limitations for asbestos-related diseases, Or Laws 1981, ch 535, § 47, demonstrates a legislative intent to include claims arising from asbestos exposures before July 1, 1943. We disagree.

In *Bradley v. SAIF,* 38 Or App 559, 590 P2d 784, *rev den* 287 Or 123 (1979), we held an amendment to ORS 656.218, relating to eligibility for benefits, was not to be given retroactive effect. We stated:

> "The key factor in retroactive application questions is legislative intent. *See, e.g., Mahana v. Miller,* 281 Or 77, 573 P2d 1238 (1978); *Employment Div. v. Bechtel,* 36 Or App 831, 585 P2d 769 (1978). That intent may be discerned from the effects of retroactive application. As the court stated in *Joseph v. Lowery,* 261 Or 545, 548-49, 495 P2d 273 (1972):
>
> " '[T]his court has refused to give retroactive application to the provisions of statutes which affect the legal rights and obligations arising out of past actions. This is without respect to whether the change might be procedural or remedial" or substantive" in a strictly technical sense.'
>
> In the present case, application of current law rather than former law would change the rights and obligations arising out of past transactions. Respondent could be liable for greater payments than those for which it would have been liable under former law. In light of the express language of ORS 656.202(2), the presumption against retroactive application (*Smith v. Clackamas County,* 252 Or 230, 448 P2d 512 (1969)) and the absence of any legislative history supporting retroactivity, we hold that the amendment to ORS 656.218 applies prospectively only." 38 Or App at 564.

[7] Employers are liable for compensation only if an injury aris[es] out of and in the course of employment," ORS 656.005(8)(a), or if an occupational disease arises out of and in the scope of the employment." ORS 656.802(1)(a).

[8] Several courts have held that using the date of disability does not work a retroactive application of a compensation statute. *See, e.g., Frisbie v. Sunshine Mining Co.,* 93 Idaho 169, 457 P2d 408 (1979); *Wood v. J. P. Stevens & Co.,* 297 NC 636, 256 SE2d 692 (1979). We think that these cases focused only on one side of the retroactivity equation, the accrual of rights, ignoring the fact that a statute operates retroactively if it *either* impairs existing rights *or* creates new obligations with respect to past transactions. *Kolodejchuk v. Lucier,* 52 Or App 981, 985, 630 P2d 889 (1981). Although it is true that the *amount* of an insurer's liability is not determinable until the claimant becomes disabled, the *liability itself* exists, if at all, as the result of a work-related exposure.

See also Miner v. City of Vernonia, 47 Or App 393, 398, 614 P2d 1206, *rev den* 290 Or 149 (1980). *Bradley* controls the present case. As noted above, if we were to apply the Occupational Disease Law retroactively, we would be imposing a new obligation on SAIF with respect to claimant's past exposure to asbestos. We will not apply the law retroactively unless the legislature has indicated a contrary intent.

After a thorough examination of the legislative history, we find no indication that the 1981 legislature intended

retroactive application of the Occupational Disease Law.[9] Moreover, the 1943 legislature, which first enacted the Occupational Disease Law, indicated that it did not intend retroactive application. Section 8 of the original act provided:

> "Nothing in this act shall entitle an employee, or his dependents, to compensation, medical treatment, or payment of funeral expenses, for disability or death from silicosis, unless the employee has been subject to injurious exposure to silica dust (silicon dioxide) in his employment in Oregon preceding his disablement, for periods amounting in all to at least five years, *some portion of which shall have been after the effective date of this act.*" Or Laws 1943, ch 442, § 8. (Emphasis supplied.)[10]

We therefore hold that the Occupational Disease Law does not apply retroactively to asbestosis and asbestos-related claims if the last exposure occurred before July 1, 1943.

Affirmed.

[9] The legislature *did* intend that the 40 year Statute of Limitations apply retroactively. *See Argonaut Insurance Companies v. Eder,* 72 Or App 54, 57, 695 P2d 72 (1985). There is, however, no indication that the legislature even considered retroactive application of the Occupational Disease Law.

[10] The legislative history of this bill is unavailable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Brian Palmer, Claimant.

PALMER,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-06780; CA A34304)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 4, 1985.

David C. Force, Eugene, argued the cause and submitted the briefs for petitioner.

Darrell E. Bewley, 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 Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to accept claim.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order which affirmed the referee's denial of compensability. The issue is whether claimant proved by a preponderance of the evidence that his sinusitis is a compensable occupational disease. ORS 656.802(1)(a). We reverse and remand.

Claimant worked at Duco-Lam, Inc., from December, 1977, to March, 1982,[1] primarily as a sawyer on the finish end. His duties included running bandsaws, electric handsaws and chainsaws and puttying and scraping laminated beams. As a result, he was exposed to varying amounts of fine airborne sawdust. He smoked a pack of cigarettes every one or two weeks.

Early in 1982, claimant saw Dr. Wiltse and complained of headaches. Wiltse referred claimant to Dr. Johansen, an otolaryngologist. On March 22, 1982, Johansen wrote to Wiltse:

> "[Claimant], a 28 year old white male, was seen in my office with the history of having persistent headaches for the past several weeks. The patient had been seen by you and placed on antibiotics including Keflex.
>
> "The patient complains of moderate drainage into his throat but does complain of fullness of the cheek areas and head areas.
>
> "The patient also apparently saw a chiropractor for treatment.
>
> "The patient has had radiograms taken and these do reveal pansinusitis with involvement of the paranasal-sinuses. The patient's headache apparently is rather severe. This does seem to bother him greatly.
>
> "Examination today reveals the nasal turbinates are edematous. A vasoconstrictor was applied. We do see exudate present in both frontal sinus areas, left over right. Nasopharynx shows slight to moderate edema. Oral cavity, pharynx, larynx and neck normal. Transillumination does reveal marked haziness of the paranasal sinus areas.
>
> "Impression: Acute frontal sinusitis. Acute maxillary sinusitis.
>
> "Therapy: Proetz displacement using Pontocaine anesthesia.[2] He was then placed on Ampicillin and Tyzine nasal spray. We will see him back for follow-up care."

Claimant stopped working at Duco-Lam in late March, 1982, and did not work again until December. He also quit smoking during that time. Claimant testified that, during

[1] Claimant was actually employed at Duco-Lam until he was laid off in May, 1982. However, claimant did not return to work after a motorcycle accident in late March.

[2] "Proetz displacement" is also referred to in the record as "Proetz sinus aspiration."

the period of unemployment, his sinusitis symptoms "almost cleared up" but that he still took antibiotics when they would occasionally flare up.

In December, 1982, claimant was employed by Tyee Timbers, doing the same work as at Duco-Lam. He also resumed smoking. His sinus condition worsened over the next few months. He again consulted Johansen, who treated the problem with another Proetz displacement, medication and finally with surgery on March 25, 1983. On May 5, 1983, claimant filed a claim against Duco-Lam; SAIF denied it on July 8.[3]

Johansen testified that sinusitis is an infection of the sinus cavity. He explained that exposure to sawdust or dust, cigarette smoke or other allergens can cause the nose to run, producing a discharge which blocks the sinus opening. He further explained that

> "basically how sinus disease commences is by a blockage of sinus drainage—the so-called ostia. * * * This will lead to chronic changes and thickening of the mucosa lining, of which he had an X-ray, and the diseased lining, more or less, of his sinus cavities."

Johansen testified that, if claimant's exposure to sawdust was minimal, it would not be a major contributing cause of his sinusitis but, if he had a heavy sawdust exposure, then it would be a major contributing cause. He also testified that heavy sawdust exposure could cause both the disease and a worsening of symptoms. He defined "heavy" sawdust

exposure as large amounts of sawdust in the nose, causing blockage with nasal congestion.

Claimant testified:

> "I worked on the finish end, and whenever we ran the saws or anything, it would create a lot of sawdust, which would be caked all over the floor and all over you, and you would have to breathe it. Every once in a while, we'd have to stop what we were doing and go over to the air hose and blow the sawdust off of our glasses or whatever, just so we could carry it on. Get away from the sawdust a little bit, so we could breathe a little better."

He also testified that, because he is left-handed, he stands on the side of the saw where the sawdust discharges in order to get a true saw cut. Claimant's wife testified that, when he came home from work, he would have sawdust in his hair, the cuffs of his pants, down his neck and in his shirt pockets, and that sawdust was present on tissue when he blew his nose. A former Duco-Lam employe testified that, on an average, there were two hours of sawing per day in the finish end and that the saws kick sawdust onto the face of the workman. He also testified that it was common for finish end workers to blow their noses to get rid of sawdust. Two current employes testified that they get some sawdust, but not "a whole lot," in their hair and on their faces when they saw.[4]

In order to establish that his sinusitis is a compensa-

[3] SAIF did not pay any interim compensation. ORS 656.262(4). The referee awarded interim compensation, as well as penalties and attorney fees for that failure to pay. The Board affirmed. Those awards are not challenged on review.

ble occupational disease, claimant must prove by a preponderance of the evidence that his exposure to sawdust at Duco-Lam was the major contributing cause of his sinusitis. *Reining v. Georgia-Pacific Corp.*, 67 Or App 124, 128, 676 P2d 926 (1984); *Penifold v. SAIF*, 60 Or App 540, 544, 654 P2d 1142 (1982). The referee and the Board determined that claimant did not meet that burden. We disagree.

Johansen testified:

> "Q [Claimant's attorney]: Assuming Mr. Palmer was exposed to sawdust to such an extent that it actually gathered in his hair and his nostrils to a palpable extent and became a grime-like substance on his face and hands, and he had to shake it out of his clothes at the end of the day. Does that sound like the kind of exposure that could have an impact on a sinus condition either by developing it or exacerbating it?
>
> "A: Yes, I would say so, as he is exposed to this much sawdust, and it would certainly seem to aggravate his condition.
>
> "Q: Do you think it would be the major aggravating device—major contributing cause—to the need for Mr. Palmer's surgery?
>
> "A: Well, this would be rather difficult to state actually without, you know, going into his complete past background, and *I just have to say it would certainly be a major factor in producing the sinus disease.*
>
> "* * * * *
>
> "Q: We know he was a smoker, but not necessarily a particularly heavy smoker.
>
> "A: Yes.
>
> "Q: Given that and given an exposure that has been described and allowing for the fact that we are not in a laboratory, it is reasonable to state that the employment was probably the major contributing cause; accepting my hypothetical that I have given you.
>
> "A: I would say so, if you went by his history, he seemed to be aggravated a great deal by the sawdust, producing nasal stuffiness and nasal blockage." (Emphasis supplied.)

The lay testimony concerning sawdust levels at Duco-Lam supports the hypothetical posed to Johansen. On the basis of that lay testimony and on Johansen's opinion, we find that claimant's employment at Duco-Lam was the major contributing cause of his sinusitis, which eventually required surgery.

The referee found Johansen's opinion unpersuasive:

> "To a lay person it would appear that in terms of the condition that prompted surgery there would be great significance to the fact that the claimant's symptoms had 'almost cleared up', then commenced again and worsened after he began working for [Tyee Timbers]. However, nowhere does it appear that Dr. Johansen, the only doctor who has expressed an opinion on the subject, was even *aware* of such a history.

[4] Sawdust sample tests were taken at the Duco-Lam plant. The tests showed that sawdust levels in the plant were seven to thirteen percent of the allowable Oregon limit. There was conflicting testimony over whether the tests were conducted on an "average" day. We need not resolve that conflict, because there is no evidence explaining what those test results mean in terms of sawdust accumulating in claimant's nose. The mere fact that sawdust levels were well within legal limits does not mean that the sawdust did not cause claimant's sinusitis. We instead rely on the testimony of current and former employes.

> Apparently the doctor did not consider it and therefore I feel that a major element of history has been omitted from his opinion and it cannot be persuasive." (Emphasis in original.)[5]

The referee could have been troubled either (1) because claimant's sinusitis theoretically[6] might have been cured (without surgery) during that period, with the later employment causing it anew, or (2) because Johansen testified that it is possible that a person could have several episodes of rhinitis (nasal congestion), with the last one developing into sinusitis, *i.e.*, the last one here being at Tyee Timbers.

As to the first, we accept claimant's testimony that, although the symptoms "almost cleared up," he continued to take antibiotics during the period of unemployment. That testimony persuades us that his sinusitis was not cured while he was unemployed. As to the second, Johansen diagnosed sinusitis while claimant worked at Duco-Lam. That diagnosis persuades us that claimant was not suffering merely from rhinitis at Duco-Lam.

Other than those two possible objections, we see no reason why Johansen's testimony should be accorded little weight simply because he does not appear to have been aware of claimant's entire history. While we have held that a physician's opinion is entitled to little weight when it is based on incomplete facts, *see, e.g., Somers v. SAIF,* 77 Or App 259, ___ P2d ___ (1986), the omitted facts must have some bearing on the relevant issue. That logical connection is absent here and, therefore, we find Johansen's testimony persuasive.

Reversed and remanded with instructions to accept the claim.

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[5] Claimant states in his brief:

> "The Referee's conclusion that the disease arose out of Claimant's employment by Tyee Timbers between December of 1982 and February 28, 1983 simply makes no logical sense on this record."

We can find no such conclusion in the referee's order. The referee concluded only that Johansen's opinion was not persuasive because the record does not show that he was aware of claimant's entire history.

[6] There was no testimony by Johansen or anyone else on whether this was a possibility.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Harold M. Miller, Claimant.

MILLER,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-02346; CA A34889)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 4, 1985.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

Linda DeVries Grimms, Assistant Attorney General, Salem, argued the cause for respondents. On the brief were Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and Stephen E. A. Sanders, Assistant Attorney General, Salem.

Before Gillette, Presiding Judge Pro Tempore, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order affirming the referee's denial of his aggravation claim and reversing the referee's award of attorney fees for SAIF's delay in denying the claim. We affirm.

On August 13, 1976, claimant suffered a compensable fracture of his left hip that required surgery. On March 13, 1978, a Determination Order issued, awarding temporary total disability from August 13, 1976, through February 14, 1978, and 30 percent scheduled permanent partial disability of the left leg. Claimant did not seek review of the order. He continued to experience pain, and on March 11, 1983, he filed an aggravation claim.[1] SAIF denied the claim at a hearing on June 7, 1984, roughly 15 months after the claim was filed.

The referee decided that claimant had failed to prove a worsening of his condition since the last arrangement of compensation, stating:

> "[Claimant's] testimony reveals his activity levels in 1983 and currently if anything exceed those which he was capable of performing on March 13, 1978."

The referee did award claimant $350 in attorney fees for SAIF's delay in denying the claim. Claimant sought Board review. The Board affirmed the denial of the aggravation claim and reversed the attorney fee award, because there were

no "amounts then due" on which to assess attorney fees. ORS 656.262(10).[2]

Claimant argues that the Board erred in (1) holding that he had failed to prove a worsening of his condition, (2) denying his motion to remand for the taking of further evidence and (3) reversing, *sua sponte,* the award of attorney fees. We consider the second assignment of error first.

At the hearing, the referee refused to admit Dr.

Vessely's report dated May 30, 1984. The Board denied claimant's motion to remand. Claimant argues that that action was erroneous and asks us to remand pursuant to ORS 656.298(6). SAIF concedes on appeal that the report should have been admitted, and we agree. Because the report was preserved in the record, remand is not necessary. We turn to claimant's first assignment of error.

After *de novo* review of the record, including Dr. Vessely's report, we agree with the referee and the Board that, although claimant now suffers some back pain which was not present in March, 1978, the evidence does not establish that that pain has resulted in additional or greater disability. Claimant failed to meet his burden of proof. *See Harwell v. Argonaut Insurance Co.,* 296 Or 505, 510, 678 P2d 1202 (1984); *Walker v. Compensation Department,* 248 Or 195, 196, 432 P2d 1018 (1967); *McElmurry v. Roseburg School District,* 77 Or App 673, ___ P2d ___ (1986).

Claimant's final assignment of error is that the Board erred in reversing *sua sponte* the referee's award of attorney fees. He argues (1) that the Board "lacked jurisdiction" to reduce the award, because SAIF did not cross petition, and (2) that, even if the Board has the power, it incorrectly reversed the award. We disagree.

We have consistently held that the Board's "review is *de novo* and that it may reverse or modify the order of the referee, or make such disposition of the case as it determines to be appropriate," *Russell v. A & D Terminals,* 50 Or App 27, 31, 621 P2d 1221 (1981); a cross-petition to question the referee's award is unnecessary. *Neely v. SAIF,* 43 Or App 319, 323, 602 P2d 1101, *rev den* 288 Or 493 (1979); *Cf. R.A. Gray & Co. v. McKenzie,* 57 Or App 426, 427, 645 P2d 30, *rev den* 293 Or 340 (1982) (requiring cross-petition to obtain more favorable judgment on review by Court of Appeals). Thus, the Board may reverse the attorney fee award, even though SAIF did not cross-petition. The question is whether the Board was correct in doing so.

ORS 656.262(10) provides:

> "If the insurer * * * unreasonably delays acceptance or denial of a claim, the insurer * * * shall be liable for an additional amount up to 25 percent of the amounts then due

[1] The "claim" consisted of a hearing request form, which had a box labeled "Aggravation" checked off. Claimant simultaneously filed a request to cancel the hearing date in order "to allow [SAIF] time to process [the] aggravation application."

[2] In the usual case, an insurer must begin paying interim compensation within 14 days of filing of an aggravation claim. ORS 656.273(6). However, the record reflects that claimant has been out of the work force since his original compensable injury and, thus, was not entitled to interim compensation pending acceptance or denial of his claim. *See Cutright v. Weyerhaeuser,* 299 Or 290, 300, 702 P2d 403 (1985).

plus any attorney fees which may be assessed under ORS 656.382."

Claimant correctly argues that ORS 656.262(10) does not require "amounts then due" as a prerequisite to an award of attorney fees. However, ORS 656.262(10) *does* state that the fee award "may be assessed under ORS 656.382." The pertinent part of ORS 656.382 provides:

> "(1) If an insurer * * * *unreasonably resists the payment of compensation,* the * * * insurer shall pay to claimant * * * a reasonable attorney's fee * * *.

The language is clear. Claimant was entitled to an attorney fee only if SAIF unreasonably had resisted the payment of compensation. Claimant does not argue, nor does it appear he could argue, that SAIF's delay in denying his claim amounted to an unreasonable resistance to the payment of compensation. The Board did not err. *See Poole v. SAIF,* 69 Or App 503, 508, 686 P2d 1063 (1984).

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Clara J. Petersen, Claimant.

PETERSEN,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 83-05423; CA A33543)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 19, 1985.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Nicholas M. Sencer and Malagon & Associates, Eugene.

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 for acceptance of claim.

Buttler, P. J., dissenting.

ROSSMAN, J.

This is an occupational disease claim in which claimant seeks review of a Workers' Compensation Board decision

which affirmed the referee's determination that claimant's mental disorder is not compensable. On *de novo* review, we reverse.

In February, 1983, claimant, a billing clerk for the city of Myrtle Point, filed a claim form indicating that she was unable to work due to "stress, job harassment and undermining of the city administrator." The claim was denied.

Claimant testified at the hearing that her troubles at work started in September, 1981, when a new city administrator was hired for the purpose of reorganizing the city offices. He changed her job description, took away certain of her responsibilities and found fault with her work. He ignored her suggestions and, according to her uncontradicted testimony, placed unrealistic expectations on her. He did not allow her to work at home while she was sick, but made her take sick leave. She testified that there was a great deal of tension in the office.

Claimant began receiving treatment for stress from Dr. Reed Gurney and Dr. E. R. Gurney in January, 1982. In January, 1983, they diagnosed "situational stress reaction" and "chronic anxiety and depression" and advised claimant to stop working, because they believed that her job was creating stress and making it difficult for her to function. That is when claimant filed her claim. She did not return to work. Her position was eliminated in June of that year.

Claimant was referred by SAIF to Dr. Holland for a psychiatric examination. He performed psychological tests which he stated indicated a moderate level of depression and a "profile which is diagnostic of paranoid type schizophrenia." He concluded, however, that there was no clinical evidence of schizophrenia and that claimant's mental status demonstrated no significant abnormalities. Holland noted that claimant had other stresses in her life. He also found her to have "a significant level of interpersonal dysfunction," as indicated by a history of six marriages. In his opinion, claimant's predisposition to psychiatric symptoms was the major contributing cause of her difficulties but he would express no

opinion as to how her work might have affected her problems. The doctors Gurney referred claimant to Dr. Martin, a psychiatrist. He disagreed with Holland's conclusion that claimant is predisposed to psychological problems and reported in September, 1983, that claimant's on-the-job exposure to stress was a major contributing cause of her psychological condition.

The referee determined that claimant had failed to prove that the real events and conditions of her work had caused the problems. In the opinion portion of her order, the referee stated:

> "It would appear from the record that the majority of the claimant's stresses came from a perceived stress source rather than from a real identifiable stress source. It is also difficult for me to accept the fact that when viewed objectively the specific incidents that the claimant testified to would be sufficient to be the basis for a stress claim."

A claim for a stress-related condition must be supported by proof of objective stress factors on the job. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983). The stress-causing work conditions must be "objective" in the sense that the conditions must be real, as opposed to imaginary; their medical effect on the worker, however, is measured by the worker's actual reaction, rather than by an objective standard of whether the conditions would have caused disability in the average worker. *SAIF v. Shilling,* 66 Or App 600, 675 P2d 1081 (1984). Here, even if claimant's reaction to the real events of a new city manager and changed work duties was psychotic, her condition would still be compensable, if she was reacting subjectively to real, potentially stress-causing events. In *Shilling,* the claimant sought compensation for a stress- related illness due to what she characterized as "overwork." SAIF argued that there was no objective evidence that claimant was overworked. We stated:

> "* * * The question is not whether claimant's perception of overwork was accurate, or whether claimant was overworked as judged by a standard of what would constitute overwork to the average person on her job. The question is whether there were stress-causing pressures on her job that were 'real.' * * *" 66 Or App at 605.

In studying the record, we found that the claimant's job in

general had subjected her to real pressures. She was frequently required to tend the office alone and to deal with long lines of people, sometimes working through her breaks and lunch hour. We stated that her reaction to those real pressures was not a reaction to mere imaginary conditions.

> "* * * That she was more susceptible to the conditions than others might be, that she characterized them as 'overwork' when someone else would not have or that they were more stressful for her does not preclude her claim." 66 Or App at 606.

Similarly, here, claimant's characterization of the events at work as stress and "harassment," rather than, for example, office tension and a reorganization of office duties, does not preclude her claim. The record contains uncontradicted evidence of many "real factors" which, when viewed objectively, are capable of producing stress: the new administrator took away many of claimant's responsibilities; he found fault in her work; he did not allow her to be paid for work done at home; he changed her job description; there was tension at the office. Claimant reacted to those events by feeling harassed and "undermined." Her reaction need not have been reasonable; it need not even have been rational. If claimant reacted to real events, she had a basis for a stress claim. *See Leary v. Pacific Northwest Bell,* 67 Or App 766, 680 P2d 5 (1984). Although the conditions of claimant's work may not have been sufficient to give rise to illness in the average person, we are persuaded by both the medical and the non-medical evidence that claimant has proved that the stress of those real events was the major contributing cause of her disability and of her need for treatment for a stress-related mental condition. *Cf. Leary v. Pacific Northwest Bell, supra* (we found that most of the conditions that allegedly produced

stress were imaginary). Although claimant had experienced other stresses in her life, she had always been able to cope in the past. We find, from a preponderance of the evidence on *de novo* review, that it was the employment-related stress that brought about her disability.

The thrust of SAIF's argument is that the responsibilities which claimant felt were being taken from her by the new city administrator were not part of her job description as a billing clerk and that, therefore, stress caused by the taking

away of those responsibilities was not a risk of her employment. The argument is unpersuasive. The conditions of a person's employment are not defined solely by the job's description. If claimant was required, before the arrival of the new administrator, to perform tasks outside of her job description, and the record does not indicate otherwise, those tasks were part of her employment.

Claimant seeks the imposition of a penalty and attorney fees under ORS 656.262(10) for denial of her claim. Although SAIF's denial was wrong, we do not conclude that SAIF acted so unreasonably as to justify the assessment of a penalty. SAIF had in its possession, at the time of the denial, a report of Holland, who suggested that off-the-job stress might also have been responsible for claimant's condition. On the basis of that opinion, it had a legitimate doubt as to its liability. *Norgard v. Rawlinsons,* 30 Or App 999, 569 P2d 49 (1977).

Reversed and remanded for acceptance of the claim.

BUTTLER, P. J., dissenting.

Because I agree with both the referee and the Board that claimant has not sustained her burden to prove that the on-the-job conditions, whatever they were, were *the* major contributing cause of her psychological problems, I would affirm. There are two parts to the problem.

First, assuming that the majority properly interprets *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983), and *Leary v. Pacific Northwest Bell,* 67 Or App 766, 680 P2d 5 (1984), as holding that a claimant's unrealistic perception of events that occurred on the job justifies compensation if the misperceptions resulted in psychological disability, it misapplies the requirement that at-work conditions, when compared to off-work exposure, be the major contributing cause of claimant's disease. Here, although the medical evidence was conflicting, it was agreed that claimant was exposed to several off-the-job stresses, including difficulties with one of her children, flooding that surrounded her house and isolated her for days at a time each winter, and her interpersonal disfunction, evidenced by a history of six marriages. She is 35. Although claimant had seen four doctors, only one of them, Dr. Martin, came close to supporting her claim. However, he did not come

close enough: he stated that claimant's on-the-job exposure to stress was *a* major contributing cause of her psychological condition. The majority translates that opinion as stating that the on-the-job stress was *the* major contributing cause.

When there are several stress factors that contribute to a claimant's psychological problem, some of which are job-related and others not, a statement that the job-related stress is *a* major cause does not equate with its being *the* major cause. If we assume that each of the stress factors could be quantitatively assessed, it could be that three off-the-job stress factors each contributed to the extent of 20 percent and that the on-the-job stress contributed to the extent of 40 percent. Under those circumstances, it would be accurate to state that the on-the-job stress was *a* major contributing cause; however, it would not be accurate to state that the on-the-job stress (40 percent), as compared to the off-the-job stress (60 percent), was *the* major contributing cause.

The majority, apparently recognizing that the medical evidence is insufficient to carry claimant's burden, bridges the gap by stating that it relies on both the medical and non-medical evidence to conclude that the job-related stress was *the* major cause of claimant's psychological problems. It is not clear what non-medical evidence the majority relies on, unless it is the statement that "[a]lthough claimant had experienced other stress in her life, she had always been able to cope in the past," (___ Or App at ___; slip opinion at 5). Not even claimant asserts that. Rather she concedes that she has had "prior emotional problems" but that they had been resolved at the time she worked for the city.

To the extent that the majority relies on lay testimony to support its conclusion that on-the-job stress was *the* major contributing cause of her psychological problems, it is in error. This kind of problem is not uncomplicated; it requires expert testimony, although the expert need not be a specialist in psychiatry. A medical doctor's testimony is competent to show the causal connection, *Barrett v. Coast Range Plywood,* 294 Or 641, 661 P2d 926 (1983), and in order to establish compensability one "must then look either to the degree or to the quantum of stress on the job as compared to that off the job." *Dethlefs v. Hyster Co.,* 295 Or 298, 308, 667 P2d 487 (1983). On this record, claimant has not sustained her burden

to show that the on-the-job stress, when compared to the off-the-job stress, was *the* major cause of her disability. Accordingly, and for this reason alone, I would affirm.

The second aspect of the problem is more problematical. We had found in *McGarrah v. SAIF,* 59 Or App 448, 651 P2d 153 (1982), that the on-the-job events of which the claimant had complained had actually occurred, that there was no evidence of stress off the job that contributed to his condition and that the medical evidence was undisputed that the job-related stress caused claimant's mental disorder. On those facts, we held that the claim was compensable. In *Leary v. Pacific Northwest Bell,* 60 Or App 459, 653 P2d 219 (1982), we held that claimant's work-related stress was the major contributing cause of his disability, applying the subjective test, concluding that, even though the work-related stress appeared largely to be his own reaction to his working conditions, the claim was compensable.

The Supreme Court granted review in both *McGarrah* and *Leary.* The court affirmed *McGarrah,* holding that we

had properly applied the objective test; it remanded *Leary,* because we had applied the subjective test. On remand, 67 Or App 766, 680 P2d 5 (1984), applying the objective test, we found that some of the on-the-job stress causing conditions were real and that others were imagined. We stated that, when viewed objectively, the on-the-job conditions could produce stress, even though an average worker might not have responded adversely to them. Notwithstanding that observation, we held that the claim was not compensable, apparently because we concluded that most of the events and conditions of claimant's employment that produced stress were imagined and that claimant's stress appeared to result primarily from his perception of the way he was treated at work.

Although I confess some doubt, I believe that the Supreme Court's opinion in *McGarrah* and our opinion in *Leary* on remand require that, not only must the events complained of actually have occurred, but also that the claimant's perception of the events must have been within the realm of reason. Here, all that really occurred was that a new city manager took over and made some changes, including a change in claimant's job description. The new manager's reorganization of the city offices, the purpose for which he was

hired, apparently created tension in the office. That much is reasonably understandable. However, claimant's principal concern was that she was going to be "squeezed out" of her job. Although she said that some work was taken from her, she also complained that she did not have time to do her assigned work. There was no evidence that anyone sought to dismiss her. She felt nervous and sought tranquilizers, because she did not want to lose the contact with people which her job afforded her. Unless the majority is right in applying a subjective test, I do not think the record is sufficient to sustain this aspect of claimant's burden of proof.

Accordingly, I respectfully dissent.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Raymond P. Davidson, Claimant.

DAVIDSON,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(83-10512; CA A34909)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 5, 1985.

Robert Wollheim, Portland, argued the cause for petitioner. With him on the brief was Welch, Bruun and Green, Portland.

Darrell E. Bewley, 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 Richardson, Presiding Judge, and Warden and Newman, Judges.

PER CURIAM

Modified to award additional unscheduled permanent partial disability of 56 degrees for aggravation, for a total of 240 degrees; affirmed as modified.

PER CURIAM

In this workers' compensation case involving a claim for aggravation, the issue is the extent of permanent disability. Claimant had previously been awarded permanent partial disability of 184 degrees for 57.5 percent unscheduled disability. He requested a hearing on the determination order which awarded him additional temporary total disability and temporary partial disability but no additional permanent disability. The referee awarded permanent total disability based on the "odd lot" doctrine. The Board reversed, concluding that claimant was not entitled to an increase in permanent disability, because his condition had not worsened since the last determination of permanent disability. ORS 656.273(1). On *de novo* review, we find that there has been a worsening; before the most recent surgery, it was not clear that claimant's abdominal weakness could not be permanently corrected but would continually progress to the left of the most recent surgical repair. We determine claimant to have 240 degrees unscheduled permanent partial disability. *Hoag v. Duraflake,* 37 Or App 103, 105, 585 P2d 1149, *rev den* 284 Or 521 (1978).

Modified to award claimant an additional 56 degrees unscheduled permanent partial disability for aggravation, for a total of 240 degrees; affirmed as modified.

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